NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vii

District Court Judges xi

Attorney General xviii

District Attorneys xx

Public Defenders xxi

Table of Cases Reported xxii

Table of Cases Reported Without Published Opinions xxv

General Statutes Cited xxviii

Constitution of North Carolina Cited xxix

Rules of Evidence Cited xxix

Rules of Civil Procedure Cited xxx

Rules of Appellate Procedure Cited xxx

Opinions of the Court of Appeals 1-848

Headnote Index 849

Word and Phrase Index 892

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	First Division	
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13B	Ola M. Lewis	Southport
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1. Retired 1 October 2009.
2. Appointed and sworn in 4 September 2009.
3. Resigned 31 August 2009.
4. Retired 31 July 2009.
5. Retired 31 July 2009.
6. Resigned 25 August 2009.
7. Resigned 31 July 2009.
8. Appointed and sworn in 1 August 2009.

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1. Resigned 6 July 2009.
2. Resigned 21 August 2009.

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	PAGE
ABF Freight Sys., Inc., Bolick v.	294
Albemarle Reg'l Health Servs. Bd., Holt v.	111
Alliance One Int'l, Inc., Applewhite v.	271
Andrews v. Haygood	244
APAC/Barrus Constr. Co., Hunter v.	723
Applewhite v. Alliance One Int'l, Inc.	271
Aubin, Bluebird Corp. v.	671
A.V., In re	317
Baxley Dev., Inc., Perry v.	158
Beaufort Cty. Bd. of Comm'rs, Beaufort Cty. Bd. of Educ. v.	399
Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs	399
Blue Ridge Co., L.L.C. v. Town of Pineville	466
Bluebird Corp. v. Aubin	671
Bolick v. ABF Freight Sys., Inc.	294
Bowman, State v.	635
Bryant, Myers v.	585
Campbell, State v.	701
Catawba Valley Bank v. Porter	326
Charlotte-Mecklenburg Bd. of Educ., Sugar Creek Charter School, Inc. v.	454
City of Concord, McDonald v.	278
City of Winston-Salem, Johnson v.	383
City of Winston-Salem, Tripp v.	577
Coleman, State v.	144
Coltrane, State v.	498
Conyers v. New Hanover Cty. Schools	253
Craddock v. Craddock	806
Craven v. SEIU COPE	814
Croom v. Hedrick	262
Cross, State v.	334
Crowe, State v.	765
Cummings, State v.	598
Cunningham, State v.	832
Davis, State v.	735
Dillard's Inc., Scarborough v.	430
Duncan, State v.	508
Ellis, State v.	820
Emerson, Southeastern Jurisdictional Admin. Council, Inc. v.	93
Estate of Bullock, In re	518
Etheridge, N.C. State Bar v.	653
Fu v. UNC Chapel Hill	610
Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.	68
Graham v. Masonry Reinforcing Corp. of Am.	755
Hagans, State v.	799
Hall v. Hall	527
Hanner, State v.	137
Harris v. Harris	477
Hayes, State v.	313
Haygood, Andrews v.	244
Hedrick, Croom v.	262
Hernandez, State v.	193
Herring v. Winston-Salem/ Forsyth Cty. Bd. of Educ.	441
Holston Grp., Kyle v.	686
Holt v. Albemarle Reg'l Health Servs. Bd.	111
Household Realty Corp. v. Lambeth	545
Hunter v. APAC/Barrus Constr. Co.	723
I.D.G., In re	629
In re A.V.	317
In re Estate of Bullock	518
In re I.D.G.	629
In re T.R.M.	773
In re Will of Jones	1
Johnson v. City of Winston-Salem	383
Jones, State v.	562
Kennon, Roush v.	570
Kirschbaum v. McLaurin Parking Co.	782
Kyle v. Holston Grp.	686
Labinski, State v.	120
Lambeth, Household Realty Corp. v.	545

	PAGE
Law Cos. Grp., Inc., Williams v.	235
Leche, Sprake v.	322
Lewis, State v.	308
Little, State v.	152
Lopez, State v.	553
Macher v. Macher	537
Mack, State v.	365
Mallory, Riverpointe Homeowners Ass'n v.	837
Maready, State v.	169
Marshall, State v.	744
Masonry Reinforcing Corp. of Am., Graham v.	755
Maxim Healthcare/Allegis Grp., Richardson v.	337
McDonald v. City of Concord	278
McIntyre v. McIntyre	26
McLaurin Parking Co., Kirschbaum v.	782
Melvin, State v.	827
Moncree, State v.	221
Moore, State v.	416
Myers v. Bryant	585
Myles, State v.	42
N.C. Dep't of Health & Human Servs., Good Hope Health Sys., LLC v.	68
N.C. State Bar v. Ethridge	653
New Hanover Cty. Schools, Conyers v.	253
Parker, State v.	616
Patrick v. Wake Cty. Dep't of Human Servs.	592
Perry v. Baxley Dev., Inc.	158
Pierce v. Pierce	488
Porter, Catawba Valley Bank v.	326
Rakestraw v. Town of Knightdale	129
Reece v. Smith	605
Richardson v. Maxim Healthcare/Allegis Grp.	337
Richardson Sports Ltd. Partners, Swift v.	82
Ridgeway Brands Mfg., LLC, State ex rel. Cooper v.	302
Riverpointe Homeowners Ass'n v. Mallory	837
Roush v. Kennon	570
Rowlette v. State	712
Russell, State v.	625
Scarborough v. Dillard's Inc.	430
SEIU COPE, Craven v.	814
Smith, State v.	842
Smith, Reece v.	605
Smith, State v.	207
Southeastern Jurisdictional Admin. Council, Inc. v. Emerson	93
Sprake v. Leche	322
State v. Bowman	635
State v. Campbell	701
State v. Coleman	144
State v. Coltrane	498
State v. Cross	334
State v. Crowe	765
State v. Cummings	598
State v. Cunningham	832
State v. Davis	735
State v. Duncan	508
State v. Ellis	820
State v. Hagans	799
State v. Hanner	137
State v. Hayes	313
State v. Hernandez	193
State v. Jones	562
State v. Labinski	120
State v. Lewis	308
State v. Little	152
State v. Lopez	553
State v. Mack	365
State v. Maready	169
State v. Marshall	744
State v. Melvin	827
State v. Moncree	221
State v. Moore	416
State v. Myles	42
State v. Parker	616
State v. Russell	625
State v. Smith	207
State v. Smith	842
State, Rowlette v.	712
State v. Stephens	286

	PAGE
State v. Thompson	102
State v. Walker	331
State v. Ware	790
State ex rel. Cooper v. Ridgeway Brands Mfg., LLC	302
Stephens, State v.	286
Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.	454
Swift v. Richardson Sports Ltd. Partners	82
Thompson, State v.	102
Town of Knightdale, Rakestraw v.	129
Town of Pineville, Blue Ridge Co., L.L.C. v.	466
Town of Weaverville Zoning Bd. of Adjust., Weaverville Partners, LLC v.	55
Tripp v. City of Winston-Salem	577
T.R.M., In re	773
UNC Chapel Hill, Fu v.	610
Wake Cty. Dep't of Human Servs., Patrick v.	592
Walker, State v.	331
Ware, State v.	790
Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust.	55
Webb v. Webb	621
Will of Jones, In re	1
Williams v. Law Cos. Grp., Inc.	235
Winston-Salem/Forsyth Cty. Bd. of Educ., Herring v.	441

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE
Amerlink, Ltd., Keyzer v.	165
Anderson, State v.	847
Arreola, State v.	166
Bar Constr. Co., Grove v.	164
Beacham, Randell v.	632
Berry, State v.	166
Black, Rogers v.	632
Blackstone, State v.	847
Bowlin v. Cornerstone Realty Tr.	164
Brown v. Brown	164
Brown, State v.	847
Buchanan v. N.C. Dep't of Transp.	632
Bullock, State v.	166
Burnette v. City of Goldsboro	164
Bynum v. Whitley	632
Campbell, State v.	633
Carringer, State v.	633
Carroll v. Perry	164
Carter, State v.	848
Carver v. Carver	164
Caudill, State v.	166
C.C.R., In re	632
Christmas, State v.	633
City of Goldsboro, Burnette v.	164
Clark, Odom v.	165
Clayborn v. Novant Health, Inc.	632
Cochrane, State v.	166
Cole, State v.	166
Coleman, State v.	633
Cooke, Nolan v.	847
Cooper v. McAden	847
Cornerstone Realty Tr., Bowlin v.	164
Craig, State v.	166
Creech, Smithfield Housing Auth. v.	847
Daleus, State v.	633
D.C.H., In re	164
Dep't of Transp. v. Jamestown Vill. Assocs., L.L.C.	164
Dickerson, State v.	166
D.M., In re	632
D.S.B., In re	847
D.W., In re	164
English v. Nixon	164
Everson, Honacher v.	847
Fairview Developers, Inc. v. Miller	164
Farlow v. Farlow	847
Ferguson, State v.	166
Freeman, Mason v.	165
Fuller, State v.	633
Gatlin v. Gatlin	164
Gatlin v. Gatlin	164
Gomez, State v.	633
Graveran, State v.	166
Green, State v.	166
Grove v. Bar Constr. Co.	164
Hagen, State v.	166
Hanton, State v.	167
Harrison, State v.	167
HBD Indus., Inc., Shulenberger v.	847
Healy v. Union Cty. Bd. of Adjust.	847
Holman, State v.	633
Holt, State v.	167
Honacher v. Everson	847
Honeycutt v. Honeycutt	164
Hunter Motors, Inc., McCarver v.	165
In re C.C.R.	632
In re D.C.H.	164
In re D.M.	632
In re D.S.B.	847
In re D.W.	164
In re J.A.T., S.T.T., J.C.T. & E.D.T.	632
In re J.D.W.	164
In re J.E.J., B.M.J., T.L.J.	632
In re J.F.	164
In re J.G.	632
In re J.J.	165
In re J.M.	165
In re J.S.R.	165
In re J.W.H.	165
In re M.K.B.	165
In re M.S.C.	165
In re N.D.D.S.	847
In re R.L.M.	165
In re S.L.E.	165
In re S.M.F. & J.M.F.	165
In re S.W.	165
In re T.G., X.G., A.G.	632
In re W.L., D.R.L., D.M.L.	632

	PAGE
Jacobs, State v.	167
Jamestown Vill. Assocs., L.L.C., Dep't of Transp. v.	164
J.A.T., S.T.T., J.C.T. & E.D.T., In re	632
J.D.W., In re	164
J.E.J., B.M.J., T.L.J., In re	632
J.F., In re	164
J.G., In re	632
J.J., In re	165
J.M., In re	165
Johnson, State v.	167
Johnson, State v.	633
Jones, State v.	848
Jordan, State v.	167
J.S.R., In re	165
J.W.H., In re	165
Kelley, State v.	167
Kelley v. Wake Cty. Sheriff's Dep't	165
Keyzer v. Amerlink, Ltd.	165
Lash, State v.	167
Lawson v. White	165
Lee, State v.	633
Lewis, State v.	633
Little, State v.	848
Lopez, State v.	848
Mai, State v.	167
Mason v. Freeman	165
McAden, Cooper v.	847
McCarver v. Hunter Motors, Inc.	165
McCullough, State v.	848
McDougald, State v.	633
McKim & Creed, P.A., PVC, Inc. v.	632
McNeely v. McNeely	632
Melvin, State v.	633
Middleton, State v.	633
Miller, Fairview Developers, Inc. v.	164
Mintz, State v.	167
M.K.B., In re	165
Morgan, State v.	633
Moss, State v.	848
M.S.C., In re	165
Mullins, State v.	848
National Fed'n of Indep. Businesses, Shepherd v.	166
N.C. Dep't of Transp., Buchanan v.	632
N.D.D.S., In re	847
Nixon, English v.	164
Nolan v. Cooke	847
Novant Health, Inc., Clayborn v.	632
Odom v. Clark	165
Owens, State v.	848
Pass, State v.	848
Pate, Royal v.	165
Patterson v. Sanders Util. Constr.	847
Patterson, State v.	848
Payne, State v.	633
Perry, Carroll v.	164
Pilkington N. Am., Inc., Sampson v.	166
Poley, State v.	634
PVC, Inc. v. McKim & Creed, P.A.	632
Quiroz, State v.	167
Rabon, State v.	634
Randell v. Beacham	632
Ratashara-Stark, Stark v.	166
Regal Mfg. Co., Shuford v.	633
R.L.M., In re	165
Roberson v. Terminix Co. of E. N.C.	847
Rogers v. Black	632
Ross, Scott v.	847
Ross, State v.	167
Royal v. Pate	165
Sampson v. Pilkington N. Am., Inc.	166
Sanders Util. Constr., Patterson v.	847
Scott v. Ross	847
Scriven, State v.	167
Shepherd v. National Fed'n of Indep. Businesses	166
Shuford v. Regal Mfg. Co.	633
Shulenberger v. HBD Indus., Inc.	847
Shuler, State v.	634
Siler, State v.	634
S.L.E., In re	165
S.M.F. & J.M.F., In re	165
Smith, State v.	634

	PAGE
Smithfield Housing Auth. v. Creech	847
Stark v. Ratashara-Stark	166
State v. Anderson	847
State v. Arreola	166
State v. Berry	166
State v. Blackstone	847
State v. Brown	847
State v. Bullock	166
State v. Campbell	633
State v. Carringer	633
State v. Carter	848
State v. Caudill	166
State v. Christmas	633
State v. Cochrane	166
State v. Cole	166
State v. Coleman	633
State v. Craig	166
State v. Daleus	633
State v. Dickerson	166
State v. Ferguson	166
State v. Fuller	633
State v. Gomez	633
State v. Graveran	166
State v. Green	166
State v. Hagen	166
State v. Hanton	167
State v. Harrison	167
State v. Holman	633
State v. Holt	167
State v. Jacobs	167
State v. Johnson	167
State v. Johnson	633
State v. Jones	848
State v. Jordan	167
State v. Kelley	167
State v. Lash	167
State v. Lee	633
State v. Lewis	633
State v. Little	848
State v. Lopez	848
State v. Mai	167
State v. McCullough	848
State v. McDougald	633
State v. Melvin	633
State v. Middleton	633
State v. Mintz	167
State v. Morgan	633
State v. Moss	848
State v. Mullins	848
State v. Owens	848
State v. Pass	848
State v. Patterson	848
State v. Payne	633
State v. Poley	634
State v. Quiroz	167
State v. Rabon	634
State v. Ross	167
State v. Scriven	167
State v. Shuler	634
State v. Siler	634
State v. Smith	634
State v. Stokes	167
State v. Thompson	167
State v. Ward	848
State v. Wilkes	848
State v. Williams	848
State v. Young	848
Stokes, State v.	167
S.W., In re	165
Terminix Co. of E. N.C., Roberson v.	847
T.G., X.G., A.G., In re	632
Thompson, State v.	167
Tuck v. Turoci	634
Turoci, Tuck v.	634
Union Cty. Bd. of Adjust., Healy v.	847
Wake Cty. Sheriff's Dep't, Kelley v.	165
Ward, State v.	848
White, Lawson v.	165
Whitley, Bynum v.	632
Whitley v. Wilson Woodworks	168
Wilkes, State v.	848
Williams, State v.	848
Williamson v. Woodard Funeral Home, Inc.	168
Wilson Woodworks, Whitley v.	168
W.L., D.R.L., D.M.L., In re	632
Woodard Funeral Home, Inc., Williamson v.	168
Young, State v.	848

GENERAL STATUTES CITED

G.S.	
1-52(16)	Reece v. Smith, 605
1-53(1)	Tripp v. City of Winston-Salem, 577
1-567.13(a)(3)	Sprake v. Leche, 322
1-567.13(c)	Sprake v. Leche, 322
1A-1	See Rules of Civil Procedure, infra
1D-15(c)	Scarborough v. Dillard's Inc., 430
5A-21(a)	Bolick v. ABF Freight Sys., Inc., 294
7B-1102	In re I.D.G., 629
7B-1106(a)(5)	In re I.D.G., 629
8C-1	See Rules of Evidence, infra
14-7.1	State v. Moncree, 221
14-7.3	State v. Moncree, 221
14-39	State v. Bowman, 635
14-54	State v. Jones, 562
14-54(a)	State v. Jones, 562
14-72(b)	State v. Jones, 562
14-87	State v. Marshall, 744
14-202.1	State v. Ellis, 820
14-202.3	State v. Ellis, 820
14-415.1	State v. Coltrane, 498
15A-903(a)(2)	State v. Moncree, 221
15A-923(e)	State v. Stephens, 286
15A-928(b)	State v. Stephens, 286
15A-928(c)	State v. Stephens, 286
15A-1227(c)	State v. Hernandez, 193
15A-1234	State v. Smith, 207
15A-1234(c)	State v. Smith, 207
15A-1340.14(b)(6)	State v. Mack, 365
15A-1340.14(b)(7)	State v. Moore, 416
15A-1340.16(d)(2)	State v. Walker, 331
15A-1340.16(d)(12)	State v. Moore, 416
15A-1344(d)	State v. Hanner, 137
15A-1443(a)	State v. Jones, 562
15A-1445(a)(1)	State v. Hernandez, 193
20-166	State v. Hernandez, 193
20-166.1	State v. Hernandez, 193
20-279.31(b)	State v. Hernandez, 193
47F-3-102	Riverpointe Homeowners Ass'n v. Mallory, 837
50-11(e)	Webb v. Webb, 621
50-11(f)	Webb v. Webb, 621
50-16.9	Craddock v. Craddock, 806
50-21(a)	Webb v. Webb, 621
50-91	Hall v. Hall, 527

GENERAL STATUTES CITED

G.S.	
75-16.1	Catawba Valley Bank v. Porter, 326
90-95(e)(9)	State v. Moncree, 221
96-14(2a)	Applewhite v. Alliance One Int'l, Inc., 271
97-2(5)	Conyers v. New Hanover Cty. Schools, 253
97-2(6)	Richardson v. Maxim Healthcare/Allegis Grp., 337
97-10.2	In re Estate of Bullock, 518
97-10.2(h)	Richardson v. Maxim Healthcare/Allegis Grp., 337
97-10.2(j)	Richardson v. Maxim Healthcare/Allegis Grp., 337
97-17	Kyle v. Holston Grp., 686
97-22	Richardson v. Maxim Healthcare/Allegis Grp., 337
97-25	Hunter v. APAC/Barrus Constr. Co., 723
97-29	Johnson v. City of Winston-Salem, 383
	Kyle v. Holston Grp., 686
97-30	Kyle v. Holston Grp., 686
97-88	Swift v. Richardson Sports Ltd. Partners, 82
97-88.1	Swift v. Richardson Sports Ltd. Partners, 82
108A-57	Andrews v. Haygood, 244
108A-57(a)	Andrews v. Haygood, 244
115C-238.29H	Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454
115C-429	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
115C-429(c)	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
115C-431	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
115C-431(c)	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
150B-33(b)	Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs., 68

CONSTITUTION OF NORTH CAROLINA CITED

Art. I, § 23	State v. Smith, 207

RULES OF EVIDENCE CITED

Rule No.	
403	State v. Cunningham, 832
404(b)	State v. Bowman, 635

RULES OF CIVIL PROCEDURE CITED

Rule No.	
11	Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441
12	Reece v. Smith, 605
12(b)(2)	State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302
12(b)(6)	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
	Rowlette v. State, 712
12(b)(7)	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
50	Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399
59(a)(8)	Catawba Valley Bank v. Porter, 326
60	Catawba Valley Bank v. Porter, 326
60(b)	Croom v. Hedrick, 262
	Macher v. Macher, 537
60(b)(1)	Croom v. Hedrick, 262
60(b)(3)	Croom v. Hedrick, 262
60(b)(6)	Croom v. Hedrick, 262
	Catawba Valley Bank v. Porter, 326

RULES OF APPELLATE PROCEDURE CITED

Rule No.	
2	Hunter v. APAC/Barrus Constr. Co., 723
3(a)	State v. Smith, 842
3(c)	Harris v. Harris, 477
3(d)	In re A.V., 317
10(a)	Hunter v. APAC/Barrus Constr. Co., 723
10(b)	Harris v. Harris, 477
10(c)	Richardson v. Maxim Healthcare/Allegis Grp., 337
28(b)(6)	State v. Labinski, 120
	State v. Smith, 207
	State v. Stephens, 286
	State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302
	Richardson v. Maxim Healthcare/Allegis Grp., 337

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF THE WILL OF JOHN A. JONES, JR.

No. COA07-4

(Filed 15 January 2008)

1. Wills— standing of executor—aggrieved party

The executor of a contested will, who was also the propounder, was an aggrieved party and had standing to appeal an adverse decision of the lower court. The executor is the personal representative of the decedent, stands in the place of the deceased person, and occupies the position of trustee for the persons beneficially interested in the estate.

2. Wills— contested—undue influence—summary judgment

The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of undue influence. The propounder failed to show that the testator was susceptible to undue influence at the time he executed the will.

3. Wills— contested—testamentary capacity—summary judgment

The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of testamentary capacity. The propounder showed occasional moments of confusion by testator, but not evidence that the testator lacked testamentary capacity when the will was executed. Claims based on general testimony concerning deteriorating physical health and mental confusion do not meet the requirement of specific

evidence establishing that testator did not understand his property, to whom he wished to give it, and the effect of the will.

4. Wills— devisavit vel non—summary judgment

The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of devisavit vel non where the propounder failed to show the existence of a continuing dispute.

Judge STROUD concurring in part and dissenting in part.

Appeal by Propounder Joseph B. McLeod, CPA, from judgment entered 20 October 2006 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 29 August 2007.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton for Propounder appellant.

Smith Debnam Narron Wyche Saintsing & Myers, L.L.P., by John W. Narron, for Caveator-appellee.

McCULLOUGH, Judge.

Propounder appeals order entered granting summary judgment to caveator. We affirm.

Facts

This case arises out of a challenge to the will of John A. "Buck" Jones, Jr., who died on 11 October 2005, with no children. Caveator Jean Jones is the widow of Mr. Jones. Propounder Joseph B. McLeod is the executor named under the contested will executed in March of 2005. The record on appeal tends to show the following facts: Mr. Jones was born on 6 August 1929. Mr. Jones was the majority shareholder in Carolina Packers, Inc. ("Carolina Packers"), a closely held corporation that operated a meat packing plant in Smithfield, North Carolina. During his life, Mr. Jones served as President of Carolina Packers. Mr. Jones' wife, Ms. Jones, worked for Carolina Packers as well, serving as a member of the Board of Directors.

In 2004, Mr. Jones was diagnosed with cancer. Subsequently, Mr. Jones met with estate planning attorneys Jeff D. Batts and Michael S. Batts of the law firm Batts, Batts & Bell, LLP, for the purpose of executing a will. Mr. Jones instructed these attorneys that he wanted all the household items, the farming operation, the domesticated animals, his gun collection, and any remaining personal effects to be dis-

tributed to his wife, Ms. Jones, on the event of his death. Mr. Jones also stipulated that his cattle should go to Bob Fowler. The residue of Mr. Jones' estate, including his shares of Carolina Packers stock, was to be placed in trust for the benefit of Ms. Jones during her life. Upon Ms. Jones' death, the stock was then to be delivered to Carolina Packers employees Kent Denning, Johnny Hayes, and Lynette Thompson. Under the terms of this will, executed 3 March 2005 (the "March Will"), Mr. McLeod was to be the executor of the will. Mr. McLeod was also named trustee under the resulting trust which was also executed on 3 March 2005 (the "March Trust").

On 1 August 2005, Ms. Jones contacted attorney Michael Batts, informed him that Mr. Jones was in the hospital with a tumor pressing on his spine, and requested a meeting with Mr. Batts to discuss Mr. Jones' will and power of attorney. In response to this request, Michael Batts met with Mr. and Ms. Jones on 5 August 2005.

During this meeting, Ms. Jones voiced her belief that the March Will should be changed so that all of the property, including the cattle and Carolina Packers stock, owned by Mr. Jones would be left to her. Although Mr. Jones agreed that his wife should receive the majority of his property, including his Carolina Packers stock, he disagreed as to who should receive the cattle. Mr. Jones expressed his opinion that Mr. Fowler should receive the cattle, as he had taken care of them. After discussing this with Ms. Jones, the two agreed that Ms. Jones would receive all of Mr. Jones' property other than the cattle, which would be devised to Mr. Fowler.

Mr. Batts became concerned that such a large change in the disposition of Mr. Jones' estate might lead to a will contest. Mr. Batts then asked to speak to Mr. Jones privately to determine if these provisions reflected Mr. Jones' desires for his estate. During this conversation, Mr. Jones indicated that Mr. Batts should just do what his wife wanted. Mr. Jones further indicated that if Ms. Jones wanted to sell Carolina Packers, he would leave that decision up to her and the Board of Directors. Mr. Batts then asked Mr. Jones if he was taking any medications. Mr. Jones responded that he was taking medications, but none of them were "mind altering." Mr. Batts requested that Mr. Jones sign a health information release to allow Mr. Batts to contact Mr. Jones' primary care physician. Mr. Jones responded that he would be willing to sign the release.

In response to Mr. Batts' concerns, Dr. Joan Meehan, Mr. Jones' primary care physician for several years, met privately with Mr. Jones

and examined him on 17 August 2005. During the examination, Mr. Jones expressed his love for his wife and appreciation for the care she had provided him. Dr. Meehan found Mr. Jones to be oriented and in no acute distress at the time of the examination. In the opinion of Dr. Meehan, Mr. Jones was of sound mind and was alert and oriented on the day of the examination.

After talking to the doctor, Mr. Batts remained concerned that the proposed changes to Mr. Jones' March Will represented the desires of Ms. Jones and not those of Mr. Jones. Mr. Batts was unable to determine if Mr. Jones would be voluntarily executing the new will free from any undue influence. As a result of Mr. Batts' concerns, the firm of Batts, Batts & Bell, LLP, declined to prepare a new will for Mr. Jones.

On 31 August 2005, attorney James W. Narron met with Mr. Jones to discuss Mr. Jones' desire to prepare a new will and trust. Following this meeting, Mr. Narron drafted these documents for Mr. Jones and presented them to Mr. Jones on 1 September 2005. After reviewing the documents prepared by Mr. Narron, Mr. Jones signed the will (the "September Will") and trust (the "September Trust") before two witnesses and a notary. Mr. Jones' September Will expressly revoked all earlier wills and codicils. Mr. Jones died on 11 October 2005.

On 14 October 2005, Mr. McLeod submitted the March Will to the Superior Court of Johnson County for probate, despite knowledge that Mr. Jones had executed a subsequent will. The March Will was then admitted to probate and letters testamentary were issued to Mr. McLeod. On 18 October 2005, Ms. Jones filed a caveat to the will alleging the existence of another document, the September Will, as the Last Will and Testament of Mr. Jones. The caveat alleged that the March Will had been expressly revoked by the subsequent September Will. In response to this caveat, an order suspending Mr. McLeod's administration of Mr. Jones' estate was entered on 18 October 2005.

On 7 November 2005, Mr. McLeod filed a motion asserting that a controversy existed as to the competence of Mr. Jones at the time he executed the September Will. Specifically, Mr. McLeod alleged the possible existence of undue influence.

Following a 5 December 2005 hearing, the Honorable Benjamin G. Alford filed an Alignment Order on 6 February 2006. Under the terms of this order, Mr. McLeod was aligned with Lynette Thompson, Johnny Hayes, and Kent Denning as Propounders. Ms. Jones was

aligned as the sole caveator. Mr. Fowler was found by the court to be an unaligned party.

On 12 July 2006, Caveator filed a motion for summary judgment. In support of her motion, Caveator presented three affidavits on 12 July 2006, and an additional eight affidavits on 12 September 2006. On 20 September 2006, Propounders filed eight affidavits in opposition to Caveator's motion for summary judgment.

On 25 September 2006, Caveator's motion for summary judgment was heard by the Honorable Knox V. Jenkins, Jr. On 20 October 2006 Judge Jenkins entered, over Propounders' objections, an order granting summary judgment in favor of Caveator and directing the Clerk of the Superior Court of Johnston County to accept for probate the September Will.

On 24 October 2006, Propounder Joseph B. McLeod filed notice of appeal and a motion for stay pending appeal. On 9 November 2006, the trial court denied Propounder's motion for stay pending appeal. On 13 November 2006, Propounder filed a petition for writ of supersedeas and motion for temporary stay with this Court. This Court granted Propounder's motion for temporary stay on 14 November 2006. Propounder's petition for writ of supersedeas was subsequently denied and the temporary stay was dissolved on 1 December 2006.

On appeal, Propounder argues that the trial court committed reversible error by entering summary judgment against him. Further, Propounder argues the trial court erred in denying a stay of the judgment pending appeal. For the reasons set forth herein, we disagree with Propounder's arguments and uphold both the order and the judgment of the trial court.

I.

[1] As a preliminary matter, Caveator has filed a motion to dismiss Propounder's claims for lack of subject matter jurisdiction. Specifically, Caveator alleges that this Court did not obtain subject matter jurisdiction because the sole appellant in this matter, Propounder, is not an "aggrieved party," and thus lacks standing to appeal the decision of the lower court. We deny this motion.

"Only a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990), *superseded by statute on other grounds as stated in In re J.A.A.*, 175 N.C. App. 66, 72-73, 623 S.E.2d 45, 49 (2005); *see* N.C.

R. App. P. 3(a) (2005). "A party aggrieved is one whose rights are substantially affected by judicial order." *Carawan v. Tate*, 304 N.C. 696, 700, 286 S.E.2d 99, 101 (1982). If the party seeking appeal was not an aggrieved party, he has no standing to challenge the order of the trial court and his appeal should be dismissed. *Culton*, 327 N.C. at 626, 398 S.E.2d at 325.

In the instant case, Caveator argues that Propounder was not an aggrieved party. As Propounder was only the executor rather than a beneficiary under the March Will, Caveator contends that Propounder's rights were not substantially affected. Therefore, Caveator asserts, Propounder lacks standing to appeal the order of the trial court.

Caveator's contention raises an issue of first impression for this Court. In support of her argument that an executor lacks standing to appeal from the order of the trial court, Caveator points to the cases of *Gregg v. Williamson*, 246 N.C. 356, 362, 98 S.E.2d 481, 487 (1957), and *Summerlin v. Morrisey*, 168 N.C. 409, 410, 84 S.E. 689, 690 (1915), in which fiduciaries were denied standing to appeal from judgments of the lower court. However, the instant case can be distinguished from *Gregg* and *Summerlin* on its facts.

In *Gregg*, the North Carolina Supreme Court sought to determine whether a trustee of a mortgage could properly appeal from the judgment of the trial court. *Gregg*, 246 N.C. at 356-62, 98 S.E.2d at 481-87. In conducting its analysis, the *Gregg* Court noted:

> Plaintiff does not claim to be the owner of those notes or assert any right thereto; at least no such claim is disclosed by this record. Plaintiff's right, as we have noted, to demand possession accrues only when the owner of the debt so directs. Having no interest in the debt and being without authority to act until requested so to do by a party secured, plaintiff is not a party aggrieved.

Id. at 362, 98 S.E.2d at 487. Therefore, the Court dismissed plaintiff's appeal. *Id.*

Summerlin involved an appellant who was appointed as a commissioner to execute a land sale for the repayment of a debt. *Summerlin*, 168 N.C. at 409-10, 84 S.E. at 689-90. When directed by the lower court to execute a second deed correcting an error in the original deed, the commissioner appealed. *Id.* In dismissing the commissioner's appeal, the Supreme Court held:

> The commissioner is not a party to this action and has no personal interest whatever in the subject of it. It is his duty to obey and not to review judgments of the court appointing him. No judgment has been rendered against him, and if the court has made a mistake, as the appellant contends, that is a matter for the parties to correct by appeal, if they are inclined to do so, and it is not a matter for the commissioner.

Id. at 410, 84 S.E. at 690.

As previously noted, the instant case, like those presented in *Gregg* and *Summerlin*, involves the standing of a fiduciary to appeal an order from the trial court. Unlike those cases, however, the instant case is being brought by the executor of an estate. The executor, as a personal representative of the decedent, must serve in a dual capacity. *Allen v. Currie, Commissioner of Revenue*, 254 N.C. 636, 640, 119 S.E.2d 917, 920 (1961). The executor stands in the place of the deceased person for the purpose of settling his business affairs and distributing his estate, but also occupies the position of trustee for those persons beneficially interested in the estate. *Id.*

The case law of this state has not previously addressed whether an executor would qualify as an aggrieved party on appeal. In examining the case law of other states that have addressed this issue, we find the analysis of the Kentucky Court of Appeals particularly instructive:

> It is made the duty of the executor to execute the will of the testator, and it is also incumbent upon him to present the will to the county court of the testator's residence for probate; and while he cannot act as executor until his qualification as such, it is difficult to perceive how he can qualify until the paper is adjudged to be the last will of the devisor; and having presented the paper to the proper tribunal for probate, it would be a dereliction of duty on the part of the executor, if he was satisfied that the paper was the last will of the testator, to permit its probate [to be] denied without any additional effort to have the will recorded.
>
> It is true the judgment of the County Court would ordinarily protect the executor; but as the duty of executing the will has been confided to him by the devisor, good faith requires that he should exhaust the remedy afforded him by law for having the will probated, if he is satisfied it was improperly rejected by the County Court.

Pryor v. Mizner, 79 Ky. 232, 234 (1881). We find this rationale persuasive and hold that Propounder, as the named executor under the March Will, was an aggrieved party as specified in the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 3(a) (2005). Therefore, Propounder possessed standing to appeal from a trial court order denying the probate of that will. Caveator's Motion to Dismiss is denied.

II.

Propounder argues the trial court committed error in granting Caveator's Motion for Summary Judgment. Specifically, Propounder argues that the trial court committed reversible error by entering summary judgment against him on the issues of (A) undue influence by the caveator, Jean Jones; (B) testamentary capacity of the testator, Buck Jones; and (C) *devisavit vel non*. We will address each of Propounder's arguments in turn.

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). "Where a motion for summary judgment is supported by proof which would require a directed verdict in [the movant's] favor at trial he is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact." *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526, *disc. review denied*, 290 N.C. 308, 225 S.E.2d 832 (1976). Summary judgment should be entered cautiously. *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980). However, if the party with the burden of proof cannot prove the existence of each essential element of its claim or cannot produce evidence to support each essential element, summary judgment is warranted. *See Development Corp. v. James*, 300 N.C. 631, 638, 268 S.E.2d 205, 210 (1980). "[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).

A.

[2] Propounder first contends sufficient evidence was presented at trial to create an issue of fact as to the existence of undue influence on the testator in the execution of the September Will. We disagree.

To withstand a motion for summary judgment against him, a party seeking to contest a will on the grounds of undue influence must prove the existence of "(1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence." *Griffin v. Baucom*, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985)). We recognize that

> [b]ecause the existence of undue influence is usually difficult to prove, our courts have recognized that it must usually be proved by evidence of a combination of surrounding facts, circumstances and inferences from which a jury could find that the person's act was not the product of his own free and unconstrained will, but instead was the result of an overpowering influence over him by another.

In re Will of Dunn, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104, *disc. review denied*, *disc. review dismissed as moot*, 348 N.C. 693, 511 S.E.2d 645 (1998). *See also In the Matter of the Will of Everhart*, 88 N.C. App. 572, 574, 364 S.E.2d 173, 174, *disc. review denied*, 322 N.C. 112, 367 S.E.2d 910, 911 (1988).

The influence exerted upon Mr. Jones had to be "of a kind which operate[d] on the mind of the testator at the very time the will [was] made, and cause[d] its execution." *In re Will of Thompson*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958). For such influence to be undue,

> "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. 'It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' "

In re Will of Kemp, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951) (citations omitted). Undue influence has also been described as

> a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that

> there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law.

In re Will of Turnage, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

Our Supreme Court has identified seven factors that are probative on the issue of undue influence:

1. Old age and physical and mental weakness of the person executing the instrument.
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
3. That others have little or no opportunity to see him.
4. That the instrument is different and revokes a prior instrument.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of his bounty.
7. That the beneficiary has procured its execution.

Hardee v. Hardee, 309 N.C. 753, 756-57, 309 S.E.2d 243, 245 (1983); *see also In re Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980).

The list set forth above does not list all of the factors that can be considered. In *Griffin*, 74 N.C. App. 282, 328 S.E.2d 38, this Court noted that two of the factors pertinent in determining the existence of undue influence are "whether [the testator] had independent or disinterested advice in the transaction" and the "distress of the person alleged to have been influenced." *Id.* at 286, 328 S.E.2d at 41.

Here, Buck Jones had independent and disinterested advice from two separate lawyers. Ms. Jones was not present during either conference. Although the propounder presented evidence that Ms. Jones may have overheard one of the conferences on a baby monitor, it is still undisputed that she was not present to counter or inhibit the lawyers' advice. Both lawyers stressed that the will was Mr. Jones' decision and that the terms were solely up to him. The Honeycutt affidavit attaching memos of the two meetings with Mr. Narron indicates that Mr. Jones was specifically told that if the will was not what he wanted, then he just had to say so. With respect to the "distress" fac-

tor, the Young affidavit states that Mr. Jones expressed satisfaction with his new will and the Honeycutt affidavit reflects that he signed the will without hesitation. Mr. Narron further testified in his deposition that "there was not one thing that was the matter with Buck's mind or his ability to make a decision or his determination on what he was going to do."

The party contesting the validity of the will need not prove the existence of every factor. *In re Estate of Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343, *aff'd and remanded*, 311 N.C. 298, 316 S.E.2d 55 (1984). However, the contesting party must present "sufficient evidence to make out a *prima facie* case." *Id.* According to our case law:

> In a proceeding to [contest] a will, the [contesting parties] are required to handle the laboring oar on the issue of undue influence . . . . True, in certain fiduciary relations, if there be dealings between the parties, on complaint of the party in the power of the other, the relation of itself, and without more, raises a presumption of fraud or undue influence, as a matter of law, and annuls the transaction unless such presumption be rebutted by proof that no fraud was practiced and no undue influence was exerted. . . .
>
> . . . It is sufficient to rebut a presumption by evidence of equal weight rather than by a preponderance of the evidence, where the burden of the issue is on the opposite party. . . . Strictly speaking, the burden of the issue, as distinguished from the duty to go forward with evidence, does not shift from one side to the other, for the burden of proof continues to rest upon the party who alleges facts necessary to enable him to prevail in the cause. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict in his favor; and, as to these matters, he constantly has the burden of the issue, whatever may be the intervening effect of different kinds of evidence or of evidence possessing under the law varying degrees of probative force.

In re Will of Atkinson, 225 N.C. 526, 530-31, 35 S.E.2d 638, 640-41 (1945) (citations omitted). Thus, the party seeking to contest the will "must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." *Winslow v. Hardwood Co.*, 147 N.C. 275, 277, 60 S.E. 1130, 1131 (1908).

Propounder argues that he presented sufficient evidence to raise a question of fact as to each of the requirements necessary to establish a *prima facie* case for undue influence. With regard to the first requirement, Propounder argues that decedent, Mr. Jones, was susceptible to undue influence. To support this contention, Propounder attempted to show: Mr. Jones was suffering from old age and physical and mental weakness (Factor No. 1); Mr. Jones was in the home of the beneficiary, Ms. Jones, and subject to her constant control (Factor No. 2); and that other people were provided little or no opportunity to see Mr. Jones (Factor No. 3).

As to the first factor, Propounder points to the fact that Mr. Jones was 76 when he signed the September Will. Propounder further argues that Mr. Jones was in a weakened physical condition from 1 August 2005 through 1 September 2005, when he executed the September Will. According to Propounder, Mr. Jones' spirt was broken during this time period and he was "very vulnerable" to undue influence at the time he executed the September Will. Propounder also suggests that Mr. Jones' judgment may have been impaired by the pain medications he was taking, claiming Mr. Jones was "taking more than the prescribed amount."

However, Propounder's own evidence demonstrates that Mr. Jones was still making his own decisions on significant matters. Mr. Batts' notes indicate that, although Ms. Jones desired otherwise, Mr. Jones would not agree to sign a health care power of attorney because he did not wish to give anyone the right to say whether he lived or died or to make decisions on his health care. According to Mr. Batts, Mr. Jones even got "a little irritated." In addition, Mr. Jones directed the sale of a Lear jet and communicated with Propounder regarding that $4,000,000 sale.

On the susceptibility issue, Propounder and the dissent primarily rely upon Mr. Jones' medical condition, pointing to a note from Dr. Hoffman referring to Ms. Jones as a surrogate decision maker. Dr. Hoffman, however, explained in his deposition that, at that visit, Mr. Jones had undergone a laminectomy the day before and that during the post-operative period, there can be some confusion. During the relevant time frame in September, however, he found Mr. Jones alert and oriented and testified that he "didn't seem to have trouble making decisions about what he wanted to do." He said that Mr. Jones was able to understand the proposed course of therapy and decide that he wanted to proceed with it. Similarly, his primary care physician, Dr. Meehan, submitted an affidavit that as of 13 September 2005, his

mental condition had not deteriorated and it was not affected by his pain medications.

Propounder presented no contrary expert testimony. Instead, he relied upon assertions that Mr. Jones seemed increasingly tired, weak, and defeated and speculation regarding the possible effects of pain medication. This lay evidence–-consistent with someone failing in his battle against cancer—is not sufficient to counter the expert testimony of Mr. Jones' doctors. This Court has previously found comparable evidence insufficient. *In re Estate of Whitaker*, 144 N.C. App. 295, 301-02, 547 S.E.2d 853, 858-59, *disc. review denied*, 354 N.C. 218, 555 S.E.2d 278 (2001); *In re Will of Prince*, 109 N.C. App. 58, 63, 425 S.E.2d 711, 714-15 (1993); *In re Coley*, 53 N.C. App. 318, 324, 280 S.E.2d 770, 774 (1981).

With regard to the second factor, Propounder points to testimony that Mr. Jones was in a wheelchair and unable to perform many everyday tasks without the assistance of Ms. Jones with whom he lived. Propounder argues the level of care required by Mr. Jones effectively left him under the supervision of Ms. Jones.

With regard to the third factor (isolation), Propounder points to evidence that Ms. Jones removed the phone from Mr. Jones' room in September 2005. Propounder also argues that prior to the removal of the phone, Ms. Jones would screen Mr. Jones' calls and prohibit him from talking with others.

While Propounder argues that Ms. Jones kept the decedent isolated, the evidence of record contradicts this argument. The Powell affidavit indicates that he saw Mr. Jones on an almost daily basis from August until October. Ms. Mims visited Mr. Jones one to two times a week in August and September 2005. Hill visited two to three days per week in August and September. Sinclair visited him once a day during the same two months. Benson saw him two times in August and September, but talked to him numerous times on the phone. Oates saw him every week day from July to October and took him at times to his office and to meet with other people. Propounder submitted the affidavit of Fowler who indicated that he was able to see Mr. Jones. Propounder himself had numerous communications with Mr. Jones regarding the sale of a Lear jet.

The only evidence pointed to by Propounder on this factor is the Blackmon Affidavit and Mr. Batts' inability to speak to Mr. Jones on a single day. Ms. Blackmon stated that she was not able to visit Mr.

Jones because she was informed by an unnamed person that Ms. Jones did not want her to visit. That evidence is inadmissible hearsay and cannot be considered in connection with a summary judgment motion. In any event, Ms. Blackmon does state that she had her "last visit" in August or September, so it appears that she did indeed visit Mr. Jones. The fact that Mr. Batts did not get through on one day cannot be sufficient evidence to raise an issue of fact on this factor.

With regard to the third requirement necessary to establish a *prima facie* case for undue influence, Propounder contends Ms. Jones was motivated and disposed to exert undue influence on Mr. Jones in an effort to change his will. Specifically, Propounder presented evidence that Ms. Jones made statements illustrating her desire to take a larger portion of Mr. Jones' estate than provided under the March Will. Propounder also points to evidence that Ms. Jones believed the funds provided under the March Will would not be sufficient to support her lifestyle.

With regard to the fourth, and final, requirement necessary to establish a *prima facie* case for undue influence, Propounder contends the result of the will was indicative of undue influence. Propounder points to the fact that the September Will revokes the previously executed March Will (Factor No. 4). Propounder also presents evidence that the September Will changed the disposition of Mr. Jones' Carolina Packers stock, providing that all of the stock should go to Ms. Jones. According to Propounder, this provision runs contrary to wills executed by Mr. Jones in 1992 and 2001, as well as the March Will. In sum, Propounder believes his evidence would permit a jury to infer that the will and other documents signed by Mr. Jones on 1 September 2005 were not the result of his free will, but rather the intent of Ms. Jones. Thus, Propounder believes summary judgment was precluded as a matter of law.

Although Propounder has put forth the arguments described above, we do not find that Propounder has carried his burden of proving undue influence. Specifically, Propounder has failed to show that Mr. Jones was susceptible to undue influence at the time he executed the September Will. We have previously noted that the mental condition of the testator at the time he makes a will is

> " 'perhaps, the strongest factor leading to the answer to the [fraud and undue influence] issue.' " Without evidence that the testator is susceptible to fraud or undue influence, evidence of undue influence itself is often too tenuous for consideration.

In re Will of Campbell, 155 N.C. App. 441, 457, 573 S.E.2d 550, 562 (2002), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 278 (2003) (citations omitted).

The evidence presented in the record indicates that Mr. Jones was a strong-willed man who was very specific in voicing his desires, and remained so into the final months of his life. During the months of August and September, Mr. Jones commissioned a local painter, Lee Mims, to provide him with a painting. Mr. Mims describes Mr. Jones as being very demanding and detailed as to his desires for the final painting. Further evidence of Mr. Jones' resolute nature was displayed during his 5 August 2005 meeting with Mr. Batts for the purpose of revising his will. Although Mr. Jones directed that a majority of his estate be devised to his wife, which was clearly in accordance with Ms. Jones' wishes, Mr. Jones did not acquiesce to her every request. When Ms. Jones objected to the provision of the will devising Mr. Jones' cattle to Mr. Fowler, Mr. Jones remained unwavering, and instructed Mr. Batts that the provision was to remain intact in the subsequent will, despite his wife's protests.

Mr. Jones was also familiar with the process of drafting and revising wills, having executed wills in 1992, 2001, March 2005, and September 2005. Although Mr. Batts expressed some concern that the proposed revisions to the March Will might have been influenced by Ms. Jones, Mr. Batts was unable to determine if the changes also reflected the desires of Mr. Jones. Following Mr. Batts' declination, Mr. Jones then consulted Mr. Narron to prepare the revised will. From his meetings with Mr. Jones, Mr. Narron was of the opinion that Mr. Jones possessed the mental capacity to understand what a will was, to know what his property was, to understand the effect of making a will on his property, to understand who his family was, and to express his intention and belief on all such issues at the time Mr. Jones signed the will. Further, Mr. Narron noted that at the time Mr. Jones signed the September Will, he did not appear to be under the undue influence of anyone.

In sum, Ms. Jones submitted evidence from a well-regarded attorney who prepared the will that the attorney gave independent advice to Mr. Jones, with Ms. Jones not present, stressing that the will had to be consistent with Mr. Jones' wishes. Mr. Jones signed it without hesitation. Two of his treating physicians testified that during the relevant time frame, Mr. Jones' pain medications were not affecting his mental condition, he was capable of making his own decisions, and in fact was making decisions regarding his course of treatment. Further,

Ms. Jones' evidence indicated that Mr. Jones was seeing various people multiple days in the week, with some coming daily; he talked on the telephone; and he was even traveling to his office and other locations. Various of these people, who saw him regularly, swore that he was demanding, was making his own decisions, and was not intimidated by Ms. Jones.

To counter this evidence, Propounder offered only a lawyer's inability to determine what Mr. Jones' desires were, evidence that on one day that lawyer was unable to reach Mr. Jones, and that Mr. Jones was in poor health and taking pain medications. That same evidence, however, established that Mr. Jones made his own decisions regarding a health care power of attorney, the disposition of cattle in his will, and the sale of a Lear jet.

Upon review, the record contains no specific evidence that Mr. Jones was subject to undue influence at the time he executed the September Will. We note that the mere fact that Mr. Jones bequeathed a substantial portion of his estate to his wife, by itself, is not sufficient to prove that Ms. Jones exerted undue influence on her husband. *See In re Broach's Will*, 172 N.C. 520, 523-24, 90 S.E. 681, 683 (1916). Thus, we believe Propounder has failed to present specific facts showing that Mr. Jones' will was executed solely as a result of fraudulent and overpowering influence by Ms. Jones that controlled Mr. Jones at the time he executed the documents. *Whitaker*, 144 N.C. App. at 299-302, 547 S.E.2d at 857-59. We therefore hold the trial court did not commit error in granting summary judgment on the issue of undue influence.

B.

[3] Propounder next argues sufficient evidence was presented at trial to create an issue of fact as to the absence of testamentary capacity on the part of the testator in the execution of the September Will. We disagree.

"The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity." *In re York's Will*, 231 N.C. 70, 70, 55 S.E.2d 791, 792 (1949). To establish testamentary incapacity, a party contesting a will must show that one of the essential elements of testamentary capacity is lacking. *Kemp*, 234 N.C. at 499, 67 S.E.2d at 675. "It is not sufficient for a [contesting party] to present 'only general testimony concerning testator's deteriorating physical health and mental confusion in the

months preceding the execution of the will, upon which [a contesting party] based [his] opinion[] as to [the testator's] mental capacity.' " *In re Will of Smith*, 158 N.C. App. 722, 725, 582 S.E.2d 356, 359 (2003) (citation omitted). A contesting party must present specific evidence "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *In re Will of Buck*, 130 N.C. App. 408, 413, 503 S.E.2d 126, 130 (1998), *aff'd in part, rev'd on other grounds and remanded*, 350 N.C. 621, 516 S.E.2d 858 (1999).

Propounder presents no specific evidence that Mr. Jones lacked testamentary capacity at the time he executed the September Will. Rather, Propounder argues Mr. Jones had a general lack of testamentary capacity as evidenced by his lack of good judgment and confusion in dealing with other matters. Specifically, Propounder points to evidence that Mr. Jones suffered from moments of confusion when confronted with his medical diagnosis. During a medical consultation with Mr. Jones on 1 August 2005, Dr. Leroy G. Hoffman noted that Mr. Jones had multiple lesions in his brain compatible with metastatic disease and that Mr. Jones might be a candidate for palliative radiation therapy. Unsure if Mr. Jones fully understood his diagnosis and the possible treatment options, Dr. Hoffman elected to discuss these options with Ms. Jones when she arrived. Mr. Jones exhibited similar confusion in an earlier meeting with Dr. Christopher G. Nelson on 28 July 2005. During this meeting, Dr. Nelson noted that Mr. Jones was confused and unable to make decisions at the present time, so Ms. Jones was serving as his surrogate decision maker.

Propounder also argues that other evidence seems to show Mr. Jones was generally confused. Propounder points to testimony by Kent Denning that Mr. Jones appeared confused on occasion during the summer of 2005. Other testimony, proffered by Mr. Fowler, describes Mr. Jones' sale of cattle in August of 2005 as being irrational. According to Mr. Fowler, Mr. Jones' behavior during this transaction "did not exhibit an understanding of the nature and value of his property, and showed a lack of judgment and insight."

Upon review, Propounder has shown only that the testator suffered occasional moments of confusion, but has provided no evidence that Mr. Jones lacked testamentary capacity at the time the September Will was executed. Although the record contains evidence that Mr. Jones was confused while discussing treatment options on 28 July 2005 and 1 August 2005, further evidence indicates that no such confusion existed when Mr. Jones executed the September Will. On 1

September 2005, Dr. Hoffman again met with Mr. Jones to discuss his medical treatment. During this discussion, Dr. Hoffman found Mr. Jones to be "competent and capable of making his own decisions." Dr. Hoffman further opined that Mr. Jones "had the mental capacity to understand what a Will was, to know what his property was, to understand the [e]ffect of making a Will on his property, to understand who his family was, and to express his intention and belief on all such issues." Even had Mr. Jones exhibited such confusion at the time he executed the September Will, we note that his confusion as to medical treatment does not constitute circumstantial evidence of a lack of testamentary capacity.

Propounder's other claims based on general testimony concerning Mr. Jones' deteriorating physical health and mental confusion in the months preceding the execution of the September Will are similarly unpersuasive. Such claims do not meet the requirement of specific evidence establishing that Mr. Jones did not understand his property, to whom he wished to give it, and the effect of his act in making the will at the time the will was executed. *See Whitaker*, 144 N.C. App. at 299, 547 S.E.2d at 857. Mr. Jones had an absolute right to disinherit anyone he chose. *In re Will of Edgerton*, 29 N.C. App. at 63, 223 S.E.2d at 527; *Kidder v. Bailey*, 187 N.C. 505, 507, 122 S.E. 22, 23 (1924). As this Court has previously noted, "a will is not void if it has been obtained by fair argument or persuasion, even if an unequal disposition of the testator's property is the end result." *Campbell*, 155 N.C. App. at 460, 573 S.E.2d at 563. "It is not necessary that the testator should be able to dispose of his property with judgment and discretion—wisely or unwisely, for he may do with his own as he pleases; but it is enough if he understands the nature and effect of his act and knows what he is about." *In re Craven*, 169 N.C. 561, 567, 86 S.E. 587, 591 (1915). As the evidence presented by Propounder is insufficient to show that Mr. Jones did not understand the nature and effect of his action in executing the September Will, we find that Propounder has failed to present an issue of fact as to the absence of testamentary capacity on the part of Mr. Jones at the time he executed the September Will. Therefore, we hold the trial court did not commit error in granting summary judgment on the issue of testamentary capacity.

C.

[4] Propounder argues the trial court erred in granting summary judgment on the issue of *devisavit vel non*. We disagree.

"Upon the filing of the *caveat* the proceeding is transferred [to superior court] . . . for trial before a jury . . . [so] that the court may determine whether the decedent left a will and, if so, whether any of the scripts before the court is the will." *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965). The question of whether a valid will exists is known as *devisavit vel non*, translated from Latin as " 'he devises or not.' " *In re Will of Mason*, 168 N.C. App. 160, 162, 606 S.E.2d 921, 923, *disc. review denied*, 359 N.C. 411, 613 S.E.2d 26 (2005) (citations omitted). "Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806, *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987) (emphasis in original).

In a caveat proceeding it is "the duty of the trial judge to submit such issues to the jury as are necessary to resolve the material controversies arising upon the pleadings and the evidence." *Dunn*, 129 N.C. App. at 325, 500 S.E.2d at 102. However, the entry of summary judgment and a directed verdict may be appropriate under certain circumstances. *Mason*, 168 N.C. App. at 165, 606 S.E.2d at 924. We have previously noted that "although motions for directed verdict have not generally been granted in caveat proceedings, . . . propounders may move for directed verdict on the issue of whether a validly executed will exists . . . and . . . caveators may move for directed verdict at the close of the propounders' case[.]" *In re Will of Smith*, 159 N.C. App. 651, 655-56, 583 S.E.2d 615, 619 (2003).

In the case *sub judice*, Propounder argues the trial judge should not have granted summary judgment on the issue of *devisavit vel non*. According to Propounder, the issue of *devisavit vel non* should have gone to the jury. However, Propounder fails to show the existence of a continuing dispute as to the validity of the September Will. Propounder does not dispute the existence of the September Will, the contents of the September Will, or even the fact that the September Will was executed subsequent to the execution of the March Will. Propounder only challenges the validity of the September Will on the aforementioned grounds of undue influence and testamentary capacity. Having already addressed Propounder's arguments with respect to these issues, and having found them to be without merit, we find that there is no remaining evidentiary conflict as to the validity of the September Will. *See In re Will of Mason*, 168 N.C. App. at 165, 606 S.E.2d at 924. Thus, as there were no remaining issues of material fact, we find the trial court did not err in granting Caveator's motion for summary judgment on the issue of *devisavit vel non*.

IV.

Propounder lastly argues the trial court erred in denying a stay pending appeal. As Propounder has cited no authority in support of this argument, we find this argument to be abandoned. N.C. R. App. P. 28(b)(6) (2005).

Upon thoughtful review of the record and the arguments presented by the parties, we conclude the trial court did not err in granting summary judgment on the issues of undue influence, testamentary capacity, and *devisavit vel non*. Further, despite Propounder's claims, we find no evidence to suggest the trial court granted summary judgment on grounds other than those specified in Caveator's motion for summary judgment. Therefore, we discern no error in the trial court's order granting summary judgment to Caveator.

Affirmed.

Judges GEER concurs.

Judge STROUD concurs in part and dissents in part in separate opinion.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the holding of the majority opinion as to the denial of propounder's motion to dismiss and agree that propounder, the named executor under the March will, was an aggrieved party with standing to appeal the trial court's order denying probate of the March will. I also concur with the majority opinion in its holding that summary judgment was properly granted for Ms. Jones on the issue of the testamentary capacity of Mr. Jones. However, I respectfully dissent as to the majority's holding regarding the grant of summary judgment to caveator, Jean Jones ("Ms. Jones"), against the propounder, Joseph B. McLeod ("McLeod"), on the issue of undue influence by Ms. Jones.[1] I would therefore reverse the order of the trial court granting summary judgment for Ms. Jones on the issue of undue influence and *devisavit vel non* and remand for trial on the issues of undue influence and *devisavit vel non*.

1. For clarity, I will use the names of the parties in the analysis rather than the terms propounder and caveator. Mr. McLeod is the propounder of the March will, but would be the caveator of the September will. Ms. Jones is the caveator of the March will, but would be the propounder of the September will. Undue influence is alleged only as to the September will.

"In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists." *Griffin v. Baucom*, 74 N.C. App. 282, 284, 328 S.E.2d 38, 40, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 481 (1985). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006). On a motion for summary judgment, neither this Court nor the trial court may resolve issues of fact and the motion must be denied if there is a genuine issue as to any material fact. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

In ruling on a motion for summary judgment, "the evidence is viewed in the light most favorable to the non-moving party, and all inferences of fact must be drawn against the movant and in favor of the nonmovant." *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 503, 631 S.E.2d 884, 887 (2006) (citations and quotations omitted). The standard of review for summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

"[W]hether [a party] unduly influenced decedent in the execution of the Will [is a] material question[] of fact." *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360 (2003).

> [T]he burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a *prima facie* case in order to take the case to the jury. The test for determining the sufficiency of the evidence of undue influence is usually stated as follows: it is generally proved by a number of facts, each one of which, standing alone, may have little weight, but taken collectively may satisfy a rational mind of its existence.

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (internal citations, brackets, and quotations omitted).

Our Supreme Court has listed seven factors to be considered in deciding the issue of undue influence in the execution of a will:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

Id. (citation and quotation omitted).

This list of factors "does not purport to contain all facts and circumstances which might suggest the existence of undue influence, and the caveator need not prove the existence of every factor." *In re Estate of Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343, *aff'd*, 311 N.C. 298, 316 S.E.2d 55 (1984).

In the case *sub judice*, we must view the evidence in the light most favorable to McLeod, the non-moving party, and draw all reasonable inferences from the evidence in his favor. *Koenig*, 178 N.C. App. at 503, 631 S.E.2d at 887; *In re Andrews*, 299 N.C. at 56, 261 S.E.2d at 200-01 (viewing the evidence in the light most favorable to the caveator when the propounder moved for directed verdict on the issue of undue influence). In the case cited by the majority for the list of factors which are probative on the issue of undue influence, *Hardee v. Hardee*, 309 N.C. 753, 309 S.E.2d 243 (1983), our Supreme Court noted "defendants presented evidence that [the deceased] was alert and aware of what he was doing on the day the deed was executed and had the mental capacity to know and understand the nature and effect of his executing the deed," *Hardee*, 309 N.C. at 758, 309 S.E.2d at 246, but considered only "[e]vidence in this case favorable to the plaintiff," *Id.* at 757, 309 S.E.2d at 246, in concluding the evidence was sufficient to submit the case to the jury. *Id.* at 759, 309 S.E.2d at 247.

Viewed in the light most favorable to McLeod, the evidence tends to prove that the testator was suffering from a terminal illness which included mental weakness related to "multiple lesions in his brain compatible with metastatic disease" as of 1 August 2005. On 28 July 2005, his doctor noted that he was "profoundly weak and confused." Mr. Jones did not know where he was, what month it was, the year, or the name of the president. Dr. Nelson noted that Mr. Jones was "confused and [was] unable to make decisions" and that Ms. Jones was serving as his "surrogate-decision maker." Mr. Jones' medical and

prescription medication records indicate that during August and September he was taking multiple pain medications, including methadone and hydrocodone, medications which can "affect a patient's thinking."

McLeod's evidence shows that the testator was confined in the home with Ms. Jones, due to his illness, and subject to "near constant association and supervision." Although other people did see the testator at times, McLeod also presented evidence that at times Ms. Jones limited contact between Mr. Jones and others, even intercepting his phone calls. Some of Mr. Jones' friends who did see him during August and September of 2005 noted that his mental ability declined in this time period and that he talked little during visits. His "attitude and personality were greatly changed" and "his spirit was gone and all of the fight was out of him by that point." At the end of August 2005, Wayne Sinclair, a friend who had witnessed Mr. Jones' March will, visited with Mr. Jones. As he was leaving, Ms. Jones told Mr. Sinclair that the March will which he had witnessed was "totally wrong" because it did not provide enough for her and that she was "going to have somebody look into a new will." Mr. Sinclair told Ms. Jones that he did not read the March will so he did not know its terms, but Mr. Jones had told him that "it was exactly what he wanted." The evidence is undisputed that the September will is different from and revokes the March will, and in addition, changes the general testamentary plan that the testator had since as far back as 1992.

The majority opinion addresses only the first four of the *Andrews* factors which can apply to this case but fails to address the seventh factor as listed in *Andrews*, specifically 'that the beneficiary has procured [the will's] execution." However, McLeod's evidence indicates that Ms. Jones vigorously procured the execution of the September will. The affidavit of Michael Batts, the attorney who prepared the testator's March will, sets out in detail his communications with Ms. Jones and Mr. Jones regarding drafting a new will. On 5 August 2005, after talking with both Mr. and Ms. Jones together, Mr. Batts asked Ms. Jones to leave so that he could talk to Mr. Jones privately about his will. Ms. Jones left the room, but when Mr. Batts and Mr. Jones completed their conversation and called Ms. Jones back to the room, she repeatedly insisted that she needed to know what they had discussed. Mr. Batts also realized when Ms. Jones returned to the room that Ms. Jones had been able to listen to his conversation with Mr. Jones over a baby monitor in Mr. Jones' room. After Mr. Batts' "pri-

vate" conversation with Mr. Jones about his will, Ms. Jones followed Mr. Batts out of the house and reiterated her ideas regarding the new will: a simple will, leaving everything to her, and with her as executrix, since she did not need any help administering the estate.

When Mr. Batts mentioned the "possibility of a Will contest as the reason for being very careful" regarding the new will, Ms. Jones told him that she was not worried because she did not think that the employees (the remainder beneficiaries of the trust) even knew about Mr. Jones' March Will and Trust. When Mr. Batts told Ms. Jones that he was pretty sure that they did know, since he had some communications with them about the March Will and Trust, she said that Mr. Jones should never have told them about it, that she did not think they would contest the new will, and if they did, "she would just fire them." Ms. Jones also mentioned to Mr. Batts that Mr. Jones had an affair in 2001 that had "messed up his mind" and that he had changed his will after the affair. The context of her remark about Mr. Jones' prior affair was her statement that she had been "stepped on for too long and was now going to fight for what was hers." She also informed Mr. Batts that "her lawyers had told her that Buck's Will wouldn't have worked anyway, because she would have been able to contest it and get one-half of the company." On 23 August 2005, Mr. Batts noted his concerns that Ms. Jones "is pushing so hard [for the new Will] that he [could not] believe it's [Mr. Jones'] idea." Mr. Batts' concerns were based both upon his knowledge of Mr. Jones' desires in March 2005 to balance benefit to his employees with provision for his wife, as well has his personal observations of and conversations with both Mr. and Ms. Jones in August 2005. Mr. Batts' notes summarized his concerns regarding undue influence as follows: "She's worn him out—with him all day—he's tired—dependent—plans to change 'when he gets better'—she called us about his desire to change—won't leave the room, insists on knowing everything said between them—have told them this is asking for a will contest."[2] On Thursday, 25 August 2005, Mr. Batts called Ms. Jones to inform her of his decision not to prepare a new will for Mr. Jones. Mr. Batts' refused to prepare a new will for Mr. Jones based upon his "opinion that the

2. Mr. Batts' note that Mr. Jones "plans to change 'when he gets better' " refers to Mr. Jones' comment that he would "just do what she wants and after I get back on my feet I'll take a look at it again and make sure it's what I want to do." This statement and other evidence indicates that Mr. Jones was at times in a state of denial as to the terminal nature of his illness and that he had an irrational belief that he would have a chance to change his will again after his recovery. At other times he said that Mr. Batts "should just do the Will the way that Jean wanted it" and he did not really care what his will provided because he would be gone and it would not be his problem."

proposed changes to Mr. Jones' March 3, 2005 Will and Trust were actually the desires of Jean Jones, and due to the action of Jean Jones and her insistence in being involved in the proposed changes [he] was unable to determine if the proposed changes were also the desire of Mr. Jones and if he would be signing a new Will and Trust as a free and voluntary act free from any constraint or undue influence." Upon Mr. Batts' refusal to prepare the new will, Ms. Jones immediately sought out another attorney who had not represented the testator previously regarding estate planning issues and thus may have less suspicion regarding her motives. Exactly one week after Mr. Batts refused to prepare the new will, on 1 September 2005, Mr. Jones executed the September will.

McLeod presented evidence as to each of the five *Andrews* factors which could potentially apply to support a claim of undue influence in this case (as Ms. Jones was the testator's wife and a natural object of his bounty). Although it is not necessary that McLeod produce evidence to support every possible factor which could indicate undue influence, McLeod has done so, and all of the facts "taken collectively may satisfy a rational mind of" the existence of undue influence. *In re Estate of Forrest*, 66 N.C. App. at 225, 311 S.E.2d at 343 (citation omitted). McLeod's evidence, if viewed in the light most favorable to him, could establish that Ms. Jones exercised influence over the testator in such a way to substitute her desires for his as to the disposition of his estate.

Although the majority opinion discusses some of McLeod's evidence which would support a finding of undue influence based upon four of the *Andrews* factors, it places more emphasis upon Ms. Jones' evidence which would support a finding that Mr. Jones was not unduly influenced when he executed the September will. For example, the majority states that "Ms. Jones submitted evidence from a well-regarded attorney who prepared the will that the attorney gave independent advice to Mr. Jones, with Ms. Jones not present, stressing that the will had to be consistent with Mr. Jones' wishes." However, if we view the evidence in the light most favorable to the non-moving party, McLeod, we see that another well-regarded attorney, who had previously represented Mr. Jones on his estate planning issues, after extensive consultation with Mr. Jones, refused to prepare a new will for Mr. Jones because of his detailed and well-documented concerns regarding undue influence by Ms. Jones. It is not proper for us to accept as true Ms. Jones' evidence which contradicts McLeod's evidence for purposes of summary judgment.

Determining the credibility of the various witnesses—even the two "well-regarded" attorneys—and the weight to give to the evidence is the province of the jury. *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993). Even if Ms. Jones has produced substantial evidence contradicting McLeod's evidence, her forecast of evidence cannot eliminate the dispute as to genuine issues of material fact. *Hayes v. Turner*, 98 N.C. App. 451, 457, 391 S.E.2d 513, 517 (1990). Because there is a dispute as to the material facts regarding undue influence, and Ms. Jones is not entitled to summary judgment as a matter of law, "the undue influence issue should have been placed before a jury." *Id.*

Because I would reverse the trial court's order granting summary judgment as to undue influence, I would also reverse the trial court's order granting summary judgment on the issue of *devisavit vel non*. Accordingly, I respectfully dissent on these issues.

STEVE McINTYRE, PLAINTIFF-APPELLANT v. VICKI McINTYRE, DEFENDANT-APPELLEE

No. COA07-235

(Filed 15 January 2008)

1. Appeal and Error— appealability—denial of partial summary judgment—trial and judgment

The denial of partial summary judgment was not addressed in an appeal after a trial and a judgment on the merits.

2. Husband and Wife— prenuptial agreement—waiver of equitable distribution—ambiguous

A prenuptial agreement was not interpreted as a matter of law on the question of whether it waived equitable distribution where the agreement was ambiguous.

3. Husband and Wife— prenuptial agreement—equitable distribution—free traders

There was competent evidence, even though there was evidence to the contrary, to support the trial court's findings that a prenuptial agreement allowed plaintiff and defendant to be "free traders," but did not bar defendant's equitable distribution claim.

4. Husband and Wife— prenuptial agreement—interpretation—reliance on evidence not admitted—no prejudice

There was no prejudice in an action involving a prenuptial agreement where the court referred to a form book not admitted into evidence when discussing the language of the agreement. The reference was not included in the findings and conclusions, which were supported by competent evidence, and the court could have drawn the same comparison by relying on cases involving agreements with similar language.

5. Divorce— prenuptial agreement—classification of property as marital

The trial court did not err in its classification of property as marital in an action involving the interpretation of a prenuptial agreement.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 27 June 2000 by Judge Victoria L. Roemer in District Court, Forsyth County; and from order entered 31 July 2001 and judgment entered 3 December 2004 by Judge Chester C. Davis in District Court, Forsyth County. Heard in the Court of Appeals 19 September 2007.

Tash & Kurtz, PLLC, by Jon B. Kurtz, for Plaintiff-Appellant.

Bell, Davis & Pitt, P.A., by Robin J. Stinson, for Defendant-Appellee.

McGEE, Judge.

Steve McIntyre (Plaintiff) and Vicki McIntyre (Defendant) were married on 17 July 1986. A number of hours before their wedding, Plaintiff and Defendant executed a prenuptial agreement (the Agreement) that provided, in pertinent part:

> THAT WHEREAS, said parties have agreed to be married, each to the other; and WHEREAS said parties each own property; and WHEREAS said parties, deeming the same to be just and fair to the other party, have mutually agreed as herein set out:
>
> NOW, THEREFORE, in consideration of said contemplated marriage and of the covenants hereby entered into, the parties mutually agree as follows:

> FIRST: STEVE A. McINTYRE hereby releases, renounces and forever quitclaims to VICKIE [sic] GAIL TRUELL all right, title, interest, claim and demand whatsoever including all marital rights in the real estate and personal property of VICKIE [sic] GAIL TRUELL and agrees that VICKIE [sic] GAIL TRUELL may at all times hereafter purchase, acquire, own[,] hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though still unmarried and without the consent, joinder or interference of the party of STEVE A. McINTYRE.
>
> SECOND: VICKIE [sic] GAIL TRUELL hereby releases, renounces and forever quitclaims to STEVE A. McINTYRE all right, title, interest, claim and demand whatsoever including all marital rights in the real estate and personal property of STEVE A. McINTYRE and agrees that STEVE A. McINTYRE may at all times hereafter purchase, acquire, own, hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though still unmarried and without the consent, joinder or interference of VICKIE [sic] GAIL TRUELL.

Plaintiff filed a complaint in Forsyth County District Court on 24 August 1999 seeking a divorce from bed and board and equitable distribution of the marital estate. Defendant filed an answer and counterclaim on 25 October 1999 seeking post-separation support, alimony, equitable distribution of the marital estate, and other relief. Plaintiff replied on 4 November 1999 and pled the Agreement as an affirmative defense to Defendant's counterclaim for equitable distribution.

Plaintiff moved for partial summary judgment as to Defendant's counterclaim for equitable distribution on 27 April 2000, arguing that the Agreement barred Defendant's claim. Defendant responded to Plaintiff's motion and claimed that the Agreement was invalid for reasons of undue influence, duress, unconscionability, and lack of adequate disclosure. The trial court denied Plaintiff's motion for partial summary judgment on 27 June 2000. Plaintiff dismissed his own claim for equitable distribution on 1 March 2001. Defendant amended her answer and counterclaim on 20 April 2001 to address certain issues regarding the validity and enforceability of the Agreement.

The case proceeded to trial on 6 July 2001 on the issues of the validity of the Agreement and its effect on Defendant's claim for equitable distribution. The trial court entered an order on 31 July 2001 concluding, *inter alia*, that: (1) Defendant was not unduly influenced,

coerced, or under duress when she executed the Agreement; (2) the Agreement was valid as between the parties; and (3) the terms of the Agreement did not waive either party's right to equitable distribution of marital property. The trial court held equitable distribution hearings on 20 April 2004, 17-18 May 2004, and 21 June 2004, and entered an equitable distribution judgment and order on 3 December 2004. Both parties appealed various orders of the trial court, but our Court dismissed the appeals as interlocutory due to an outstanding issue concerning alimony. *See McIntyre v. McIntyre*, 175 N.C. App. 558, 623 S.E.2d 828 (2006).

The trial court entered an alimony order on 6 October 2006. With no issues remaining before the trial court, Plaintiff now appeals: (1) the trial court's order of 27 June 2000 denying Plaintiff's motion for partial summary judgment; (2) the trial court's order of 31 July 2001 finding the Agreement valid but not preclusive with respect to Defendant's request for equitable distribution; and (3) the trial court's order of 3 December 2004 ordering equitable distribution of the parties' marital property. For the reasons stated below, we affirm.

I.

[1] Plaintiff first argues that the trial court erred by denying his motion for partial summary judgment to dismiss Defendant's claim for equitable distribution. This Court is unable to review Plaintiff's argument. Our Supreme Court has previously held:

> Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> . . . To grant a review of the denial of the summary judgment motion after a final judgment on the merits . . . would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). *See also WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 252, 644 S.E.2d

245, 246-47 (2007) (citing *Harris* for the proposition that "[t]his Court cannot consider an appeal of denial of [a] summary judgment motion [once] a final judgment on the merits has been made"). Therefore, we do not address Plaintiff's first argument.

II.

[2] Plaintiff next argues the trial court erred by allowing the equitable distribution of property acquired by the parties during their marriage. Plaintiff argues that the Agreement waived the parties' rights to equitable distribution, and that the trial court erred by interpreting the Agreement to the contrary. We disagree.

North Carolina law provides that upon separation, a party to a marriage may institute an action for equitable distribution of the marital estate. *See* N.C. Gen. Stat. § 50-20 (2005) (providing procedures governing equitable distribution of marital and divisible property). However, "parties to a marriage may forego equitable distribution and decide themselves how their marital estate will be divided upon divorce." *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987). Under N.C. Gen. Stat. § 50-20(d) (2005), "[b]efore, during or after marriage the parties may by written agreement . . . provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." Likewise, under N.C. Gen. Stat. § 52-10(a) (2005):

> Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released.

Our Court has previously noted that "[a]ntenuptial contracts are not against public policy and should be enforced as written." *Harden v. Bank*, 28 N.C. App. 75, 78, 220 S.E.2d 136, 138 (1975).[1]

1. The Uniform Premarital Agreement Act (UPAA), N.C. Gen. Stat. § 52B-1 et seq. (2005), provides specific rules governing premarital agreements. The UPAA became effective on 1 July 1987 and only applies to premarital agreements executed on or after that date. *See* 1987 N.C. Sess. Laws ch. 473, § 3. The UPAA is therefore not applicable in the current case.

Premarital agreements are contracts, and thus are to be construed in the same manner as other contracts. *See Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) ("principles of construction applicable to contracts also apply to premarital agreements"). Under well-settled principles of legal construction, if "the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court." *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234. Further, "[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." *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted). However, if the language of a contract "is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993).

A.

In the present case, Plaintiff argues that the Agreement constitutes a clear and unambiguous waiver of the parties' rights to equitable distribution. In support of this contention, Plaintiff first notes that our Supreme Court has previously recognized that "the very existence of [a prenuptial or postnuptial agreement] evinces an intention by the parties to determine for themselves what their property division should be and what their future relationship is to be, rather than to leave these decisions to a court of law." *Hagler*, 319 N.C. at 293, 354 S.E.2d at 233. Against this backdrop, Plaintiff relies on *Hagler* to demonstrate that the Agreement does, in fact, explicitly preclude equitable distribution. In *Hagler*, a husband and wife entered into a separation agreement that dealt with the marital residence, alimony, child support and custody, acquisition of property, and also provided for distribution of existing property and obligations. *Id.* at 288, 293, 354 S.E.2d at 231, 233-34. In addition, the separation agreement contained the following reciprocal release provision:

> [Each spouse] does hereby release and relinquish unto [the other spouse] . . . all right of future support . . . and all right of [dower or courtesy], inheritance, descent and distribution, and any and all other rights arising out of the marriage relation in and to any and all property now owned by the [other spouse], or which may be hereafter acquired by [the other spouse][.]

Id. at 288, 354 S.E.2d at 231. The husband pled the separation agreement as a bar to the wife's request for equitable distribution of the marital estate. *Id.* The trial court granted summary judgment for the husband, finding that the separation agreement was a bar to equitable distribution. *Id.*

On appeal, our Supreme Court noted that since the language of the release provision "does not refer specifically to the right of equitable distribution, we must consider whether the language nonetheless sufficiently encompasses this right to be a valid release of it." *Id.* at 291, 354 S.E.2d at 232. Noting the breadth of the separation agreement, the Court "conclude[d] from [its] reading of the entire agreement that the parties intended to completely dispose of the marital estate and effectuate a complete waiver of claims by one party against the other." *Id.* at 293, 354 S.E.2d at 234. Focusing specifically on the language of the release provision, the Court found that the parties' waiver of "all other rights arising out of the marriage relation" clearly encompassed the right to equitable distribution. Given that the separation agreement had already covered rights such as support, dower, inheritance, descent, and distribution, it was unclear what rights other than equitable distribution the parties could have intended to come within the "all other rights" waiver. *Id.* at 293-94, 354 S.E.2d at 234. The Court therefore concluded that the separation agreement clearly and unambiguously "disposed of the parties' property rights arising out of the marriage and thus acts as a bar to equitable distribution." *Id.* at 295, 354 S.E.2d at 235.

In the present case, Plaintiff notes the similarities between the release provision in *Hagler* and the Agreement signed by Plaintiff and Defendant. As in *Hagler*, the Agreement in the present case specifically provides that each party "releases" certain rights, including "all marital rights in the real estate and personal property" of the other spouse. Plaintiff maintains that, under *Hagler*, such language clearly and unambiguously encompasses the parties' rights to equitable distribution.

Like Plaintiff, Defendant also maintains that the Agreement is clear and unambiguous. However, Defendant claims that, rather than constituting an equitable distribution waiver, the Agreement is a mere "free trader" agreement that allowed each spouse to buy and sell property without the consent or interference of the other during marriage. Defendant first recognizes that N.C.G.S. § 50-20(d) allows future spouses to waive their rights to equitable distribution, but notes that the Agreement in the present case does not contain an

express waiver of equitable distribution rights. According to Defendant, under *Hagler*, if a prenuptial agreement does not expressly waive equitable distribution rights, then the parties may still waive such rights impliedly, so long as the agreement contains language constituting a complete relinquishment of all property rights following marriage. *See Hagler*, 319 N.C. at 290-91, 354 S.E.2d at 232 (stating that because the parties' separation agreement did not specifically refer to equitable distribution rights, the Court "must consider whether the language nonetheless sufficiently encompasses this right to be a valid release of it"); *McKissick v. McKissick*, 129 N.C. App. 252, 255, 497 S.E.2d 711, 713 (1998) ("It is only pre-marital agreements that fully dispose of the parties' property rights that bar subsequent actions under the equitable distribution statute."). Defendant contends that the Agreement in the present case did not fully dispose of the parties' property rights, and thus did not impliedly waive the parties' equitable distribution rights.

Defendant notes that the separation agreement in *Hagler* was a comprehensive, fifteen-paragraph settlement that addressed alimony, child support, the marital residence, property acquisition, and distribution of existing property. *Hagler*, 319 N.C. at 293, 354 S.E.2d at 233-34. Thus, because the agreement was "a comprehensive settlement . . . dealing with all aspects of the marital estate, including the division of property," the additional language waiving "all other rights arising out of the marriage relationship" indicated that the parties intended "to completely dispose of the marital estate and effectuate a complete waiver of claims by one party against the other," including claims for equitable distribution. *Id.* at 293, 354 S.E.2d at 233-34. *See also Anderson v. Anderson*, 145 N.C. App. 453, 458-59, 550 S.E.2d 266, 270 (2001) (holding that where a separation agreement expressly purported to "settle by agreement all of [the parties'] marital affairs with respect to property," and did in fact "provide[] a section expressly for the division of property," the agreement "serve[d] as the sole and complete division of the marital estate" and precluded a claim for equitable distribution). In contrast, according to Defendant, the Agreement in the present case is a short document that contains "free-trader" language and does not actually distribute any property between the parties. As such, with no express waiver of equitable distribution and no actual division of property, the Agreement merely set out rules regarding how the parties were able to own, buy, and sell property once married. Therefore, Defendant argues that the presumption in *Hagler*—that "the very existence of [a prenuptial or postnuptial agreement] evinces an intention by the par-

ties to determine for themselves what their property division should be"—should not apply in the present case. *See Hagler*, 319 N.C. at 293, 354 S.E.2d at 233.

Finally, Defendant notes that the Agreement only references "marital rights in *the* real estate and personal property" of each spouse (emphasis added). According to Defendant, this language was only meant to encompass rights in property owned by the parties at the time they entered into the Agreement. If the parties had intended for the Agreement to constitute a waiver of rights in property acquired during marriage, they would have expressly extended its coverage to property later acquired by the parties. In support of this argument, Defendant notes that in prior cases finding equitable distribution barred by a prenuptial or postnuptial agreement, such agreements clearly referenced property to be acquired. *See*, *e.g.*, *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (finding equitable distribution precluded based on agreement in which each party "forever waive[d], release[d] and relinquishe[d] any right or claim that he or she now has, or may hereafter acquire, pursuant to the provisions of [Chapter 50 of the General Statutes]"); *Prevatte v. Prevatte*, 104 N.C. App. 777, 781-82, 411 S.E.2d 386, 389 (1991) (finding equitable distribution precluded based on agreement where each party waived all rights or claims regarding "the property, real, personal and mixed, now owned, or hereafter acquired by the [other party]"); *Hagler*, 319 N.C. at 288, 354 S.E.2d at 231 (finding equitable distribution precluded based on agreement in which each party waived "all other rights arising out of the marriage relation in and to any and all property now owned by the [other spouse], or which may be hereafter acquired by [the other spouse]").

As set out above, if "the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court." *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234. However, if the language of a contract "is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury." *Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209. An ambiguity exists where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties. *Id.* Further, " '[t]he 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.' " *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988)). While both Plaintiff and Defendant assert that the language of the

Agreement is clearly and unambiguously in their favor, we find that both parties have offered reasonable interpretations of the Agreement. It is true that the Agreement does state that the parties waive "all marital rights" in each others' property. However, unlike other agreements that have been found to waive equitable distribution rights, the Agreement in the present case does not specifically reference property that might be acquired during marriage, nor does it contain an express waiver of equitable distribution rights. Further, the Agreement does not otherwise distribute property between the parties in the event of divorce. While there is some reasonable indication that the parties intended the Agreement to preclude equitable distribution, the Agreement may also reasonably be interpreted as a mere "free trader" agreement. We find the Agreement is ambiguous, and therefore do not interpret the Agreement as a matter of law.

B.

[3] Due to the ambiguity of the Agreement, its interpretation was properly for the finder of fact. *Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209. Our review is therefore limited to whether there was competent evidence to support the trial court's findings of fact, and whether the trial court's conclusions of law were proper in light of those facts. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004).

Plaintiff's evidence at trial tended to demonstrate that the parties may have intended for the Agreement to bar equitable distribution. Plaintiff testified that before his marriage to Defendant, Defendant had agreed to sign a prenuptial agreement to protect both parties' financial interests. Plaintiff then retained an attorney, Charles Harp (Mr. Harp), to draft the Agreement. Plaintiff told Mr. Harp that he wanted to protect his financial interests after marriage in case of divorce, and that he wanted to be able to buy, sell, and trade property as if single during the marriage. Mr. Harp testified that he had only prepared three prenuptial agreements during his entire legal career, and that he "probably" prepared the prenuptial agreement by using language from a Douglas Forms book. Mr. Harp also testified that he had never drafted a "free-trader" document during his legal career. However, neither Plaintiff nor Mr. Harp could recall if they had ever specifically discussed whether the prenuptial agreement was to contain language barring equitable distribution.

Further, Plaintiff argues that the trial court ignored the fact that after he and Defendant separated, they entered into a separation agreement containing a "free-trader provision." According to Plain-

tiff, had the original Agreement truly been a mere free-trader agreement, there would have been no need for the parties to enter into another free-trader agreement after they separated.

Defendant's evidence at trial tended to show that Plaintiff presented Defendant with the Agreement just hours before the wedding and told Defendant that the wedding would be cancelled unless she signed the document. Defendant testified that she did not understand the document and signed it without reading it. Defendant and Plaintiff never discussed equitable distribution. Defendant maintains, however, that the trial court properly considered the language of the Agreement as clear evidence that the Agreement was a mere "free-trader" agreement, given that the Agreement never specifically referenced equitable distribution rights, did not otherwise dispose of property in the event of divorce, and did not reference the parties' rights to property acquired during marriage. Finally, Defendant notes that in Plaintiff's original August 1999 complaint for divorce from bed and board, Plaintiff also sought equitable distribution of the marital estate. Plaintiff did not dismiss his own equitable distribution claim until March 2001, after having pled the Agreement as a bar to Defendant's counterclaim for equitable distribution. Defendant argues that the fact that Plaintiff originally sought equitable distribution demonstrates that he too believed that equitable distribution was not barred by the Agreement.

Based on this evidence, and after its own review of the Agreement's language, the trial court found, in pertinent part:

> XVII. The Court finds that the Plaintiff, at the time of the execution of the Agreement, desired to protect his financial interest and retain the ability to buy and sell property without the consent or interference of the Defendant.
>
> XVIII. The Court finds that the language set out in [the Agreement] does allow the Plaintiff to conduct himself as a "free trader" and allows him, in fact, to do exactly what he desired, that is, to buy and sell property without the consent or interference of the Defendant.
>
> XIX. The Court finds that [the Agreement] specifically releases all right, title and interest in *the* real estate owned by Plaintiff at the time of his marriage to the Defendant on July 17, 1986.
>
> XX. The Court finds that the provision of [the Agreement] which referred to "*the*" real estate and personal property of the

parties refers to property owned at the time of the parties' marriage and does not apply to property acquired during the course of the parties' marriage.

XXI. The Court therefore finds that although [the Agreement] is valid, the terms of the Agreement distinguish the property that the parties owned at the time of their marriage rather than property acquired after their marriage and that further, the document simply provided that the Plaintiff and the Defendant were "free traders".

XXII. The Court finds that [the Agreement] does not bar the Defendant's claim for Equitable Distribution (emphases in original).

While Plaintiff certainly introduced evidence to the contrary, we find that the trial court's findings of fact are supported by competent evidence in the record. Based on Plaintiff's stated intentions regarding the creation of the Agreement, his discussions with Mr. Harp, and the actual language of the Agreement, the trial court could properly find that the Agreement constituted a "free trader" agreement that did not waive the parties' rights to equitable distribution.

Based on these findings of fact, the trial court concluded, in pertinent part:

III. [T]he terms and conditions of [the Agreement] did not waive either party's right to an Equitable Distribution of property nor does said Agreement determine the property interest of the parties as to property acquired following their marriage on July 17, 1986.

We find that the trial court's conclusion was proper in light of its findings of fact. Therefore, the trial court did not err by allowing equitable distribution to proceed, as the Agreement did not waive the parties' claims to equitable distribution.

III.

[4] Plaintiff next argues the trial court erred by relying on certain evidence not properly before the trial court. When rendering its decision regarding the interpretation of the Agreement at a 13 July 2001 hearing, the trial court stated:

The Court having looked at other Douglas Forms found a prenuptial agreement wherein the parties gave up, released, re-

> nounced and quitclaim—they use all the terms—but, anyway, all rights to real property, personal property. In this case, they did the year's allowance and, more importantly—now I quote—"as to property now owned by him and property hereafter acquired," end quotation.
>
> The Court notes that that language is not present in the prenuptial agreement that I have just read. The Court further finds that the word "the" is the most significant word in the prenuptial agreement; and I, therefore, interpret the words "the real estate and personal property of [Plaintiff] to mean that property that he owned at the time of the marriage.
>
> The Court, therefore, finds the prenuptial agreement is valid. The Court has stated its interpretation of it.

At trial, Mr. Harp testified that he "probably prepared [the Agreement] from Douglas Forms, just using the form book." Mr. Harp was never certain whether he used a Douglas Forms book, nor did he testify as to what edition of the Douglas Forms book he might have used. Further, no Douglas Forms book was admitted into evidence. Plaintiff argues that the trial court improperly relied on the Douglas Forms book because: (1) no such book was admitted into evidence; (2) the book was irrelevant because Mr. Harp stated that he was not certain whether he relied on a Douglas Forms book; and (3) the book was irrelevant because Mr. Harp could not identify the particular version of the Douglas Forms book on which he might have relied, and the trial court did not state the version of the Douglas Forms book on which it relied.

Assuming *arguendo* that the trial court erred by relying on a Douglas Forms book, Plaintiff must still demonstrate that he was prejudiced as a result of the trial court's actions. *See* N.C. Gen. Stat. § 1A-1, Rule 61 (2005) ("No error in . . . the admission . . . of evidence and no error or defect in any ruling or order . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right."). Plaintiff argues that he was prejudiced by the trial court's reliance on a Douglas Forms book because the trial court admittedly relied upon the allegedly incompetent evidence to interpret the Agreement. We disagree. While the trial court did reference a Douglas Forms prenuptial agreement to emphasize the lack of "hereafter acquired" language in the Agreement in the present case, the trial court could have drawn the same comparison by relying on *Hagler* and other cases interpreting prenuptial or post-

nuptial agreements containing similar language. Further, when making the findings of fact and conclusions of law in its 31 July 2001 order, the trial court never referenced a Douglas Forms book. This demonstrates that the trial court believed it had sufficient competent evidence from other sources to support its findings of fact. As set out in Part II, we have reviewed the trial court's findings of fact and have held that they are supported by competent evidence that does not include a Douglas Forms book. Therefore, Plaintiff has not demonstrated that he was prejudiced by the trial court's allegedly improper reliance on a Douglas Forms book.

IV.

[5] Finally, Plaintiff argues that the trial court erred as a matter of law and abused its discretion by classifying Plaintiff's separate property as marital property, where the Agreement provided that such property was Plaintiff's separate property. Plaintiff argues that because the trial court in its 31 July 2001 order erroneously found that the parties did not waive their equitable distribution rights, the trial court also erred by actually carrying out the equitable distribution of the parties' marital property in its 3 December 2004 order. Because we find that the trial court did not err in its interpretation of the Agreement, Plaintiff's assignment of error is overruled.

In light of the foregoing, we do not address Defendant's cross-assignments of error.

Affirmed.

Judge ELMORE concurs.

Judge TYSON concurs in part and dissents in part with a separate opinion.

TYSON, Judge concurring in part and dissenting in part.

The majority's opinion holds: (1) this Court cannot consider plaintiff's first argument challenging denial of summary judgment because a final judgment on the merits has been made; (2) the trial court did not err by allowing equitable distribution to proceed; (3) plaintiff failed to demonstrate he was prejudiced by the trial court's allegedly improper reliance on a Douglas Forms book; and (4) the trial court did not err by classifying plaintiff's separate property as marital property. I concur in that portion of the majority's opinion

holding this Court cannot review a denial of a motion for summary judgment once a final judgment on the merits has been entered.

I disagree with the majority's holding that the trial court properly allowed equitable distribution to proceed in contravention to a valid prenuptial agreement and properly classified plaintiff's separate property as marital property. I vote to reverse and respectfully dissent.

I. Analysis

Plaintiff argues the parties' prenuptial agreement waived the parties' rights to equitable distribution and the trial court erred when it allowed equitable distribution and classified property acquired by the parties individually during their marriage as marital property. I agree.

The parties' prenuptial agreement expressly states that each party "releases . . . *all marital rights* in the real estate and personal property . . . ." of the other spouse. (Emphasis supplied). The trial court specifically and correctly concluded: (1) defendant was not unduly influenced, coerced, or under duress when she signed the prenuptial agreement and (2) the prenuptial agreement was valid. Defendant did not cross-appeal any error in either of these conclusions and does not argue the invalidity of either conclusion.

"[T]he very existence of the [prenuptial] agreement evinces an intention by the parties to determine for themselves what their property division should be . . . rather than to leave th[is] decision[] to a court of law." *Hagler v. Hagler*, 319 N.C. 287, 293, 354 S.E.2d 228, 233 (1987). "The value of such agreement[] lies in the ability to have [it] enforced in the courts." *Id.* at 295, 354 S.E.2d at 235.

"Premarital agreements, like all contracts, must be interpreted according to the intent of the parties." *Howell v. Landry*, 96 N.C. App. 516, 532, 386 S.E.2d 610, 619 (1989), *disc. rev. denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).

> When the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court.
>
> . . . .
>
> It is a well-settled principle of legal construction that it 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.

Hagler, 319 N.C. at 294, 354 S.E.2d at 234 (internal citations and quotation omitted).

The unambiguous language of the parties' prenuptial agreement clearly established the parties' intention to fully resolve "all marital rights in the real estate and personal property . . . ."

> Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.

Hemric v. Groce, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (internal quotations omitted), *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).

"[T]he object of all interpretation is to arrive at the intent and purpose expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose unless at variance with some rule of law or contrary to public policy." *Bank v. Corl*, 225 N.C. 96, 102, 33 S.E.2d 613, 616 (1945). "Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said-what their contract is, and not what it should have been." *Penn v. Insurance Co.*, 160 N.C. 399, 402, 76 S.E. 262, 263 (1912).

The language the parties used in the prenuptial agreement is clear and unambiguous. The trial court erred when it concluded the prenuptial agreement did not waive "all marital rights . . . ." of the parties and allowed an equitable distribution of property.

II. Conclusion

The parties' intent must be gleaned from the four corners of the unambiguous and valid written agreement. *Corl*, 225 N.C. at 102, 33 S.E.2d at 616. The plain and unambiguous language of the prenuptial agreement entered into by the parties fully disposed of "all marital rights . . . ." and bars equitable distribution. This Court cannot under the guise of judicial construction divine a different intent than that shown by the express terms of the binding agreement. *Id.*

I vote to reverse the trial court's 31 July 2001 judgment that found the parties did not waive "all marital rights . . . ." to an equitable dis-

tribution of their property and to vacate the trial court's equitable distribution order entered 3 December 2004. I respectfully dissent.

STATE OF NORTH CAROLINA v. TOMMIE EARL MYLES

No. COA07-118

(Filed 15 January 2008)

Searches and Seizures— traffic stop—justification—nervousness

A motion to suppress was erroneously denied, and the resulting guilty plea to trafficking in marijuana was ordered vacated, where a traffic stop resulted in the discovery of marijuana in the trunk of a car driven by defendant. The stop was for weaving, but the purpose of the stop was fulfilled with no evidence of violations, and further detention required suspicion based solely on information obtained during the lawful stop. Viewed through the eyes of a reasonable, cautious officer, the only suspicious fact was nervousness, but nervousness alone has not been held sufficient for reasonable suspicion. Since the continued detention was unconstitutional, defendant's consent to a search was not voluntary.

Judge McCULLOUGH dissenting.

Appeal by defendant from judgment entered 24 October 2006 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 19 September 2007.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

CALABRIA, Judge.

Tommie Earl Myles ("defendant") pled guilty to trafficking in marijuana and reserved his right to appeal the denial of his motion to suppress. Defendant appeals from the judgment. We reverse and remand.

The pertinent facts are summarized as follows: On 6 March 2005, Officer Brandon Gilmore ("Gilmore"), a K-9 officer with the Waynesville Police Department, participated in a joint law enforcement effort to enforce traffic violations on Interstate 40. Gilmore responded to a request for assistance from another officer and proceeded east towards Exit 20 of Interstate 40. As Gilmore approached Exit 20, he noticed a white vehicle weaving in its travel lane. As Gilmore passed the white vehicle, it weaved toward his lane. As the white vehicle approached Exit 20, it ran slightly off the road to the right. Gilmore noticed the driver looking into his rear and passenger mirrors and initiated a traffic stop. Gilmore did not videotape or audiotape the traffic stop.

Defendant's cousin, Sheraod Croon ("Croon"), drove the vehicle and defendant sat in the passenger seat. After Gilmore identified himself, he informed defendant and Croon the reason for the stop. When Gilmore asked Croon for his driver's license and registration, he learned the vehicle was a rental. Since defendant had rented the vehicle, Gilmore also requested and received defendant's driver's license. Gilmore did not detect an odor of alcohol. Gilmore told them to be more careful and issued a warning ticket. Gilmore then asked Croon to come to his police car so he could write the warning ticket. As Gilmore and Croon walked to the police car, Gilmore frisked Croon. During the frisk, Gilmore did not find any weapons or contraband, however, he noticed Croon's heart was beating unusually fast.

During the time Croon was in Gilmore's patrol car, Gilmore noticed Croon was sweating profusely and wiped his hands on his pants, despite the fact it was a cool day and Gilmore had the air conditioner running in his car. At some point in the conversation, Croon told Gilmore they were headed to Fayetteville to visit defendant's sick mother. When Gilmore asked Croon how long he would be in Fayetteville, Croon looked down and said a week.

Gilmore then left Croon and stepped out to talk with defendant, but did not tell Croon he was free to leave. Gilmore approached defendant, and spoke with him about the rental agreement. Defendant said he had extended the rental agreement until Wednesday. He also said they were going to Fayetteville to visit defendant's sick mother and were going to stay a week. Gilmore asked defendant how they intended to return the rental car on Wednesday in Nashville, if they were staying in Fayetteville for a week. Defendant hesitated, looked away, and then told Gilmore that

he would renew the rental agreement. As Gilmore looked down at defendant, he noticed defendant's heart beating through his shirt.

Gilmore then returned to his patrol car with Croon still seated in the vehicle. Gilmore told Croon that he was suspicious of their stories, and he called Trooper Herndon ("Herndon") of the North Carolina Highway Patrol for assistance. Croon and defendant gave Gilmore written consent to search the car. Gilmore told defendant that he would walk the canine around the car and then the canine would search the inside of the car. Gilmore testified they did not limit their consent. However, both defendant and Croon testified they orally limited their consent to allow only a search of the outside of the car.

Gilmore walked to the car, removed the keys from the ignition, and visually checked inside the car for potential dangers to the canine. Gilmore looked inside the trunk, moved a coat, and saw packages wrapped in cellophane that appeared to contain narcotics due to their size and the bulk. Gilmore then asked Herndon to arrest defendant. After securing both Croon and defendant, the officers found marijuana in the trunk.

Defendant was indicted on charges of trafficking in marijuana. At trial, defendant moved to suppress the evidence that was seized as a result of the search of defendant's rental car. The trial court denied his motion to suppress. Defendant pled guilty to trafficking in marijuana and reserved his right to appeal the denial of his motion to suppress. Defendant was sentenced to a minimum of 25 months to a maximum of 30 months in the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant argues the trial court erred by denying his motion to suppress. He contends Gilmore lacked reasonable suspicion to detain him after completing the traffic stop, thereby violating his federal and state constitutional rights to be free from unreasonable searches and seizures. We reverse and remand.

On review of a motion to suppress:

> An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [its] find-

> ings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (internal quotation marks omitted) (citations omitted).

"Generally, the scope of the detention must be carefully tailored to its underlying justification. Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citations omitted). To determine whether the officer had reasonable suspicion, it is necessary to look at the totality of the circumstances. *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 133 (1999). "After a lawful stop, an officer may ask the detainee questions in order to obtain information concerning or dispelling the officer's suspicions." *Id.*, 350 N.C. at 636, 517 S.E.2d at 132. "[T]he return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *State v. Kincaid*, 147 N.C. App. 94, 99, 555 S.E.2d 294, 299 (quoting *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997) (internal citation omitted) (internal quotation marks omitted)).

In the case *sub judice*, Gilmore stopped defendant's vehicle because the vehicle weaved in its lane, indicating the driver may be impaired. During the stop, Gilmore did not detect an odor of alcohol either in the car, on defendant, or on Croon. Gilmore described both of them as cooperative. Croon's license check revealed he had a valid license. Furthermore, Gilmore did not find any weapons or contraband on Croon. Because there was no evidence to indicate either Croon or defendant was impaired, Gilmore considered the traffic stop "completed" because he had "completed all [his] enforcement action of the traffic stop." Therefore, in order to justify Gilmore's further detention of defendant, Gilmore must have had defendant's consent or "grounds which provide a reasonable and articulable suspicion in order to justify further delay" *before* he questioned defendant. *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360.

In order to determine whether Gilmore's further questioning of defendant and Croon was a detention or a consensual encounter, it is necessary to look at the totality of the circumstances. *McClendon*,

350 N.C. at 636, 517 S.E.2d at 133. Gilmore asked Croon if he would mind if he talked to defendant. Croon said he did not mind if Gilmore spoke to defendant. However, Gilmore testified that he never told Croon he was free to leave. In fact, Gilmore testified that Croon was not free to leave because he felt "there was more to the traffic stop than just failure to maintain a lane." Therefore, we conclude that defendant was detained when Gilmore questioned him and that defendant's encounter with Gilmore was not consensual. Since we have concluded that Gilmore detained Croon and defendant beyond the original justification for the traffic stop, we must determine whether Gilmore had "grounds which provide a reasonable and articulable suspicion in order to justify further delay." *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360.

Our Supreme Court has previously examined factors to determine whether a nonconsensual search of defendant's car was justified. *See State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998). In *Pearson*, the officer stopped defendant on an interstate highway. *Id.*, 348 N.C. at 276, 498 S.E.2d at 600-01. The officer detected an odor of alcohol, defendant acted nervous and excited, and he made statements inconsistent with those of the passenger regarding their whereabouts the night before. *Id.*, 348 N.C. at 275, 498 S.E.2d at 600. The Court held, "the circumstances . . . did not justify a nonconsensual search of defendant's person." *Id.*, 348 N.C. at 276, 498 S.E.2d at 601. The Court said, "the nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper. The variance in the statements of the defendant and his fiancee did not show that there was criminal activity afoot." *Id.*

However, in *State v. McClendon*, our Supreme Court clarified *Pearson*. In *McClendon*, the Court held that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances . . . nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *McClendon*, 350 N.C. at 638, 517 S.E.2d at 134. In affirming the trial court's denial of defendant's motion to suppress, the Court distinguished *Pearson* from *McClendon*. *Id.*, 350 N.C. at 638-39, 517 S.E.2d at 134. The Court held:

> In the case before us, however, defendant exhibited more than ordinary nervousness; defendant was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer. This, taken

in the context of the *totality of the circumstances* found to exist by the trial court, gave rise to a reasonable suspicion that criminal activity was afoot.

Id., 350 N.C. at 639, 517 S.E.2d at 134 (emphasis added).

In the case *sub judice*, it is necessary to determine whether the "totality of the circumstances" gave rise "to a reasonable articulable suspicion that criminal activity was afoot" to justify Gilmore's further detention of defendant. *Id.* "To determine reasonable articulable suspicion, courts 'view the facts through the eyes of a reasonable, cautious officer, guided by his experience and training' at the time he determined to detain defendant." *State v. Bell*, 156 N.C. App. 350, 354, 576 S.E.2d 695, 698 (2003) (quoting *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222 (2001) (internal citations omitted) (internal quotation marks omitted)).

When Gilmore stopped defendant's vehicle, he did not detect an odor of alcohol in the vehicle. When Gilmore frisked Croon, he found no contraband or weapons. However, as Gilmore frisked Croon, he noticed Croon's heart was beating unusually fast. Gilmore checked Croon's license and found no outstanding violations. Gilmore noticed the rental car was one day overdue. However, Gilmore did not suspect anything unusual about the rental agreement extension. The relevant testimony between Gilmore and defense counsel at trial went as follows:

Q: Now, the fact that the car was rented to [defendant] and [Croon] was driving it, was there anything illegal about that, sir?

A: Nothing illegal. It's just that he was the only one noted on the rental agreement. At the time when he rented the car, he would be the only one driving it. There's no law in North Carolina that I know of that would—

Q: And I believe you also noted on the rental agreement that the car was due back I believe the day before this incident?

A: Yes, sir, March 5th.

Q: Did you also note on the rental agreement that there was an option to keep the car to a maximum of seven days?

A: If you can point it out to me, I can probably agree with you. Yeah, max seven days, minimum of one day, yes, sir.

Q: But did you make an issue of the fact that the car was late being turned in as being one of your concerns?

A: Yes, sir, I just asked him. I said the car was supposed to be back yesterday, and he said well, he called and extended it, which is nothing uncommon.

Q: So there was nothing unusual then about having the car out beyond the due date?

A: Once he explained to me that he had called and extended the agreement, no, sir. I have heard of that taking place and I've actually had to do that myself.

According to the dissent, Gilmore's "legitimate investigation was not yet complete" when he learned the vehicle was a rental and one day overdue. In reaching this conclusion, the dissent relies on *U.S. v. Dorais*, 241 F.3d 1124 (9th Cir. 2001). However, *Dorais* is distinguishable from the case *sub judice*.

In *Dorais*, Laurie Gomes ("Gomes") rented a car from Dollar Rent-a-Car ("Dollar") that was due two days later. *Id.*, 241 F.3d at 1127. "[U]nder Hawaii law, a person who keeps a rental car for more than 48 hours after it is due commits a misdemeanor." *Id.*, 241 F.3d at 1130-31. Therefore, when the rental car was not returned four days after it was due, a Dollar employee notified police that the car was overdue. *Id.*, 241 F.3d at 1127. Based on the Dollar employee's complaint, a police officer stopped Gomes' car. *Id.* Gomes signed a consent for the police officer to search her purse, and the search yielded crystal methamphetamine. *Id.* In affirming the district court's denial of Gomes' motion to suppress the crystal methamphetamine, the Ninth Circuit held the police officer had reasonable suspicion to stop Gomes' car. *Id.*, 241 F.3d at 1131. In determining the police officer had reasonable suspicion to stop Gomes' car, the Ninth Circuit placed its emphasis on the fact that the police officer received a report from Dollar that a crime had been committed. *Id.* The police officer's justification for stopping Gomes' vehicle was based on the violation of a state statute. *Id.* The police officer had reasonable suspicion to stop Gomes' vehicle because the officer had received a report that Gomes had allegedly committed a misdemeanor for keeping the vehicle more than 48 hours after it was due. *Id.* In the instant case, unlike the officer in *Dorais*, Gilmore did not stop defendant's vehicle because a private business reported an overdue vehicle and the possibility that the driver of the vehicle had committed a crime. Rather, Gilmore stopped

defendant because the vehicle "was weaving within its traveling lane." It was only after Gilmore asked defendant and Croon for their driver's licenses that Gilmore learned the vehicle was a rental vehicle that was one day overdue. Furthermore, Gilmore testified that there was nothing unusual about defendant having possession of the rental vehicle one day beyond the due date.

Gilmore also testified that while he spoke to Croon in the patrol car, Croon appeared nervous throughout their interaction. Gilmore noticed Croon's heart was pounding, he was sweating profusely, and he averted his eyes during their conversation.

While our Supreme Court held in *McClendon* that a defendant's extreme nervousness may be taken into account in determining whether reasonable suspicion exists, here Croon's nervous behavior taken in the context of the totality of the circumstances does not rise to the level of reasonable suspicion necessary to justify Gilmore's further detention of defendant. In *McClendon*, Sergeant Cardwell ("Cardwell") noticed two cars traveling seven miles over the posted speed limit on Interstate 85 in Greensboro. *McClendon*, 350 N.C. at 632, 517 S.E.2d at 130. One vehicle was a minivan and following closely behind it was a station wagon driven by defendant. *Id.* Cardwell called for assistance and they stopped both vehicles. *Id.*, 350 N.C. at 633, 517 S.E.2d at 130. Trooper Lisenby questioned defendant who appeared nervous, did not make eye contact, and was breathing heavily. *Id.* Defendant did not have the registration for the vehicle. *Id.* He said that his girlfriend owned the car, but "could not give Trooper Lisenby her name even though the address on defendant's driver's license and the address on the title to the station wagon were the same." *Id.*, 350 N.C. at 633, 517 S.E.2d at 130-31.

Trooper Lisenby told defendant to get into his patrol car for further questioning. *Id.*, 350 N.C. at 633, 517 S.E.2d at 131. "Trooper Lisenby testified that as defendant answered the questions, his nervousness increased. Defendant was fidgety, evasive with his answers, and appeared very uncomfortable." *Id.* (quotation marks omitted). When Trooper Lisenby questioned defendant about the name on the car's registration, defendant mumbled something, which Trooper Lisenby thought was Anna. *Id.* A radio check revealed the name on the title to the station wagon was Jema Ramirez. *Id.* After issuing a warning ticket for speeding and following too closely, Trooper Lisenby asked defendant if he had any weapons or narcotics in the vehicle. *Id.*, 350 N.C. at 634, 517 S.E.2d at 131. "Defendant sighed

deeply, chuckled nervously, looked down, and finally muttered 'No.' " *Id.* Trooper Lisenby then asked defendant for permission to search the vehicle and defendant said no. *Id.* The Supreme Court held that defendant's extreme nervousness "*taken in the context of the totality of the circumstances* found to exist by the trial court, gave rise to a reasonable suspicion that criminal activity was afoot." *Id.*, 350 N.C. at 638, 517 S.E.2d at 134 (emphasis added). In the case *sub judice*, Gilmore testified he did not suspect anything unusual about the overdue rental car and a check of Croon's license revealed no outstanding violations. Thus, when we "view the facts through the eyes of a reasonable, cautious officer," the only suspicious fact during the traffic stop was Croon's nervous behavior. *Bell*, 156 N.C. App. at 354, 576 S.E.2d at 698. The single fact that Croon appeared very nervous, while being questioned by a police officer, is not enough to "rise to a reasonable suspicion that criminal activity was afoot." *McClendon*, 350 N.C. at 639, 517 S.E.2d at 134. Although our Supreme Court previously has stated nervousness can be a factor in determining whether reasonable suspicion exists, our Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.

Moreover, the trial court appeared to rely on information Gilmore learned after he completed the traffic stop to justify further detaining the defendant. The trial court found that when Gilmore questioned defendant, he appeared extremely nervous, there were several cell phones ringing, and his story contradicted Croon's story. The dissent contends that "[o]ther courts are in accord and recognize nervousness and differing stories as giving rise to reasonable suspicion." However, Gilmore's testimony revealed defendant and Croon's stories were not contradictory. Gilmore testified as follows:

> Q: But did you make an issue of the fact that the car was late being turned in as being one of your concerns?
>
> A: Yes, sir, I just asked [Croon]. I said the car was supposed to be back yesterday, and he said well, he called and extended it, which is nothing uncommon.
>
> . . . .
>
> Q: And what did you discuss with [defendant]?
>
> A: . . . I also asked him as far as the extension on the rental agreement. [Defendant] told me he had extended it until the fol-

lowing Wednesday. . . . I believe that's basically the gist of the conversation with him.

. . . .

Q: And your basis for searching the car for the determination you made to search the car was exactly what?

A: . . . [Croon] was asked how long they would be staying in Fayetteville, he told me that—he initially told me about a week. When he told me that, he kind of looked down. . . . And throughout that conversation he told me that he was going to be looking for employment there and he may be staying if he did find it. When I questioned [defendant] about the rental agreement as far as the length of the stay and when the rental agreement or the rental car was supposed to be turned back in, when he told me—first he told me it was supposed to be back on Wednesday, but then he told me he was supposed to stay for a week.

Thus, both defendant and Croon told Gilmore the rental agreement had been extended until the following Wednesday. Croon told Gilmore initially they were staying in Fayetteville a week but then later said he *may* stay longer if he found employment. Defendant corroborated Croon's story by saying they were "supposed to stay [in Fayetteville] for a week."

Furthermore, Gilmore questioned defendant and observed defendant's nervousness *after* Gilmore considered the traffic stop complete. In order for Gilmore to lawfully detain defendant, Gilmore's suspicion must be based solely on information obtained during the lawful detention of Croon up to the point that the purpose of the stop has been fulfilled. *See generally Kincaid*, 147 N.C. App. at 94, 555 S.E.2d at 294; *McClendon*, 350 N.C. at 636, 517 S.E.2d at 134. Any information obtained during the improper detention cannot support the detention. Because the trial court did not specify in its conclusions of law which findings of fact were relied on in making its determination, we conclude that Gilmore unreasonably detained defendant. Since Gilmore's continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary. *See Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983).

In conclusion, defendant was unconstitutionally detained and therefore the search of defendant's car was unlawful. We reverse and

remand to the Superior Court, Haywood County, to vacate defendant's guilty plea.

Reversed and remanded.

Judge STEPHENS concurs.

Judge McCULLOUGH dissents with a separate opinion.

McCULLOUGH, Judge, dissenting.

The majority has concluded that Officer Gilmore of the Waynesville Police Department improperly detained the driver of an automobile and his passenger, defendant herein, after a legitimate traffic stop had been concluded.

As I believe the driver's extreme nervousness provided the officer with reasonable suspicion that the men were engaged in criminal activity, the limited time he spent conducting further inquiry was proper. *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999).

In the case *sub judice*, Officer Gilmore was on patrol on I-40 when he noticed a car being operated in an erratic manner, weaving in its travel lane and toward his vehicle. The car then ran off the road to the right shoulder with the driver looking in his rearview mirror while observing the police car. It is conceded that the initial stop was thus proper.

The defendant passenger identified the vehicle as his rental car and provided the rental agreement to the officer. The officer and driver went to the patrol car so that the officer could check both parties' drivers licenses and look at the rental agreement. Officer Gilmore noted the rental agreement with the driver stated that only defendant was to operate the vehicle under the contract and that the car was overdue. The driver explained that defendant had extended the contract and that he did not know he was not supposed to operate the car. At some point, the driver told Officer Gilmore he was going to Fayetteville and why. Having determined that the drivers license was valid, Officer Gilmore then went to speak to defendant about the rental agreement.

At this point it was noticeable to the officer that the driver's heart was beating extremely fast. He also observed the driver was sweating profusely despite the fact that the temperature was 50°F.

As defendant was the renter of a vehicle that was overdue, it was reasonable for the officer to question him about the rental contract. Thus, despite the fact that the officer was finished with the driver, his legitimate investigation was not yet complete.

While defendant was explaining to Officer Gilmore the purpose of the trip (to visit his sick mother), the officer noticed defendant was also visibly nervous and could see his heart beating through his shirt.

Up until this point the officer was conducting a legitimate inquiry and seeking to satisfy himself that the vehicle was not overdue and was properly possessed and operated by defendant. In fact, the officer could have done more investigation and could have verified defendant's explanation, instead of merely accepting his story.

In any event, it was at this point that Officer Gilmore confronted defendant and the driver with their nervousness and their unlikely accounts of the trip. The majority concludes that once the driver was cited, the officer had no further right to investigate; and it is with this conclusion that I disagree.

Officer Gilmore was presented with a rental agreement that showed the car was overdue. Certainly he had the right to ask the actual renter (defendant) about what steps he had taken to maintain possession. *See U.S. v. Dorais*, 241 F.3d 1124 (9th Cir. 2001) (having reasonable suspicion to stop car reported as overdue by rental agency). Here the officer had a vehicle with a lease that showed it was overdue.

It was at the end of that process that the officer asked for and received the consent to search which resulted in the seizure at issue.

In *McClendon*, the trooper who stopped the defendant appeared nervous, was breathing heavily, was fidgety, evasive and appeared uncomfortable. During further questioning, the defendant in *McClendon* was breathing rapidly and sweating profusely.

Nervousness can be a factor as Chief Justice Mitchell noted in *McClendon* stating:

> Defendant stresses the fact that in *Pearson*, we said that "[t]he nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper." *Id.* at 276, 498 S.E.2d at 601. Although the quoted language from *Pearson* is

> couched in rather absolute terms, we did not mean to imply there that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists. *See Butler*, 331 N.C. 227, 415 S.E.2d 719; *see also United States v. Perez*, 37 F.3d 510, 514 (9th Cir. 1994) (nervousness and sweating profusely were among the factors giving rise to reasonable suspicion); *United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir. 1984) (fact that defendant was nervous and failed to make eye contact gave rise to reasonable suspicion).
>
> In *Pearson*, the nervousness of the defendant was not remarkable. Even when taken together with the inconsistencies in the statements of the defendant and his girlfriend, it did not support a reasonable suspicion. In the case before us, however, defendant exhibited more than ordinary nervousness; defendant was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer. This, taken in the context of the totality of the circumstances found to exist by the trial court, gave rise to a reasonable suspicion that criminal activity was afoot.

McClendon, 350 N.C. at 638-39, 517 S.E.2d at 134.

Other courts are in accord and recognize nervousness and differing stories as giving rise to reasonable suspicion. *U.S. v. Williams*, 403 F.3d 1203, 1206-07 (10th Cir. 2005).

The principal disagreement with the majority conclusion concerns its determination that the only legitimate inquiry ended after citing the driver and that the officer had no right to prolong the stop and to investigate the overdue rental agreement. With this I disagree and therefore dissent.

WEAVERVILLE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PETITIONER-APPELLEE v. THE TOWN OF WEAVERVILLE ZONING BOARD OF ADJUSTMENT, RESPONDENT-APPELLANT

No. COA07-185

(Filed 15 January 2008)

1. Zoning— superior court review of board of adjustment— standards of review

Although the superior court employed both the whole record and de novo standards when reviewing a board of adjustment decision, the court properly separated the two standards and separately applied them to different issues.

2. Zoning— apartment complex—special exception permit— evidence to rebut prima facie case—not substantial

The superior court correctly concluded that the evidence presented to the Weaverville Board of Adjustment rebutting petitioner's prima facie entitlement to a special exception permit for an apartment complex was not supported by competent, material and substantial evidence. At the public hearing, the opponents based their conclusions solely upon their own observations and opinions without providing any expert opinion to quantitatively link their observations to the Boards' denial of the permit.

3. Zoning— denial of permit—arbitrary and capricious—insufficient supporting evidence

A board of adjustment acted arbitrarily and capriciously in denying a special exception permit to build an apartment complex where there was no competent, material and substantial evidence in the whole record to support the board's conclusion.

Appeal by respondent from order entered 9 October 2006 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 19 September 2007.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for petitioner-appellee.

Roberts & Stevens, P.A., by Sarah Patterson Brison, for respondent-appellant.

CALABRIA, Judge.

On 15 November 2005, Weaverville Partners, LLC ("WP") petitioned the trial court to reverse a decision by the Weaverville Zoning Board of Adjustment (the "Board"), denying WP's request for a special exception permit to build a multi-family apartment complex in a Primary Residential District. The trial court reversed the Board's denial of WP's request, and the Board appeals. We affirm.

In July of 2005, WP applied with the Town of Weaverville for a special exception permit ("the permit") to build a 96 unit[1] apartment complex known as Weaverville Crossing. The Unified Housing Development Project ("the project") would be built on three parcels of land, which totaled approximately twelve acres, located south of Weaver Boulevard in the Town of Weaverville. WP planned to build the project on a site zoned R-1 for Primary Residential. The zoning to the east of the proposed site is C-2, general business district, which consists of a number of commercial strip developments, including Ingles grocery store and a gas station.

The proposed property site's northern boundary is a three-lane highway known as Weaver Boulevard and is one of the entrances into the Town of Weaverville. WP's project included an access from Weaver Boulevard as well as an access from Moore Street. Across Weaver Boulevard is a 24 unit apartment complex in an area zoned R-2 Transition Residential District. The zoning to the north of the property is a mixture of R-1 and R-2. The lands to the west and south of the property are principally single-family housing zoned R-1.

On 22 August 2005, the Board held a public hearing to consider WP's proposal. Since Weaverville's Code of Ordinances permitted Unified Housing Developments in the R-1 district subject to obtaining a special exception permit, WP's experts at the hearing included a project engineer, a traffic engineer, and a real estate appraiser to present evidence showing WP's compliance with Weaverville's Code of Ordinances as well as to address concerns. Also present at the hearing were Weaverville residents to address their concerns about the project. Some of their concerns included the traffic generated from the proposed development, pedestrian conflicts on Moore Street, the compatibility of the project with the R-1 uses, and the potential impact on property values.

1. WP initially proposed building a 96 unit complex. Later, the number of apartment units was reduced from 96 to 90.

On 18 October 2005, the Board denied WP's request for the permit, concluding that the proposed project did not comply with subparagraphs (1) through (4) of Section 36-238 of Weaverville's Code of Ordinances. On 15 November 2005, WP filed a petition, and the trial court issued, a writ of certiorari for judicial review of the Board's decision. On 9 October 2006, the trial court's order reversed the Board's decision and directed the Board to issue the permit for the project. The Board appeals.

On appeal, the Board asserts the trial court erred in (i) applying the *de novo* standard of review; (ii) reversing the Board's decision because there was competent, material and substantial evidence in the whole record to support the Board's decision; and (iii) concluding as a matter of law that the Board acted arbitrarily and capriciously. We disagree.

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, L.L.C. v. Board of Aldermen of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000). In this capacity, the Board's decisions "shall be subject to review by the superior court by proceedings in the nature of certiorari . . . wherein the superior court sits as an appellate court, and not as a trier of facts." *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (1997) (internal quotation marks omitted) (citations omitted).

"[W]e note that a trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). "On the other hand, '[c]onclusions of law are entirely reviewable on appeal.' " *County of Moore v. Humane Soc'y of Moore Cty.*, 157 N.C. App. 293, 296, 578 S.E.2d 682, 684 (2003) (quoting *Creech v. Ranmar Properties*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001)).

I. Trial court's standard of review

[1] The Board first argues that the trial court erred as a matter of law in failing to apply the correct standard of review of the Board's decision.

When the superior court reviews the decision of a zoning board, the court should:

> (1) review the record for errors of law[;] (2) ensure that procedures specified by law in both statute and ordinance are followed[;] (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003) (quoting *Whiteco Outdoor Adver. v. Johnson County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999)).

"The trial court, when sitting as an appellate court to review [a decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999). "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." *Sun Suites Holdings*, 139 N.C. App. at 273, 533 S.E.2d at 528 (internal quotation omitted).

"When a party alleges an error of law in the Council's decision, the reviewing court examines the record *de novo*, considering the matter anew. However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court reviews the whole record." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 629, 589 S.E.2d at 165 (citations omitted).

In applying the "whole record" test, the superior court must "review . . . all competent evidence to determine whether the agency's decision was supported by substantial evidence." *Sutton*, 132 N.C. App. at 388, 511 S.E.2d at 341. However, in applying the *de novo* review, the superior court is free to substitute its own judgment for the agency's judgment. *Id.*, 132 N.C. App. at 388-89, 511 S.E.2d at 341. "A court may properly employ both standards of review in a specific case, but the standards are to be applied separately to discrete issues." *Sun Suites Holdings*, 139 N.C. App. at 273-74, 533 S.E.2d at 528 (citations omitted).

In the case *sub judice*, the Board argues that WP asked the trial court to review the Board's decision to determine if the deci-

sion was supported by competent, material and substantial evidence; therefore, the trial court incorrectly applied the *de novo* standard of review. However, WP disagrees. WP argues that the petition to the superior court asserted the Board committed an error of law; therefore, the superior court correctly applied the *de novo* standard of review.

The superior court states in its conclusions of law, "[b]ased upon the . . . undisputed findings of fact and, after applying *de novo* review for Conclusions 1-7 . . . and the 'whole record' test for Conclusions 8-12 . . ., this Court concludes as follows[.]" Thus, the trial court properly separated the two standards of review. Additionally, the court found in its conclusions of law numbered 1-7:

> 1. Petitioner presented in the record at the Public Hearing competent, material and substantial evidence constituting a *prima facie* showing of compliance with all of the standards for special exceptions set forth in the Town's zoning ordinance for developing the Project on the Property.
>
> 2. The Board committed errors of law in finding and concluding in the Board's Decision that the testimony of the opposition to the Project constituted competent, material and substantial evidence that could legally support its conclusions denying Petitioner's Permit for the Project.
>
> 3. . . . Specifically, findings #28-41, 46-59 of the Board's decision relate to testimony that does not constitute competent, material or substantial evidence as a matter of law.
>
> 4. The testimony of Bud Taylor as noted in findings #42-45 of the Board's Decision was not competent, material or substantial evidence as a matter of law . . . .
>
> 5. The testimony of Leslie Osborne as noted in findings #46-48 of the Board's Decision was not competent as a matter of law in that she never provided competent and substantial evidence that the Project would cause the property values in the neighborhood to substantially diminish as required by Section 36-238(2) of the Town's zoning ordinance.
>
> 6. There is no competent evidence in the record, as a matter of law, supporting a conclusion that the Project would substantially diminish property values within the neighborhood . . . .

> 7. The Board committed errors of law in basing its Conclusions #1-4 of its Decision on testimony that was not competent, material or substantial evidence.

In its conclusions of law numbered 1-7, the superior court considered the matter anew and re-weighed the evidence; therefore, the superior court correctly applied the *de novo* standard of review.

Furthermore, in its conclusions of law numbered 8-12, the superior court reviewed the record and determined:

> 8. Petitioner presented competent, material and substantial evidence in the record showing a *prima facie* case for entitlement to the Permit for the Project on the Property.
>
> 9. There was no competent, material and substantial evidence in the record to support the Board's conclusions denying Petitioner's Permit . . . .
>
> 10. In the Board's Decision, the Project complies with Sections 36-238(5) and (6) of the Town's zoning ordinance, which expressly addressed the adequacy of access roads and the adequacy of measures to minimize traffic congestion. There is no competent evidence in the record to support a finding to the contrary.
>
> 11. The inclusion of a Unified Housing Development use in the R-1 district constitutes a *prima facie* case that said permitted use is in harmony with the general zoning plan for the neighborhood. . . . There is no competent evidence in the record to support a finding to the contrary, only generalized concerns regarding the possible effects of the Project.
>
> 12. Because there was no competent, material and substantial evidence in the record to support the Board's Decision to deny the Permit, the Board acted arbitrarily and capriciously.

The superior court held since "[t]here is no competent evidence in the record to support a finding to the contrary," the Board's decision to deny the permit was not supported by competent, material and substantial evidence in the record. In reaching this conclusion, the superior court did not substitute its judgment for that of the Board. Rather, the superior court reviewed all the evidence in the record, but did not weigh the credibility of the evidence to reach this conclusion.

Therefore, although the superior court employed both the *de novo* standard and "whole record" standards of review in reaching its conclusions of law, the court properly separated the two standards, and separately applied them to different issues. This assignment of error is overruled.

II. Competent, material and substantial evidence

[2] The Board next argues there was competent, material and substantial evidence in the whole record to support its denial of WP's request for the permit.

Our Supreme Court has stated:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Refining Co. v. Board of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). Substantial evidence has been defined as:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id., 284 N.C. at 470-71, 202 S.E.2d at 137 (internal quotation marks omitted) (citations omitted). "The issue of whether substantial competent evidence is contained in the record is a conclusion of law and reviewable by this Court *de novo*." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (2005).

In the case *sub judice*, the Board does not argue that WP failed to produce competent, material and substantial evidence establishing a *prima facie* entitlement to the permit. Thus, the only issue on appeal is whether the Board's findings of fact denying WP's permit were "supported by competent, material and substantial evidence

appearing in the whole record." *Refining Co.*, 284 N.C. at 468, 202 S.E.2d at 136.

Weaverville's Code of Ordinances allows unified housing developments in R-1 primary residential districts, "provided such developments meet the requirements of section 36-241." Section 36-241 sets forth specific technical, objective requirements for permitting unified housing developments, including density, parking and access. In addition to the technical requirements listed in Section 36-241, Weaverville's Code of Ordinances Section 36-238 also provides general standards the Board must consider before approving a unified housing development. Section 36-238 states in relevant part:

> No special exception permit shall be issued unless the zoning board of adjustment shall find that:
>
> 1. The establishment, maintenance, or operation of the special exception will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.
>
> 2. The special exception will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood.
>
> 3. The establishment of the special exception will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
>
> 4. The exterior architectural appeal and functional plan of any proposed structure will not be so at variance with the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or with the character of the applicable district as to cause a substantial depreciation in the property values within the neighborhood.
>
> 5. Adequate utilities, access roads, drainage and/or other necessary facilities have been, are being or will be provided.
>
> 6. Adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets.
>
> 7. The special exception shall, in all other respects, conform to the applicable regulations of the district in which it is located,

except as such regulations may, in each instance, be modified by the zoning board of adjustment.

In its order denying WP's request, the Board concluded that WP had failed to satisfy the first four standards of Section 36-238. In its conclusions, the Board held:

> 1. The access road, particularly developing Moore Street as a through street, would create a vehicular and pedestrian safety problem for the neighborhood and the proposed project would be detrimental to or endanger the public health, safety, morals, comfort or general welfare of the neighborhood and will not, therefore, comply with . . . the Code of Ordinances.
>
> 2. The proposed project will be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted and will substantially diminish and impair property values in the neighborhood and will not, therefore, comply with . . . the Code of Ordinances.
>
> 3. The proposed project will impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district and will not, therefore, comply with . . . the Code of Ordinances.
>
> 4. The exterior architectural appeal and functional plan of the proposed structures will be so at variance with the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or with the character of the applicable district as to cause a substantial depreciation in the property values within the neighborhood and will not, therefore, comply with . . . the Code of Ordinances.

"Speculative assertions and mere opinion evidence do not constitute competent evidence." *MCC Outdoor*, 169 N.C. App. at 815, 610 S.E.2d at 798. "Further, the expression of generalized fears does not constitute a competent basis for denial of a permit." *Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530 (internal quotation marks omitted) (citation omitted).

In *Cumulus Broadcasting*, this Court addressed the issue of whether a witness' personal knowledge may be used to rebut an expert's quantitative data in support of granting a petitioner's application for a permit. *Cumulus Broadcasting, LLC v. Hoke Cty. Bd. of*

Comm'rs, 180 N.C. App. 424, 638 S.E.2d 12 (2006). Cumulus Broadcasting, LLC ("Cumulus") applied to Hoke County's Planning Department for a conditional use permit to construct a radio tower. *Id.*, 180 N.C. App. at 425, 638 S.E.2d at 14. The Planning Board voted to deny the permit and approximately one month later the Commission held a public hearing. *Id.* After the Commission denied Cumulus's application, Cumulus appealed to the superior court, and the court reversed the Commission's decision. *Id.* In affirming the superior court, this Court held, "[h]ere, the testimony in opposition to the granting of the conditional use permit was from witnesses relying solely upon their personal knowledge and observations. *No witnesses rebutted Cumulus's quantitative data* and other evidence in support of the conditional use permit." *Id.*, 180 N.C. App. at 430, 638 S.E.2d at 17 (emphasis added).

a. Projected traffic

At the public hearing, WP presented the testimony of Ken Putnam ("Mr. Putnam"), a traffic engineer, to address the Board's concerns about the increased traffic. Mr. Putnam testified that based on his traffic engineering experience, Weaverville's road plan was adequate to handle the projected traffic from the project. In reaching this conclusion, Mr. Putnam used the nationally accepted methodology, the "trip generation methodology." He also testified that in his opinion, the developer took every practical step to minimize the traffic congestion.

Opponents testified that the project's increased traffic would cause a significant impact on the adjacent residential neighborhood since children and elderly residents walk on the streets. The opponents who testified about the project's increased traffic were all residents of the Town of Weaverville. The residents stated that WP's expert testimony concerning the traffic was "absurd." The residents reasoned that WP's traffic study failed to include the drivers who will take a shortcut through the neighborhood in order to bypass the traffic on the main road, Weaver Boulevard. However, none of the residents provided any mathematical studies or factual basis for their opinions regarding how the increased traffic generated from the project would significantly impact the surrounding neighborhood. Rather, all of the residents' testimony consisted of speculative opinions. Furthermore, the court found the project complied with Weaverville's zoning ordinance regarding the adequacy of measures to minimize traffic congestion and there was no competent evidence to support a finding to the contrary.

b. Property values

WP presented the testimony of Mark Morris ("Mr. Morris"), a real estate appraiser, regarding the project's impact on property values. Mr. Morris testified that based upon his market analysis and his review of the architectural plans submitted, the proposed project "will not be injurious to the use and enjoyment of other property in the immediate vicinity . . . nor substantially diminish and impair property values within the neighborhood."

Mr. Morris conducted a market study of similarly situated neighborhoods in Weaverville, and was able to opine that property values in close proximity to other apartment complexes increased, rather than decreased. In reaching this conclusion, Mr. Morris looked at all the properties adjoining the proposed project, all the surrounding properties, and the sales histories for the last ten years. He also interviewed people to determine what motivated them to buy property near the proposed project. Furthermore, while the Board's conclusion of law #2 states the proposed project "will substantially diminish and impair property values in the neighborhood," the neighborhood already includes a shopping center and a gas station, as well as other commercial and multi-family uses.

Mr. Morris' review also included the architectural features of the project and concluded the project's architectural structure will not cause substantial depreciation of the property values within the immediate neighborhood. Additionally, WP offered to increase buffers and place shields on outdoor lighting, place no trespassing signs on the property, place additional trees on the property, and alter the architectural plans, to include changing the proposed vinyl siding.

The opponents presented the testimony of two witnesses, Bud Taylor ("Taylor") and Leslie Osborne ("Osborne"), regarding the project's effect on property values in the neighborhood. Taylor reviewed property appreciation rates in Buncombe County as a whole, and neighborhoods that included apartments and neighborhoods without apartments in the City of Asheville. He opined that the project would slow appreciation rates and create longer marketing time. However, Taylor testified he could not state "there's going to be diminution in property value immediately." Furthermore, Taylor did not conduct any market studies of neighborhoods in the Town of Weaverville that shared similar characteristics to the neighborhood adjoining the project's site.

Osborne, a realtor, testified that she was involved as an agent in "several of the transactions that Mr. Morris brought up" in his market study. Osborne inferred that because there were "grave concerns" regarding the close proximity of apartments in several locations that Mr. Morris previously discussed, the sales price for the property located near the apartments was below the asking price. However, Osborne testified that although the close proximity of the apartments was a hot topic, surprisingly "the buyers went ahead and purchased" the property.

Section 36-238 of Weaverville's Code of Ordinances states in relevant part:

> 2. The special exception will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood.

Osborne's testimony failed to show that the property values of previous transactions were "substantially diminish[ed]" by the close proximity to other apartments. Furthermore, Osborne's testimony also failed to show that property values in the neighborhoods located near the proposed project would be "substantially diminish[ed]" by their close proximity to the proposed project.

c. Crime rate

One Weaverville resident determined that apartment complexes have a much higher crime rate after reading reports from the Cambridge, Massachusetts Police Department and City of Charleston Police Department. Another resident testified, "All you have to do is read the Asheville paper. Most of the drug busts and murders are in apartment units around the City of Asheville." Neither one of the residents provided any factual basis for their opinions and the testimony of all the residents who testified consisted of speculative opinions and generalized fears.

d. Architectural appeal

Opponents testified regarding the architectural appeal of the proposed project. They believed it would violate Section 36-238(4) of Weaverville's Code of Ordinances since the project's exterior architectural appeal would be at variance with the current architectural appeal of the structures already located in the immediate neighborhood. To illustrate their testimony, opponents presented numerous

photographs showing the exteriors of residential dwellings in the area close to the proposed project to attempt to demonstrate how the proposed project's architectural appeal violated Weaverville's Code of Ordinances. However, their testimony was based solely on their personal knowledge and observations. The witnesses did not provide any expert testimony to show any quantitative link between their personal observations and how the project's exterior architectural appeal would "cause a substantial depreciation in the property values within the neighborhood."

Thus, at the public hearing, the opponents based their conclusions solely upon their own observations and opinions without providing any expert opinion to quantitatively link their observations to the Board's denial of the permit. As such, we conclude this evidence fails to qualify as "substantial evidence," such that a "reasonable mind" could accept "as adequate to support a conclusion." *Refining Co.*, 284 N.C. at 470-71, 202 S.E.2d at 137. Therefore, after reviewing the whole record, we affirm the superior court's conclusion that the evidence presented to the Board rebutting WP's *prima facie* entitlement to the permit was not supported by competent, material and substantial evidence. This assignment of error is overruled.

III. Arbitrary and capricious

[3] Lastly, the Board argues that the superior court erred in concluding that it acted arbitrarily and capriciously. "When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *MCC Outdoor*, 169 N.C. App. at 811, 610 S.E.2d at 796. "An arbitrary decision . . . is one where there is no substantial relationship between the facts in the record and the conclusions reached by the quasi-judicial body." *Tate Terrace Realty Investors*, 127 N.C. App. at 223, 488 S.E.2d at 851. Since there was no competent, material and substantial evidence in the whole record to support the Board's conclusion to deny WP's request for the permit, we affirm the superior court's conclusion that the Board acted arbitrarily and capriciously. This assignment of error is overruled.

IV. Conclusion

The superior court applied the proper standard of review to the Board's order. In addition, the superior court did not err in finding there was insufficient competent, material and substantial evidence in the whole record to rebut WP's *prima facie* entitlement to the permit. Finally, the superior court did not err in reversing the Board's

order and concluding that the Board acted arbitrarily and capriciously in denying WP's request for a permit. The order of the superior court is affirmed.

Affirmed.

Judges McCULLOUGH and STEPHENS concur.

GOOD HOPE HEALTH SYSTEM, LLC, PETITIONER, AND TOWN OF LILLINGTON, PETITIONER-INTERVENOR, N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, AND HARNETT HEALTH SYSTEM, INC. HARNETT COUNTY AND WAKEMED, RESPONDENT-INTERVENOR

HARNETT HEALTH SYSTEM, INC., HARNETT COUNTY AND WAKEMED, PETITIONER v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND GOOD HOPE HEALTH SYSTEM, LLC, RESPONDENT-INTERVENOR

No. COA07-551

(Filed 15 January 2008)

1. **Hospitals— certificate of need—earlier certificate—hospital not built**

The Certificate of Need section of the Department of Health and Human Services did not err by approving Harnett Health's application for a certificate for a new hospital where petitioner alleged that the Agency did not consider its earlier certificate of need. Petitioner's position assumes that the Agency had no authority to conclude, based on the available evidence, that petitioner was not going to build the hospital permitted by its prior certificate of need.

2. **Hospitals— certificate of need—CT scanner—rule not valid as applied**

The Certificate of Need section of the Department of Health and Human Services did not err by adopting the action of the administrative law judge voiding an administrative rule as applied to a CT scanner. N.C.G.S. § 150B-33(b) allows the agency to determine that a rule as applied in a particular case is void when the rule is not reasonably necessary in a particular case to enable the agency to fulfill its duty.

Appeal by Petitioner from decision entered 2 February 2007 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 14 November 2007.

Law Office of Joy H. Thomas, by Joy H. Thomas; and Morgan Reeves & Gilchrist, by C. Winston Gilchrist, for Petitioner-Appellant Good Hope Health System, LLC.

Morgan Reeves & Gilchrist, by C. Winston Gilchrist, for Petitioner-Intervenor-Appellant Town of Lillington.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for Respondent-Appellee North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section.

Poyner & Spruill, by William R. Shenton, Kenneth L. Burgess, and Thomas R. West, for Respondent-Intevenor Appellees Harnett Health System, Inc., Harnett County and WakeMed.

ARROWOOD, Judge.

Petitioner-Appellant, Good Hope Health System, LLC (GHHS), appeals from a final agency decision of the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (the Agency), entered 2 February 2007. The Agency decision denied Petitioner's application for a Certificate of Need (CON) to build a new hospital in Harnett County, North Carolina, and granted the CON application of Respondent-Appellees Harnett Health System, Inc., Harnett County, and WakeMed (collectively, Harnett Health). We affirm.

The procedural history of this case is summarized in relevant part as follows: Good Hope Hospital (Good Hope) previously operated an acute care hospital in Erwin, North Carolina. In 2001:

> Good Hope applied for a Certificate of Need (CON) . . . to partially replace its existing facility. . . . On 14 December 2001, the Agency issued a CON to Good Hope for a forty-six bed hospital with three operating rooms. . . . Good Hope later entered into a joint venture with Triad Hospitals, Inc. . . . The two formed Good Hope Hospital System, L.L.C. (GHHS). GHHS filed a motion for declaratory ruling requesting: (1) it be assigned Good Hope's 2001 CON[.] . . . The Agency denied the request for declaratory ruling.

> GHHS appealed the denial . . . but obtained a stay of that appeal. Good Hope has not relinquished its 2001 CON.

Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs., 175 N.C. App. 296, 298, 623 S.E.2d 307, 309, *rev'd on other grounds*, 360 N.C. 635, 637 S.E.2d 517 (2006) (*Good Hope I*).

The procedural history of *Good Hope I* is summarized as follows:

> In April 2003 GHHS filed a new application (2003 application) for a CON to build a complete replacement hospital in Lillington, rather than Erwin. . . . Prior to filing the 2003 application, . . . [the Agency] advised GHHS to file a new CON application, not just an amended 2001 application because of the difference in location, size, and scope of the proposed new hospital. After review, the Agency denied GHHS's 2003 application. GHHS appealed to [the Office of Administrative Hearings] OAH, challenging the Agency's decision. Betsy Johnson and Central Carolina Hospital (CCH) moved to intervene as respondents in support of the Agency's decision. The administrative law judge (ALJ) granted the motion to intervene. On 9 July 2004, the ALJ recommended the Agency's decision be reversed. Respondents appealed to the Department for final agency review. On 10 September 2004, the Department denied GHHS's application in a final agency decision. GHHS appealed.

Good Hope I, 175 N.C. App. at 298, 623 S.E.2d at 309.

In August 2005, while its appeal was pending before this Court, GHHS filed a new CON application "in response to a need determination issued by the Governor in the 2005 State Medical Facilities Plan (SMFP). . . . In its 2005 application, GHHS resubmitted its 2003 CON application in its entirety, with some supplemental information." *Id.* On 3 January 2006 this Court dismissed GHHS's appeal, on the grounds that it was rendered moot by GHHS's 2005 CON application. In an opinion filed 17 November 2006, the North Carolina Supreme Court reversed this Court, holding that GHHS's appeal was not moot and remanding the case to this Court "for consideration on the merits." *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 635, 637, 637 S.E.2d 517, 518 (2006).

In a separate appeal, GHHS appealed the Agency's decision denying GHHS's request for an exemption from CON review. This Court affirmed the Agency in *Good Hope Hosp., Inc. v. N.C. HHS*, 175 N.C. App. 309, 623 S.E.2d 315, *aff'd*, 360 N.C. 641, 636 S.E.2d 564 (2006).

Harnett Health and GHHS submitted CON applications in August 2005, wherein each proposed to construct a new hospital in central Harnett County. In January 2006 the CON section of the Agency conditionally approved Harnett Health's application and denied GHHS's application. Petitioner-appellant appealed from this Decision, and Harnett Health appealed the condition imposed upon it by the Agency. The Town of Lillington was allowed to intervene in support of GHHS. In October 2006 a contested case hearing was conducted before an Administrative Law Judge, who issued a recommended decision on 20 November 2006. On 2 February 2007 the Agency adopted the ALJ's recommended decision, denying GHHS's application for a CON and granting Harnett Health's application "without the condition which preclude the acquisition of a CT scanner[.]" From this decision GHHS has timely appealed.

Standard of Review

Review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51(b) (2005), which provides in relevant part that upon appeal:

> the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision[.]

"The substantive nature of each assignment of error controls our review of an appeal from an administrative agency's final decision. Where a party asserts an error of law occurred, we apply a *de novo* standard of review. If the issue on appeal concerns an allegation that the agency's decision is arbitrary or capricious or 'fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision' we apply the whole-record test." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006) (quoting *North Carolina Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)) (internal quotation marks omitted).

Additionally, "deference must be given to the agency's decision where it chooses between two reasonable alternatives. It would be improper for this Court to substitute our judgment for the Agency's decision where there is substantial evidence in the record to support its findings." *Craven Regional*, 176 N.C. App. at 59, 625 S.E.2d at 845 (citing *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human*

Servs., 137 N.C. App. 638, 646, 529 S.E.2d 257, 261, *aff'd*, 353 N.C. 258, 538 S.E.2d 566 (2000)).

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[1] Petitioner argues first that the Agency erred by approving Harnett Health's application, on the grounds that the Agency failed to consider the 2001 CON held by Good Hope Hospital. We disagree.

Petitioner correctly reviews the general law governing the Agency's review of CON applications. Pursuant to N.C. Gen. Stat. § 131E-183(a) (2005), the Agency "shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." Petitioner directs our attention primarily to N.C. Gen. Stat. §§ 131E-183(a)(3) and (a)(6) (2005), which require that:

> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed[.]
>
> (6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

Petitioner's summary of the procedural rules under which the Agency makes its decisions is generally accurate, and Petitioner correctly notes that a project is "approved" when a CON has been issued, and retains its "approved" status until either the project is complete or the CON is withdrawn. Petitioner points out that, at the time of the hearing, Good Hope had a CON that was still legally valid.

However, Petitioner contends that the requirement that the Agency "consider" the 2001 CON imposed on the Agency a mandatory finding that the 2001 CON was the functional equivalent of a finished project. Petitioner essentially asserts that the Agency was required to find that Good Hope would successfully develop the project approved in the 2001 CON, and to factor a hypothetical completed hospital into its determinations regarding the population to be served and the possibility of duplicative services.

GHHS assigned error to numerous of the Agency's findings of fact, but does not argue on appeal that any specific finding is unsupported by record 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). "In the present case, defendant assigned error to numerous findings of fact by the [Agency], but has failed to argue any of these assignments of error in her brief on appeal. Such assignments of error are therefore abandoned, and the [Agency's] findings are binding on appeal." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006). The Recommended Decisions' Findings of Fact, which were adopted by the Agency, easily support its conclusion that there was no realistic possibility that Good Hope would develop the hospital approved in the 2001 CON. These findings include the following:

> 9. The preponderance of the evidence clearly showed that at the time of the Review, Good Hope was in poor Condition with numerous serious safety code deficiencies that had been acknowledged by Good Hope, and with no realistic prospect for renovating the existing hospital.
>
> 10. In 2001, Good Hope applied for a certificate of need to develop a hospital that would be a partial replacement of its existing facility. On December 14, 2001, the Agency issued a [CON] to Good Hope which authorized the development of a 48-bed hospital[.]
>
> 11. CON holders provide progress reports to the Agency regarding the progress they are making on the implementation of the project for which they have received a CON.
>
> 12. In progress reports that it has filed since shortly after Good Hope received the 2001 CON, Good Hope reported that it had not secured financing to develop the 2001 CON, as that project was originally approved by the Agency.
>
> 13. Beginning with the progress report it filed in November of 2002, Good Hope [stated] . . . that its proposed partner, Triad Hospital, Inc. ('Triad'), would provide capital for the project but only if the Agency issued a declaratory ruling approving changes in the proposed project for which Good Hope received the 2001 CON.
>
> 14. In the progress report it filed in November of 2004, and continuing through the progress report filed most recently before the Review, Good Hope Hospital ceased referring to Triad as a majority partner and funding source for its 2001 certificate of need, and expressly stated that it had not identified a

source willing to finance its project as it was originally approved by the Agency.

15. In the progress reports which it has filed since November of 2002, Good Hope has represented that it has not expended any additional funds to develop the 2001 CON.

16. In the progress report that it filed most recently before the 2005 Harnett Hospital Review, Good Hope indicated that the projected dates for all milestones were "unknown."

. . . .

40. Prior to and during the Review, there was substantial information available to the Agency to indicate that Good Hope Hospital would soon close its doors. This information included the following:

> Good Hope's representation to the Department, acknowledged in the Easley Memoranda, that Good Hope would close in 2006.
>
> . . . .
>
> The exemption request filed by Good Hope with DFS, asking that it be permitted to build a replacement hospital without obtaining a [CON] since closure of its existing facility was imminent due to the deteriorated condition of its facility.

. . . .

44. No evidence was presented to demonstrate that GHHS will be able to finance and implement the 2001 CON.

45. The information presented to the Agency before it conducted the 2005 Harnett Hospital Review indicated that Good Hope was not making any progress in implementing its 2001 CON[.]

46. The information described above strongly indicated that Good Hope Hospital would close in 2006 and that a replacement hospital would not be constructed by 2011, the third projected operating year of the hospital proposed in the Harnett Health Application.

47. At the time of the Review, the Agency assumed that Good Hope would close by November 2006, based on Good Hope's

> representations to the Department of Health and Human Services ('the Department').

These and other Agency findings establish that the agency was aware of the 2001 CON but concluded, upon review of the evidence before it, that notwithstanding the fact that Good Hope technically still held a CON, the reality was that Good Hope was not going to build the hospital proposed in the 2001 CON.

Petitioner's position would strip the Agency of authority to reach such a conclusion or to consider, not only the 2001 CON, but also subsequent events pertinent to the likelihood of Good Hope's successful completion of the 2001 project. Petitioner's position assumes that the Agency had no authority to conclude, based on review of the available evidence, that Good Hope was not going to build a replacement hospital. This contention is not supported either by the facts of this case, or by any cited statutory or common law. Petitioner cites no authority for this position and we find none. This assignment of error is overruled.

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[2] In a related argument, Petitioner asserts that the Agency erred by adopting the "unauthorized action" of the Administrative Law Judge (ALJ) that declared N.C. Admin. Code tit. 10A, r. 14C 2303 (June 2004) "void as applied" to the facts of this case. We disagree.

The Administrative Rule at issue in this case is N.C. Admin. Code tit. 10A, r. 14C 2303(3), which provides in pertinent part:

> An applicant proposing to acquire a CT Scanner shall demonstrate each of the following:
>
> 1. each fixed or mobile CT Scanner to be acquired shall be projected to perform 5,100 HECT units annually in the third year of operation of the proposed equipment;
>
> 2. each existing fixed CT scanner in the applicant's CT service area shall have performed at least 5,100 HECT units in the 12 month period prior to submittal of the application;
>
> 3. each existing and approved fixed CT scanner in the applicant's CT service area shall be projected to perform 5,100 HECT units annually in the third year of operation of the proposed equipment;
>
> 4. each existing mobile CT scanner in the proposed CT service area performed at least an average of 20 HECT units per day

per site in the CT scanner service area in the 12 months prior to submittal of the application; and

5. each existing and approved mobile CT scanner shall perform at least an average of 20 HECT units per day per site in the CT scanner service area in the third year of operation of the proposed equipment.

The Agency's findings of fact pertinent to the need for a CT scanner, include the following:

8. Before the time of the 2005 Harnett Hospital Review, Good Hope Hospital ("Good Hope") had been attempting to replace its aging physical plant for several years.

9. The preponderance of the evidence clearly showed that at the time of the Review, Good Hope was in poor condition with numerous serious safety code deficiencies that had been acknowledged by Good Hope and with no realistic prospect for renovating the existing hospital.

. . . .

23. In 2003, GHHS applied for a certificate of need to build a complete replacement hospital in Lillington.

24. In its 2003 Application, GHHS identified many serious problems with Good Hope's physical plant and represented that "Good Hope Hospital has a compelling need for a new hospital facility."

25. The 2003 GHHS Application presented detailed information regarding the dilapidated condition of Good Hope's facilities[.]

. . . .

32. The Agency has adopted special Criteria and Standards for Computed Tomography, which are codified at 10A NCAC 14C.2301 *et. seq*.

33. The Agency's rules for CT services include provisions that: (1) 'each existing CT scanner in the applicant's CT service area shall have performed at least 5,100 HECT units in the 12 month period prior to submittal of the application;' and (2) 'each existing and approved CT scanner in the applicant's CT

service area shall be projected to perform at least 5,100 HECT units in the third year of operation of the proposed equipment.' 10A NCAC 14C.2303(2) and (3) (collectively the 'CT Rule').

34. In approving the Harnett Health Application, the Agency attached a condition which provided that Harnett Health could not acquire a Computed Tomography ('CT') Scanner as part of this project. The reasons for this condition, based on the Agency Findings, were the provisions in the CON Section's administrative rules pertaining to CT services. Those provisions address the past and future utilization level of existing CT scanners within the service area where a new CT scanner is proposed.

35. At the time of the Review, there were three existing CT scanners in Harnett Health's defined service area.

36. Good Hope's CT scanner did not perform 5,100 HECT units during the 12-month period prior to submittal of the Harnett Health Application.

37. The Good Hope CT scanner was the only CT scanner in Harnett Health's defined service area that was operating below the required utilization level. . . .

. . . .

39. When the Agency reviewed the GHHS and Harnett Health Applications, the Agency was aware that GHHS's attempt to obtain the Agency's approval to establish a new hospital in Lillington had failed. The Agency knew that GHHS's requests for a Declaratory Ruling and exemption from [CON] review had been denied[.]

40. Prior to and during the Review, there was substantial information available to the Agency to indicate that Good Hope Hospital would soon close its doors. . . .

. . . .

46. . . . [Information] strongly indicated that Good Hope Hospital would close in 2006 and that a replacement hospital would not be constructed by 2011, the third projected operating year of the hospital proposed in the Harnett Health Application.

47. At the time of the Review, the Agency assumed that Good Hope would close by November 2006, based on Good Hope's representations to the Department of Health and Human Services (the 'Department').

48. Harnett Health's expert testified that in developing the Harnett Health Application's projection of CT utilization, he did not rely upon or focus on data reflecting the utilization of Good Hope's CT scanner, which was being utilized at only about 20-21% of its capacity, because Good Hope was not reflective of a stable, ongoing operati[on] since it was struggling and he did not want to base his projections on a struggling hospital. . . .

49. The Agency assumed that Good Hope's CT scanner would not be performing 5,100 HECT units per year in the future, since Good Hope would be closing.

50. Because the Good Hope CT scanner had performed less than 5,100 HECT units during the 12-month period prior to submittal of the Harnett Health Application, the Agency apparently felt obligated to approve the Harnett Health Application subject to a condition that Harnett Health "shall not acquire a computed tomography scanner as part of this project.". . . "[T]he condition precluding Harnett Health from acquiring a CT scanner as part of their proposed project was based exclusively on the utilization of the CT scanner at Good Hope Hospital."

51. There is no evidence to support the assertion that Good Hope or GHHS will have a CT scanner operational by 2011, Harnett Health's proposed third year of operation.

. . . .

93. Harnett Health's expert was aware that Good Hope held a 2001 CON for a partial replacement hospital in Erwin. However, he did not discuss this in the Harnett Health Application because Good Hope had made no progress towards developing that facility. Its progress reports showed no progress on that project. . . . Harnett Health's expert testified that he usually considers existing and approved CONs in evaluating need and utilization in a CON application, if an approved project is one that is going to be implemented. However, Good Hope's

own public statements about its 2001 CON foreclosed that option in this case.

We conclude that these findings of fact are supported by competent record evidence. Based upon these and other findings of fact, the Agency reached conclusions of law including, *inter alia*, the following:

12. The Agency is authorized by N.C. Gen. Stat. § 131E-183(b) to adopt rules for the review of particular types of applications that will be used in addition to the statutory review criteria[.] . . . The Agency has adopted special Criteria and Standards for Computed Tomography[.]

. . . .

14. These performance standards for CT services were designed to help assure that there is a need for a proposed new CT scanner and that the new scanner will not result in an unnecessary duplication of services.

15. In view of the situation in which Good Hope found itself and the importance of having CT services at the new hospital, the Agency should have determined that the utilization of the CT scanner at Good Hope for the recent past as well as future years was irrelevant to the need for the CT scanner Harnett Health proposed to acquire as part of the proposed new hospital in central Harnett County.

16. Consistent with Governor Easley's stated reliance on the closure of Good Hope in writing a need for a new hospital in central Harnett County into the SMFP, as well as the Agency's own assumption that Good Hope would close, the Agency should have concluded that the historical utilization of Good Hope's CT scanner was irrelevant to its review of the Harnett Health Application, and that 10A NCAC 14C.2303(2) was void as applied to the Harnett Health Application.

17. For these reasons, the Agency also should have concluded that the future utilization of any CT scanner that was approved with the issuance of Good Hope's 2001 CON was irrelevant to its review of the Harnett Health Application and that 10A NCAC 14C.2303(3) was void as applied to the Harnett Health Application.

18. Given the imminent closure of Good Hope Hospital and the elimination and reduction of services there . . . [t]he historical and future utilization of an existing CT scanner in a hospital that will close before Harnett Health's proposed new CT scanner is projected to be operational is not relevant to the question of need or duplication of services with regard to Harnett Health's proposed new CT scanner.

19. . . . The Agency erroneously determined that the Harnett Health could not acquire a CT scanner . . . solely upon the substandard utilization of the CT scanner at a hospital the Agency knew would soon close its doors.

. . . .

21. The CON Section's application of the CT Rule to the Harnett Health Application also was not in accordance with GHHS's lack of progress in developing a hospital pursuant to its 2001 CON.

. . . .

23. The Agency's application of the CT Rule in this manner frustrated the purpose and prevented proper implementation of the Certificate of Need Law, the SMFP, and the CT Rule itself.

24. The performance standards set forth in 10A NCAC 14C.2303(2) and (3) (collectively, the "CT Rule") are void as applied to the Harnett Health Application.

25. The condition imposed by the Agency . . . which precludes Harnett Health from acquiring a CT scanner, was not necessary to ensure that Harnett Health's proposal to develop a new community hospital which would include a new CT scanner would be consistent with the CT Rule or any other applicable review criteria. . . .

26. Because the utilization of Good Hope's CT scanner, as measured by the CT Rule, was the sole basis for the Agency's CT Condition, the Condition is also void and without merit.

Under N.C. Gen. Stat. § 150B-33(b) (2005), an "administrative law judge may . . . (9) Determine that a rule as applied in a particular case is void because it . . . (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly." The

only reasonable interpretation of this statute is that the Agency may determine "that a rule as applied in a particular case is void" when the rule "is not reasonably necessary [in a particular case] to enable the agency to fulfill a duty delegated to it by the General Assembly." In the instant case, the Agency adopted the recommended decision of the Administrative Law Judge (ALJ), that as applied to the facts of this case, N.C. Admin. Code tit. 10A, r. 14C.2303(3) was irrelevant and counterproductive and, therefore, "void as applied" to the specific facts presented.

Defendant correctly observes that the general purpose of 10A NCAC 14C.2303(3) is "to limit the construction of health care facilities in North Carolina to those that are needed by the public and that can be operated efficiently and economically for its benefit." However, the Agency did not conclude that the rule was generally unnecessary. Rather, it found that Good Hope Hospital was about to close and would not be replaced or rebuilt within the pertinent time frame. The Agency determined that underutilization of Good Hope Hospital's CT scanner was due to its imminent closure and therefore was irrelevant to a determination of the present and future need for CT scanners in central Harnett County. Defendant fails to refute this conclusion, addressing only the general utility of the rule.

Defendant asserts that the "CT Performance Standard rule restricts new approvals where, for whatever reason, the existing and/or previously approved capabilities are not presently performing or not reasonably expected to perform at the levels required by the rule." (emphasis added). This contention, which Defendant fails to support with any authority, is contradicted by the Agency's statutory authority to waive application of the rule when in a particular case, it is not reasonably necessary to its analysis.

Defendant also argues that the Agency's conclusion, that Good Hope's CT scanner would not be in operation within the relevant time frame, is "defied by the record." Defendant bases this assertion solely on the fact that Good Hope still holds its 2001 CON. We previously determined that the Agency's findings of fact on this issue were supported by competent evidence in the record. This assignment of error is overruled.

We have considered GHHS's remaining arguments and find them to be without merit. For the reasons discussed above, we conclude that the Agency did not err and that its final agency decision should be

Affirmed.

Judges CALABRIA and STEPHENS concur.

MICHAEL SWIFT, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS LTD. PARTNERS, D/B/A CAROLINA PANTHERS, EMPLOYER, AND LEGION INSURANCE COMPANY, C/O CAMERON M. HARRIS & COMPANY, CARRIER, DEFENDANTS

No. COA07-685

(Filed 15 January 2008)

1. **Appeal and Error— preservation of issues—issue not raised in prior appeal—not waived**

Defendant did not waive review of the employer's liability for attorney fees in a workers' compensation case by not raising it in a prior appeal. The opinion from which the original appeal was taken awarded attorney fees pursuant to N.C.G.S. § 97-88.1, so that the applicability of N.C.G.S. § 97-88 to the facts of this case was not pertinent to the appeal.

2. **Workers' Compensation— attorney fees—findings—not sufficient**

Although the Industrial Commission acts in its discretion in a workers' compensation case in deciding whether to award attorney fees under N.C.G.S. § 97-88, its opinion must contain sufficient findings of fact for the court to resolve appellate issues. The Commission's findings and conclusions here are not sufficient to allow resolution of several appellate issues presented by the facts of this case, including the identity of the entity ordered to pay attorney fees.

3. **Workers' Compensation— attorney fees—placement of liability—order not clear**

The issue of whether an employer can ever be liable for payment of attorney fees under N.C.G.S. § 97-88 was not reached because the Industrial Commission did not state clearly whether it was imposing attorney fees on TIGA (Tennessee Insurance Guaranty Association) or on defendant-employer.

4. Workers' Compensation— attorney fees—entity responsible—further findings needed

A workers' compensation case was remanded for further findings where defendant argued that the Industrial Commission erred by entering its Opinion and Award in violation of a stay order against an insolvent insurer, but the relevance of the argument depends on whether the Commission was imposing attorney fees against an insolvent insurer (Legion), the insurance guaranty association (TIGA), defendant employer, or more than one of these.

Appeal by Defendant from an Order entered 6 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2007.

R. James Lore, for Plaintiff-Appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher B. Kincheloe and Shannon P. Metcalf, for Defendant-Appellants.

ARROWOOD, Judge.

Richardson Sports d/b/a Carolina Panthers (Defendant) appeals from an Order of the North Carolina Industrial Commission granting a motion by Michael Swift (Plaintiff) for attorney's fees. We reverse and remand for additional findings.

The factual and procedural history of this case is summarized as follows: Plaintiff, who was previously employed by Defendant as a professional football player, suffered a compensable injury in December 1999. At the time of Plaintiff's injury, Defendant's workers' compensation insurance was provided by Legion Insurance Company (Legion). Plaintiff applied for workers' compensation benefits and a hearing was conducted before a Deputy Commissioner in November 2002. On 10 March 2003 the Commissioner entered an Opinion that awarded disability and medical benefits to Plaintiff, and attorney's fees to Plaintiff's counsel. Defendant and Legion appealed to the Full Commission. On 10 October 2003 the Commission issued an Opinion and Award adopting the Opinion of the Deputy Commissioner with modifications, and left the Commissioner's award of attorney's fees undisturbed. On 30 October 2003 the Commission filed an amendment to its Opinion, for reasons unrelated to the issue of attorney's fees.

Defendant and Legion appealed both the original and amended Opinions of the Commission. This Court issued an opinion on 5 April 2005. Following a rehearing, it issued a superceding opinion on 6 September 2005, affirming in part and reversing in part. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533 (2005) (*Swift I*), *disc. review denied*, 360 N.C. 545, 635 S.E.2d 61 (2006). In *Swift I*, this Court overruled Defendant's arguments challenging the Commission's "finding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment[,]" *Id.* at 138, 620 S.E.2d at 536, its admission of certain evidence, and the Commission's award of 299 weeks of workers' compensation benefits. The Court reversed the Commission's ruling on the issue of Defendants' entitlement to credit for amounts paid after Plaintiff's injury, and "remanded to the Commission for the entry of an appropriate award which allows for a dollar-for-dollar credit." *Id.* at 143, 620 S.E.2d at 539.

Regarding attorney's fees, this Court noted that the Commission awarded attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1, which requires that before awarding attorney's fees, "the Commission must determine that a hearing 'has been brought, prosecuted, or defended without reasonable ground.' " *Id.* (quoting N.C. Gen. Stat. § 97-88.1). The Court held that the "opinion and award sheds no light whatsoever upon this question[,]" and remanded "this issue to the Full Commission for the entry of additional findings of fact and conclusions of law on the issue of attorney fees[.]" *Id.* The opinion directed that the Commission should "state the statute it relied upon in making the award and should make the necessary findings of fact and conclusions of law supporting the award." *Id.*

In sum, this Court upheld the Commission's award of 299 weeks of workers' compensation benefits, and rejected Defendants' arguments regarding compensability, admission of certain evidence, and the number of weeks' compensation. The Court reversed the Commission's calculation of the credit to which Defendants were entitled and its award of attorney's fees.

At the same time an arbitration proceeding was occurring under the NFL Collection Barganing Agreement. Pursuant to this arbitration and the settlement thereof, on 14 August 2006 the Tennessee Insurance Guaranty Association (TIGA) paid Plaintiff and his counsel $207,194.34. On 23 August 2006 Plaintiff filed a motion for attorney's fees and for approval of Plaintiff's attorney's fees contract, pursuant to N.C. Gen. Stat. §§ 97-88 and 97-90 (2005). On

6 February 2007 the Commission approved Plaintiff's attorney's fees contract and awarded Plaintiff's counsel attorney's fees of $69,064.78, pursuant to N.C. Gen. Stat. § 97-88. Defendant has appealed from this order.

Standard of Review

> On appeal from the Industrial Commission:
>
> 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, "[t]he Commission's conclusions of law are reviewed de novo."

Rose v. City of Rocky Mount, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006) (quoting *Ward v. Long Beach Vol. Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628 (2002)), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007) (citations omitted).

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[1] Preliminarily, we address Plaintiff's argument that an employer's liability under N.C. Gen. Stat. § 97-88 is an issue that Defendant waived by failing to raise it on its previous appeal to this Court. In the Commission's October 2003 Opinion, from which Defendant originally appealed, the Commission awarded attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2005). Accordingly, the applicability of N.C. Gen. Stat. § 97-88 to the facts of this case was not pertinent to the appeal, and Defendant did not waive review by failing to raise it on its first appeal.

[2] The Commission's Opinion awards attorney's fees under N.C. Gen. Stat. § 97-88, which provides in pertinent part that:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be deter-

mined by the Commission shall be paid by the insurer as a part of the bill of costs.

"This Court reviews the Commission's ruling on a motion for attorney's fees for an abuse of discretion." *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 119, 613 S.E.2d 746, 750 (2005) (citing *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983)). However, although the Commission acts in its discretion in deciding whether to award attorney's fees under N.C. Gen. Stat. § 97-88, its Opinion must contain sufficient findings of fact for this Court to resolve appellate issues. *Hodges v. Equity Grp.*, 164 N.C. App. 339, 347, 596 S.E.2d 31, 47 (2004) ("As the Commission did not render any findings regarding [an issue pertinent to attorney's fees], this cause must be remanded to the Commission for further findings of fact and an entry of attorney's fees award reflective of [the Commission's findings on the issue.]"

In the instant case, the Commission's Opinion stated, in relevant part, the following:

> The Full Commission filed an Opinion and Award in the above captioned case . . . after the defendant appealed the award of the Deputy Commissioner below. . . . [A]n amended Opinion and Award was entered for the Full Commission on October 30, 2003. The case was appealed by the defense to the North Carolina Court of Appeals which issued its [first] decision on April 5, 2005[,] . . . [and a superceding] decision on September 6, 2005. . . . The case was remanded back to the Court of Appeals which in turn remanded the case to the Industrial Commission.
>
> Plaintiff[] filed a motion for attorney's fees and costs pursuant to N.C. Gen. Stat. § 97-88. Plaintiff's attorney submitted itemization of 187.5 total hours spent on appellate issues in this case. Considering the fact that the defense appealed and lost on both the issue of compensability, degree of disability and entitlement to medical compensation, further considering the risk of defense of such an appeal and the substantial time spent in defending the risk along with the skill and expertise of the plaintiff's counsel good cause exists for taxing the defense with plaintiff's attorney's fees otherwise due to be paid by the plaintiff.
>
> In the Commission's discretion, plaintiff's counsel is allowed reasonable attorney's fees for defendants' appeal of this matter and plaintiff's motion for attorney's fees is hereby GRANTED. In light

> of the circumstances of this case, as well as the nature and extent of services provided, the Commission in its discretion finds that a reasonable attorney's fee to be taxed is $69,064.78. Therefore, pursuant to N.C. Gen. Stat. § 97-88, defendants shall pay plaintiff a reasonable attorney's fee of $69,064.78 as part of the costs of the appeal.
>
> Plaintiff also has moved for Commission approval of a fee contract entered into by the parties[, that] . . . provides, from the date the record was filed at the Court of Appeals, for an attorney's fee of %33 1/3 of compensation awarded. This fee contract is reasonable under these circumstances and is hereby APPROVED and an attorney's fee of 33 1/3% of the benefits payable to plaintiff is awarded to plaintiff's counsel.

The Commission's Opinion adequately finds certain essential facts. It states its statutory basis (§ 97-88); enumerates factors the Commission considered in exercising its discretion (counsel's skill, the time spent, the outcome of Defendant's appeal); and specifies that attorney's fees are awarded for appellate costs (Plaintiff's contract provides for attorney's fees "from the date the record on appeal was filed."). Nonetheless, we conclude that the Commission's findings and conclusions are insufficient to allow us to resolve several other appellate issues presented by the facts of this case.

For example, Defendant argues that § 97-88 did not authorize the Commission to award attorney's fees, on the grounds that the statute requires the Commission to find that the proceedings at issue were "brought by the insurer." It appears from the record that attorney's fees were awarded on remand from this Court of an appeal taken by Defendant and its insurer, Legion from the Commission's Opinion and Award of October 2003. However, the Opinion fails to include the specific finding required under § 97-88 that "that such hearing or proceedings were brought by the insurer[.]"

Another issue raised on appeal is the identity of the entity ordered to pay attorney's fees. N.C. Gen. Stat. § 97-88 authorizes the Commission to tax attorney's fees to the insurer. In the instant case, the Commission ordered "defendants" to pay the attorney's fee. The Commission's use of the plural form, defendants, suggests that the Commission intended to order more than one defendant to pay fees. However, there are three possible "defendants" to whom the Commission might have been referring: Defendant, Legion, and TIGA.

Defendant and Legion are listed as party defendants on the case caption. However, Legion was in liquidation at the time the Commission's Opinion was entered and proceedings against it were therefore stayed. TIGA appears to have paid for Legion's liability in this case, but was not listed as a party on the case caption. Defendant argues that after proceedings against Legion were stayed "there was only one defendant" and "no viable 'insurer' to pay an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88[,]" which necessarily rendered the Commission's order one "compelling the payment of Plaintiff's attorney's fees by the employer." However, the record indicates that, although TIGA is no longer listed as a formal party on the case caption, TIGA paid for Legion's liability upon Legion's insolvency and thus may have functioned as a "viable insurer."

Following the Commission's entry of an Opinion and Award in October 2003, Defendants filed notice of appeal on 13 November 2003. The notice of appeal was filed by Defendant, Legion, and TIGA, which was designated in the case caption as "also appearing on behalf of Defendant-appellants." On 10 February 2004 Defendant filed a motion asking to add TIGA as an additional party. In its motion, Defendant stated that Legion had gone into liquidation proceedings, but that TIGA had "notified defense counsel of its agreement to fund this claim[.]" The Commission granted Defendant's motion on 11 February 2004, adding TIGA as a party to the appeal. However, on 19 February 2004 Defendant filed a motion for reconsideration of their motion, asking to remove TIGA as a named party. Defendant informed the Commission that TIGA had "agreed to accept the financial responsibility of this claim" but asserted that TIGA "cannot be named as a specific party to this lawsuit. In Tennessee, the case caption always remains as is, with the insolvent carrier listed as the carrier." Thus, Defendant's request to the Commission represented that, although TIGA would continue to provide coverage on the risk, certain technical requirements of Tennessee statutory law required TIGA to be removed from the case caption. However, the Commission's summary grant of Defendant's request fails to include any findings or conclusions about TIGA's relationship to Legion, or why the Commission granted Defendant's request to remove TIGA as a named party.

In support of its assertion that TIGA could not be listed as a party to the appeal, Defendant cited only Tennessee Code Ann. § 56-12-107(c)(1) and (2) (2000), which provides in pertinent part:

> (1) Any action relating to or arising out of this part against the association shall be brought in a court in this state. Such court shall have exclusive jurisdiction over any action relating to or arising out of this part against the association[.]
>
> (2) Exclusive venue in any action brought against the association is in the circuit or chancery court in Davidson County; provided, that the association may waive such venue as to a specific action.

(emphasis added). Defendant asserted that this statute "prohibits [TIGA] from being named as a party to a suit unless the venue of the suit is in Davidson County, Tennessee." But, Defendant did not articulate why its appeal from an award of workers' compensation benefits in North Carolina constituted an action "relating to or arising out of [the Tennessee Insurance Guaranty Statute]" or was an action brought "against the association[.]" Nor does the Opinion contain findings in this regard. Moreover, we note that under Tenn. Code Ann. § 56-12-107(b)(4) (2000), TIGA has the "right to intervene as a party before any court that has jurisdiction over an insolvent insurer as defined by this part[.]"

Additionally, cases from other jurisdictions have identified TIGA as a party in cases not brought in Tennessee. *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990); *General Elec. Co. v. Cal. Ins. Guar. Ass'n*, 997 S.W.2d 923 (Tex. Ct. App. 1999); *Colaiannia v. Aspen Indem. Corp.*, 885 P.2d 337, (Colo. Ct. App. 1994); *Maytag Corp. v. Tennessee Ins. Guaranty Ass'n*, 79 Ohio App. 3d 817, 608 N.E.2d 772 (1992). Accordingly, without findings and conclusions, Defendant's bare citation of the referenced statute does not clarify the basis for the Commission's granting Defendant's request to remove TIGA from the case caption. This issue is significant, because much of Defendant's argument rests on the proposition that TIGA had to be removed as a named party.

Defendant's arguments also assume that, upon its removal as a named party on the case caption, TIGA could no longer be considered a viable "insurer" in the case. However, Defendant cites no authority for this proposition, and the record shows that TIGA continued to provide risk coverage for Defendant, notwithstanding its removal from the case caption. On 14 August 2006 TIGA issued a check payable to Plaintiff in the amount of $207,194.34. The statement accompanying the check lists Defendant as "insured" and Plaintiff as "claimant."

As a Guaranty Association, TIGA may have been liable for payment of attorney's fees, and the Commission may have meant Legion and TIGA as the "defendants" referenced in its Opinion. Generally:

> [Guaranty Associations] are unincorporated associations created in various states throughout the country pursuant to their state statutes based upon the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (the Model Act). The purpose of the Model Act is to protect policyholders and claimants . . . against the insolvency of a local insurer[.] . . . The Guaranty Associations are comprised of all insurance companies who are authorized to write casualty and property insurance policies in the particular state.

Rhulen Agency, 896 F.2d at 676. Regarding TIGA, the Tennessee Court of Appeals has stated:

> TIGA is a creature of statute established for the express purpose of avoiding "financial loss to claimants or policyholders because of the insolvency of an insurer." . . . The statutes also provide that TIGA "be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent."

Tenn. Ins. Guar. Ass'n v. Ctr. Ins. Co., 2005 Tenn. App. LEXIS 340 (Tenn. Ct. App. 2005) (quoting Tenn. Code Ann. § § 56-12-102, and 107(a)(2) (2000)). Thus, the "guaranty association is designed to place claimants in the same positions they would have been in if the liability insurer had not become insolvent. Once an insurer is declared insolvent, the association steps into the shoes of the insurance company with all of the rights, duties and obligations of the insolvent insurer to the extent those obligations are defined by statute. TIGA is deemed to be the insurer to the extent of its statutory obligation on the claim." *Maytag Corp*, 79 Ohio App. 3d at 821, 608 N.E.2d at 775 (citing *Luko v. Lloyd's of London*, 393 Pa.Super. 165, 573 A.2d 1139 (1990); and *Washington Ins. Guar. Assn. v. Mullins*, 62 Wash. App. 878, 816 P.2d 61 (1991)).

N.C. Gen. Stat. § 58-48-5 (2005), states in pertinent part:

> The purpose of [the N.C. Insurance Guaranty Association] is to provide a mechanism for the payment of covered claims under certain insurance policies . . . and to avoid financial loss

> to claimants or policyholders because of the insolvency of an insurer[.]

Accordingly, under either Tennessee or North Carolina law, it is possible that the Commission intended to impose the attorney's fees on the insurer and used the plural form "defendants" to encompass both the original insurer, Legion, as well as TIGA, the entity that assumed responsibility for Legion's obligations. However, the Commission failed to make findings or conclusions regarding (1) the basis for the Commission's allowing the removal of TIGA from the case caption; or (2) TIGA's liability for attorney's fees.

[3] The parties also present arguments on whether an employer can ever be liable for payment of attorney's fees under N.C. Gen. Stat. § 97-88. Plaintiff argues that North Carolina case law holds that if an employer fails to maintain workers' compensation insurance at all times, it becomes liable for obligations that would normally fall to the insurer. For example, in *Roberts v. Coal Co.*, 210 N.C. 17, 21, 185 S.E. 438, 440 (1936), the North Carolina Supreme Court considered whether "the employer under the Workmen's Compensation Act should be relieved of liability for the compensation to his injured employee by reason of the insolvency of his insurance carrier" and concluded that:

> The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired. . . . "Into the construction of every act must be read the purpose of the Legislature, and the underlying purpose in this instance . . . was to give relief to workmen. This relief [is] . . . charged against the employer." . . . The statute requires the employer to insure and keep insured his liability[.] . . . [M]anifestly the insolvency of the insurer should not relieve the insured, nothing else appearing.

Id. at 21, 185 S.E. at 441 (quoting *C. & O. R. R. v. Palmer*, 149 Va. 560, 572, 140 S.E. 831, 835-36 (1927)). On the other hand, Defendant relies on the statutory language specifying that attorney's fees be paid by the "insurer." However, because the Commission does not state clearly whether it is imposing attorney's fees on TIGA or Defendant we do not reach the issue of whether Defendant could be liable for attorney's fees.

[4] We note that Defendant also argues that the Commission erred by entering its Opinion and Award in violation of a stay order. Again,

the relevance of this argument depends on whether the Commission was imposing attorney's fees against Legion, TIGA, Defendant, or more than one of these. We note, however, that in *Tucker v. Workable Company*, 129 N.C. App. 695, 501 S.E.2d 360 (1998), the Commission awarded Plaintiff workers' compensation benefits, attorney's fees, and a penalty against Defendant's insolvent insurer. Defendant appealed and argued that the Commission's award was entered in violation of a previously issued stay order that stayed "all litigation and other proceedings against [Defendant's insolvent insurer.]" This Court held:

> This argument is without merit because the Full Commission did not decide issues relating to defendant employer's insolvent insurance carrier IAEA. The only issues determined by the Full Commission were those between plaintiff employee and defendant employer. Additionally, the Full Commission could proceed against the employer Able Body because . . . even though the insurance carrier is insolvent, the employer remains primarily liable to an employee for a workers' compensation award . . . [and] "his obligation to the injured employee is unimpaired." . . . Thus, the Full Commission did not violate the stay order[.]

Id. at 699-700, 501 S.E.2d at 364 (quoting *Roberts*, 210 N.C. at 21, 185 S.E. at 440).

We conclude that the Commission's Order for payment of attorney's fees must be reversed and remanded for additional findings and conclusions addressing (1) whether the insurer was a party to the appeal from the Deputy Commissioner; (2) the basis for the Commission's granting Defendant's request to remove TIGA from the case caption; (3) TIGA's liability for attorney's fees following the insolvency of Legion; (4) the identity of the entities the Commission ordered to pay attorney's fees; and (5) TIGA's relationship to Defendant and to the insolvent insurer.

Defendant has also argued that the Commission erred by failing to conduct an evidentiary hearing. On remand, the Commission should conduct a hearing, if necessary, in order to resolve any genuine issues of fact arising from the issues presented.

Reversed and Remanded.

Judges TYSON and JACKSON concur.

SOUTHEASTERN JURISDICTIONAL ADMINISTRATIVE COUNCIL, INCORPORATED, PLAINTIFF v. GORDON W. EMERSON, DIANE R. EMERSON, PAUL D. HUFFMAN, DONALD N. PATTEN AND VIRGINIA B. PATTEN, DEFENDANTS

No. COA06-1564

(Filed 15 January 2008)

1. Deeds— restrictive covenants—service fees—authority not inferred

The trial court erred by granting summary judgment for plaintiff developer in an action to collect service charges for a real estate development. The covenants in the deeds of defendants Huffman and Emerson do not explicitly authorize assessments and such power cannot be inferred from the ability to set rules and regulations, which was established in the deeds.

2. Deeds— restrictive covenants—service fees—covenants not sufficiently definite

The trial court erred by granting summary judgment to plaintiff developer in an action to collect service charges where the deed covenants in question did not give sufficient information to determine the amount of the assessment, did not describe with particularity the property to be maintained, and did not give guidance as to the facilities actually maintained.

3. Real Estate— slander of title—no forecast of malice

The trial court correctly dismissed a counterclaim for slander of title involving disputed real estate service charges where the counterclaim did not allege or forecast any element of malice, an essential element.

4. Civil Procedure— summary judgment order—recitation of facts

The trial court did not err by including certain facts in an order granting summary judgment where the facts were not findings, which would indicate that summary judgment was improper, but instead were recitations of undisputed facts.

Judge HUNTER dissenting in part.

Appeal by defendants from judgment entered 6 June 2006 by Judge W. Erwin Spainhour in Haywood County Superior Court. Heard in the Court of Appeals 21 August 2007.

Adams Hendon Carson Crow & Saenger, P.A., by George Ward Hendon and Matthew S. Roberson, for plaintiff-appellee.

Brown, Ward and Haynes, PA, by Frank G. Queen, for defendant-appellants Gordon W. Emerson, Diane R. Emerson, and Paul D. Huffman; Brown & Patten, PA, by Donald N. Patten, for defendant-appellants, pro se and Virginia B. Patten.

BRYANT, Judge.

Gordon W. Emerson, Diane R. Emerson, Paul D. Huffman, Donald N. Patten, and Virginia B. Patten (collectively, "defendants") appeal from an order granting summary judgment to Southeastern Jurisdictional Administrative Council, Incorporated ("plaintiff"). For the reasons stated herein, we affirm in part and reverse in part.

Facts

Plaintiff is an organization that owns and develops land in Haywood County, including the Lake Junaluska development. Defendants are purchasers of lots within that development. Plaintiff commenced this action to recover certain service charges from defendants.

Defendant Huffman purchased lots in 1970 and 1974; defendants Emerson purchased lots in 1992; and defendants Patten purchased a lot in 1996. Each defendant's deed contained restrictive covenants, some of which themselves assessed or granted plaintiff the right to assess certain service charges in the future. When defendants refused to pay the relevant assessments, plaintiff brought suit. At the trial level, plaintiff moved for and was granted summary judgment. Defendants appeal.

Standard of Review

Because defendants appeal from an order granting summary judgment, we review each defendant's arguments pursuant to the same standard: *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The central issue is whether the trial court correctly concluded that there was no genuine issue as to any material fact and that the prevailing party was entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2005).

I. Service Charges

Each defendant argues the trial court erred in granting summary judgment for plaintiff on its claim for "service charges," but because

the restrictive covenants authorizing those charges differ, their arguments also differ. Thus, we address them separately.

A. Defendants Emerson and Huffman

[1] The relevant covenants in Huffman's and the Emersons' deeds are virtually identical:

> Second: That said lands shall be held, owned, and occupied subject to the provisions of the charter of the Grantor, and all amendments thereto, heretofore or hereafter enacted, and to the bylaws and regulations, ordinances and community rules which have been, or hereafter may be, from time to time, adopted by Grantor, and its successors.
>
> Fifth: That it is expressly stipulated and covenanted between the Grantor and the Grantee, his heirs and assigns, that the bylaws, regulations, community rules and ordinances heretofore or hereafter adopted by the Grantor shall be binding upon all owners and occupants of said lands as fully and to the same extent as if the same were fully set forth in this deed, and that all owners and occupants of said lands and premises shall be bound hereby.

The following is a portion of the "regulations" referred to in the covenant entitled "Second" and adopted in November 1996 (the "1996 Regulations") by the Southeastern Jurisdictional Administrative Council: "Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for police protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas."

Defendants argue that the restrictive covenants do not specifically set out an affirmative obligation to pay any money to plaintiff or anyone else. We agree.

This Court has set out the standard for reviewing covenants imposing affirmative obligations in a number of cases.

> Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed "in clear and unambiguous language" that is "sufficiently definite" to assist courts in its application. To be enforceable, such covenants must contain "some ascertainable standard" by which a court "can objectively determine both that the amount of the assessment and the purpose for which it is

> levied fall within the contemplation of the covenant." Assessment provisions in restrictive covenants (1) must contain a " 'sufficient standard by which to measure . . . liability for assessments,' " . . . (2) "must identify with particularity the property to be maintained," and (3) "must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain."

Allen v. Sea Gate Assn., 119 N.C. App. 761, 764, 460 S.E.2d 197, 199 (1995) (quoting *Beech Mountain Property Owners' Assoc., Inc. v. Seifart*, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980), and *Figure Eight Beach Homeowners' Ass'n, Inc. v. Parker*, 62 N.C. App. 367, 376, 303 S.E.2d 336, 341 (1983), *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983)).

Thus, the question becomes whether, by the standards set out in prior cases, the language from the 1996 Regulations is both "reasonable" and "sufficiently definite." We conclude that it is not.

The duty to pay an assessment is an affirmative obligation; strict construction of the covenant would require such a duty to have specific authorization, not a secondary authorization under the rubric of rules and regulations. In the instant case where plaintiff is not a homeowners' association seeking to use assessments, but is instead a property developer seeking to impose a financial condition on owners who purchased lots earlier—more than 35 years ago in the case of defendant Huffman—this situation does not fit within the guidelines of previous cases.

Defendants could not have foreseen from the wording of the restrictive covenants that they would be subject to assessments levied decades from the date they executed the deed. *See, e.g.*, *Beech Mountain*, 48 N.C. App. at 296, 269 S.E.2d at 183 ("[N]othing in the record reflects that any of the defendants could have known at the time they accepted their deeds what roads or trails would be required to be maintained with revenues from assessments.")

Without an express authorization to levy assessments in the text of the covenants, plaintiff attempts to rely on its ability to set rules, regulations and by-laws as an intermediate step toward assessments. Their argument is thus: since they rightfully can set rules, if they set a rule that contains an assessment, then the assessment is valid under the rulemaking authority. This logic assumes that an assessment is merely a rule. The rule for construction of covenants refutes this

assumption. "[C]ovenants purporting to impose affirmative obligations on the grantee [must] be strictly construed and not enforced unless the obligation be imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." *Id.* at 295, 269 S.E.2d at 183.

Because the covenants in the Huffman and Emerson deeds do not explicitly authorize assessments and such power cannot be inferred from the ability to set rules and regulations, plaintiff lacked the authority to levy an assessment against the homeowners. Therefore, the trial court committed error in granting summary judgment in favor of plaintiff in the absence of this authority.

B. Defendants Patten

[2] The Pattens' deed is subject to a different set of covenants which specifically provides for service charges. As such, defendants Patten do not argue that the covenants do not require service charges be paid. Instead, they argue that plaintiff is not using those funds for the specific terms set out by the restrictive covenants.

The applicable covenants state: "A. Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for garbage and trash collection, police protection, fire protection, street maintenance, street lighting and upkeep of common areas." The real property subject to these covenants is described as "Hickory Hill, section one," and includes a plat showing four lots, all side by side, on Tillman Drive. The covenants further state: "No property other than that described above shall be deemed subject to this Declaration, unless specifically made subject thereto." Defendants argue plaintiff is not abiding by the restriction in the deed because the Pattens' payments are used to provide services not only to the four lots mentioned in the covenant, but also to other properties.

Although the Pattens' deed does contain an explicit authorization to collect assessments in the form of service charges, the authorizing clause is not sufficiently definite to be enforceable, therefore we hold the court erred in granting summary judgment to plaintiff on this issue. In *Figure Eight*, this Court interpreted *Beech Mountain* as setting out a three-part test to determine the validity of an assessment based on the wording of the covenant: Does the covenant (1) describe an adequate standard to measure the amount of the assessment; (2) identify with particularity the property to which the assessment

applies; and (3) give guidance to the reviewing court as to the facilities maintained with the assessment funds. *Id.*, 62 N.C. App. at 376, 303 S.E.2d at 341.

Because the elements of the service charge listed in the Pattens' covenant do not give sufficient information to determine the amount of the assessment, nor describe with particularity the property to be maintained, nor give guidance as to the facilities actually maintained, it was error to grant summary judgment to plaintiff and allow plaintiff to collect an unenforceable service charge.

II. Counterclaims

[3] Defendants next argue that the trial court erred in dismissing the Pattens' counterclaim because neither party presented evidence on the counterclaim at the summary judgment hearing, and therefore the matter was not at issue. This argument is without merit.

The counterclaim, which is for slander of title, relates to a claim of lien filed by plaintiff against two separate lots owned by the Pattens. The Pattens did not pay the service charges assessed against those lots because they did not believe the funds were being spent on the maintenance of those lots. Plaintiff filed a claim of lien against the lots for the amount owed, and in order to then sell the lots, the Pattens had to pay the amount in dispute. The trial court's order includes a dismissal with prejudice of the counterclaim, even though no evidence was presented on the claim by either party. Defendants argue that plaintiff's failure to provide evidence that no genuine issue of material fact existed means their motion for summary judgment on this claim should not have been granted. This argument is without merit.

As plaintiff notes, defendants' counterclaim fails to allege or forecast any evidence as to the element of malice, an essential element of slander of title. *See Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 30, 588 S.E.2d 20, 28 (2003) ("The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages."). "Where the forecast of evidence available demonstrates that a party will not be able to make out at least a prima facie case at trial, no genuine issue of material fact exists and summary judgment is appropriate." *Metts v. Turner*, 149 N.C. App. 844, 846, 561 S.E.2d 345, 346 (2002). As such, the trial court's dismissal of the claim was proper, and we overrule this assignment of error.

III. Non-controverted facts

[4] Finally, defendants argue that the trial court erred by including "non-controverted facts" in its order, and thus those facts should be disregarded by this Court on appeal. This argument is without merit.

The six facts listed by the trial court in this instance do not appear to be *findings* of fact but rather *recitations* of facts from the record that were not disputed at the trial court level nor disputed to this Court on appeal. Defendants correctly note that "if findings of fact are necessary to resolve an issue, summary judgment is improper." *Broughton*, 161 N.C. App. at 33, 588 S.E.2d at 30 (citation omitted). However, given that these are not findings of fact, this statement is inapplicable. As such, we overrule this assignment of error.

Affirmed in part; reversed in part.

Judge WYNN concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting in part.

Because I would affirm as to all defendants, I respectfully dissent.

As the majority states, the standard for reviewing covenants imposing affirmative obligations is as follows:

> Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed "in clear and unambiguous language" that is "sufficiently definite" to assist courts in its application. To be enforceable, such covenants must contain "some ascertainable standard" by which a court "can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." Assessment provisions in restrictive covenants (1) must contain a " 'sufficient standard by which to measure . . . liability for assessments,' " . . . (2) "must identify with particularity the property to be maintained," and (3) "must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain."

Allen v. Sea Gate Assn., 119 N.C. App. 761, 764, 460 S.E.2d 197, 199 (1995) (quoting *Beech Mountain Property Owners' Assoc. v.*

Seifart, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980), and *Figure Eight Beach Homeowners' Assoc. v. Parker*, 62 N.C. App. 367, 376, 303 S.E.2d 336, 341, *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983)).

A. Defendants Emerson and Huffman

As the majority notes, under our case law, the question before this Court is whether the language from the 1996 Regulations from the Emerson and Huffman deeds is both " 'reasonable' " and " 'sufficiently definite.' " I believe that it is and would therefore affirm the trial court's ruling.

Defendants Hoffman and Emerson argue that, because the restrictions in their deeds make no specific reference to affirmative payments but simply refer to potential future regulations that might impose such requirements, plaintiff's claim fails under this standard. That is, they claim the reference to regulations that might be passed in the future is too vague to be enforced.

Generally, this Court looks for " 'sufficiently definite' " language in the covenants at issue. The distinct feature of this case is that the challenge is brought not to the covenants, as in the cases cited immediately above, but to the regulations passed later via the authority granted in the covenants. As such, the appropriate application of the " 'sufficiently definite' " test is not to the language in the deed but to the language of the 1996 Regulations.

Another consideration—separate but related to the first—also comes into play due to this distinct feature. The 1996 Regulations correspond in a legal sense most closely to an amendment to the covenants in the deeds, and our Supreme Court recently held that any amendments to restrictive covenants must be "reasonable." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). The case does not define this term, but does hold that the "broad" nature of the assessments created by the amendment makes them unreasonable. *Id.*

Thus, as the majority notes, the question before us is whether by these standards the following language from the 1996 Regulations is both "reasonable" and "sufficiently definite": "Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for police protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas." I believe that it is.

The types of assessments this Court and our Supreme Court have struck down tend to be general statements of wholesale purpose. For example, the regulations at issue in *Armstrong* created assessments for the " 'safety, welfare, recreation, health, common benefit, and enjoyment of the residents[.]' " *Armstrong*, 360 N.C. at 558, 633 S.E.2d at 87. Our Supreme Court considered this language too "broad" and "unreasonable" and, as such, held the amendment invalid and unenforceable. *Id.* at 548, 633 S.E.2d at 81. In *Beech Mountain*, this Court found that covenants creating an assessment for " 'road maintenance and maintenance of the trails and recreational areas' " and further assessments for vaguely described " 'recreational fees' " or " 'recreational areas' " were not sufficiently definite and therefore were unenforceable. *Beech Mountain*, 48 N.C. App. at 295-96, 269 S.E.2d at 183.

The language in the case at hand names both specific purposes and specific physical locations for which the money is intended. It neither names general abstract goals, as in *Armstrong*, nor lists general categories of areas but not actual goals, as in *Beech Mountain*. Accordingly, I believe the language is sufficiently definite and reasonable and therefore enforceable.

This holding is in accord with this Court's earlier holdings that held invalid clauses conferring the general power to make any and all assessments at a future date. "Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard." *Beech Mountain*, 48 N.C. App. at 295, 269 S.E.2d at 183. However, as our Supreme Court noted in *Armstrong*, "[d]eclarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that may arise during the term of years." *Armstrong*, 360 N.C. at 557, 633 S.E.2d at 86. As such, homeowners' associations must be allowed some latitude, so long as the amendments follow the requirements of being reasonable and definite.

B. Defendants Patten

The Pattens' applicable covenants state: "A[.] Each owner shall pay annually a SERVICE CHARGE in an amount fixed by the SEJ Administrative Council for garbage and trash collection, police protection, fire protection, street maintenance, street lighting and

upkeep of common areas." The covenants further state: "No property other than that described above shall be deemed subject to this Declaration, unless specifically made subject thereto." Defendants argue that, because the Pattens' payments are used to provide services not just to these four lots but to property outside section one, plaintiff is not abiding by the restriction in the deed.

However, as plaintiff notes, the covenants pertain to the "Hickory Hill Subdivision." Further, although it is true that restrictive covenants are strictly construed, "a restrictive covenant 'must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction.' " *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005) (quoting *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987)). To hold that plaintiff should somehow determine the cost of maintaining "garbage and trash collection, police protection, fire protection, street maintenance, [and] street lighting" for these four houses is to reduce the restrictive covenant to a logical absurdity. Therefore, I believe that this assignment of error should be overruled.

I agree with the majority's conclusion that the trial court did not err in dismissing the Pattens' counterclaim.

Because I believe that the service charges were reasonable and the trial court did not err by dismissing the counterclaims or including a recitation of facts in its order, I would affirm on all counts. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. JAMES ARTHUR THOMPSON

No. COA07-363

(Filed 15 January 2008)

1. Drugs— maintaining dwelling for keeping or selling controlled substances—insufficient evidence

A motion to dismiss a charge of maintaining a building for the keeping or selling of controlled substances should have been granted. There was insufficient evidence of drug use in the apartment, the sale of drugs, or the keeping drugs in the house over time.

2. Criminal Law— prosecutor's closing argument—improper comments about counsel and witnesses—not prejudicial

The prosecution's closing argument in a cocaine prosecution contained improper comments regarding witnesses and defense counsel, but was not extreme and calculated to prejudice the jury such that the trial court should have intervened ex mero motu.

3. Evidence— lab reports—nontestifying witness—admissibility

There was no error in a cocaine prosecution in the admission of evidence of lab tests performed by a witness who did not testify. An expert may base an opinion on tests performed by others if the tests are of the type reasonably relied upon in the field, the S.B.I. agent who testified was qualified as an expert, and defendant had the opportunity to cross-examine him.

Appeal by defendant from judgment entered 22 September 2006 by Judge Jack W. Jenkins in Wayne County Superior Court. Heard in the Court of Appeals 17 October 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amanda P. Little, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders David W. Andrews and Benjamin Dowling-Sendor, for defendant-appellant.

HUNTER, Judge.

James Arthur Thompson ("defendant") appeals from a judgment of guilty on charges of possession of cocaine and intentionally maintaining a dwelling used for the keeping and/or selling of controlled substances. On the same day, defendant entered a plea admitting his status as a habitual felon. After careful consideration, we reverse the trial court's denial of defendant's motion to dismiss the charge of intentionally maintaining a dwelling used for the keeping and/or selling of controlled substances, and we remand for resentencing based on the conviction of possession of cocaine.

I.

On 23 February 2005, officers of the Wayne County Sheriff's Office and the Goldsboro Police Department acted upon an anonymous tip that a person by the name of "Big Man" was selling heroin out of his residence at 204 Brazil Street. When the officers went to

this address to speak to Big Man, defendant came to the door and permitted the officers to enter upon request. When asked, defendant denied that he went by the name of Big Man or sold heroin, but allowed the officers to search his home. During the search defendant asked one of the officers if he could lie down. The officer agreed but requested that defendant first consent to a search of his person. Defendant acquiesced, then put his hands in his pockets and pulled out $345.00 in cash and a plastic bag containing 2.1 grams of cocaine. Defendant was subsequently placed under arrest. The search of defendant's apartment did not reveal any other drugs. Defendant was subsequently indicted for one count of possession with intent to sell and deliver a controlled substance and one count of keeping and maintaining a dwelling for the use of controlled substances.

At trial, one of the officers present for the search, Sergeant Daniel Peters, testified that while being processed defendant made the comment that he purchased the cocaine to "get women," but during defendant's testimony at trial he denied making the comment. Defendant also testified that at the time he revealed the cocaine in his pocket, defendant told Sergeant Peters that the substance was "fake" because he believed it may have been planted in his pocket the day before by either his estranged wife Nicky, or by a woman named Tish who was visiting the apartment with defendant's nephew, Eric Best. Defendant maintained at trial that he did not sell drugs.

II.

[1] Defendant first argues that the trial court erred by failing to grant his motion to dismiss the charge of intentionally maintaining a dwelling used for the keeping and/or selling of controlled substances. We agree.

A.

N.C. Gen. Stat. § 90-108(a)(7) (2005) states that it is unlawful: "To *knowingly* keep or maintain any . . . dwelling house . . . *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[.]" (Emphasis added.) "A motion to dismiss must be denied if 'there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense.' " *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citation omitted). " 'When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the

State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.' " *Id.* (citation omitted).

A motion to dismiss the charge of maintaining a dwelling for the keeping and/or selling of controlled substances should be denied if there is sufficient evidence for a jury to infer that defendant is guilty under either of the following two statutory alternatives:

> [First,] defendant did (1) knowingly (2) keep or maintain (3) a [dwelling] (4) which is resorted to (5) by persons unlawfully using controlled substances (6) for the purpose of using controlled substances. Under the second statutory alternative, the State must prove that the defendant did (1) knowingly (2) keep or maintain (3) a [dwelling] (4) which is used for the keeping or selling (5) of controlled substances.

State v. Mitchell, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994); *see* N.C. Gen. Stat. § 90-108(a)(7).

B.

The first statutory alternative requires that the State prove defendant knowingly allowed others to resort to his dwelling to consume controlled substances. However, the only evidence that anyone resorted to defendant's apartment to use drugs was testimony that on 22 February 2005 defendant's nephew brought to defendant's apartment a woman whom defendant knew to be a drug user. No evidence was presented that this woman used drugs at defendant's apartment, whether that evening or at any other time, or that any other person used drugs in defendant's home. As such, the State has not provided evidence to support the first statutory alternative.

C.

The second statutory alternative requires that defendant knowingly used the dwelling for the keeping or selling of controlled substances. In determining whether a dwelling is so used, courts consider the totality of the circumstances. *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30.

Our state Supreme Court has held that "keep" "denotes not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 30. Here, the evidence shows that defendant was in possession of 2.1 grams of cocaine at the time of his arrest, but the record contains no evidence that he used his home as a place to "keep" cocaine over a duration of time.

The record also lacks sufficient evidence to prove defendant was selling controlled substances. This Court has considered in examining the totality of the circumstances in these cases factors including the amount of drugs present, any paraphernalia (including cutting devices, scales, and containers for distribution) found in the dwelling, the amount of money found in the dwelling, and the presence of multiple cellular phones or pagers. *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005); *see Frazier*, 142 N.C. App. at 363-64, 542 S.E.2d at 685.

There is no bright line test in the statute or the case law regarding how much money, coupled with the presence of drugs, qualifies as substantial evidence to demonstrate an intent to sell. This Court has recently held that "[a]s with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute." *In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007). In *I.R.T.*, the juvenile-appellant was adjudicated delinquent by the trial court for possessing crack-cocaine with the intent to sell or distribute after being arrested with a crack-cocaine rock wrapped in cellophane and $271.00 in cash. *Id.* at 581, 647 S.E.2d at 132. There, this Court found that the amount of "unexplained" cash was not sufficient to establish intent to sell or distribute. *Id.* at 589, 647 S.E.2d at 137. In *Battle*, on which defendant in the case at hand relies heavily, the defendant was arrested in a hotel room with 1.9 grams of cocaine, 4.8 grams of marijuana, and $71.00. *Id.* at 731, 606 S.E.2d at 419-20. The Court held "[t]he State's meager evidence of intent to sell cannot be considered 'substantial evidence' supporting the charge of intentionally keeping and maintaining a room for the purpose of selling cocaine." *Id.* at 734-35, 606 S.E.2d at 421. *See also State v. Rosario*, 93 N.C. App. 627, 631, 379 S.E.2d 434, 436, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989) (substantial evidence where defendant was arrested in his home with several plastic bags of cocaine, a cocaine grinder, and scales); *State v. McDougald*, 18 N.C. App. 407, 409, 197 S.E.2d 11, 13, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973) (substantial evidence where the defendant was in possession of 276 grams of marijuana, separated into smaller containers, and defendant attempted to conceal it); *Frazier*, 142 N.C. App. at 363-64, 542 S.E.2d at 685 (substantial evidence where the defendant possessed a small plastic bag containing five individually wrapped rocks of crack cocaine hidden in the bathroom ceiling tiles, a crack pipe, a $20.00 bill on a table, several pagers, two cellular phones, and a wallet containing $1,493.00 in cash).

The State argues that the combination of the amount of cocaine and money present in defendant's possession in the present case is sufficient to indicate that defendant had the intent to sell the drugs. We disagree.

At trial, the State questioned defendant in such a manner as to suggest that he could not possibly have $345.00 in cash on the 23rd day of the month when he only received approximately $500.00 a month in disability benefits. Defendant claimed that his sister received his checks in the mail and cashed them for him, and he still had $345.00 because he had only paid his water bill. The State called Sergeant Peters to the stand to support their theory that defendant received the cash through the sale of cocaine. Sergeant Peters gave his opinion that 2.1 grams of cocaine could be divided into tenths and sold for $20.00 each, but he stipulated that this assertion was speculative and was based on the increments that users typically purchase. Sergeant Peters also said that the fact that defendant's bills were twenties, tens, and fives shows that he was selling the cocaine for those amounts.

It is the opinion of this Court that the officer's testimony does not provide the substantial evidence needed by the State to survive a motion to dismiss. *See State v. Turner*, 168 N.C. App. 152, 158, 607 S.E.2d 19, 24 (2005) (officer's opinion testimony about what people " 'normally' " and " 'generally' " do was not sufficient to show defendant's intent to sell or deliver drugs). Sergeant Peters was presented to evaluate the evidence, but his conjecture as to what defendant was doing with 2.1 grams of cocaine and $345.00 does not amount to additional evidence for the State. The evidence is what was confiscated at defendant's home and the totality of those circumstances are the basis for review.

Defendant had 2.1 grams of cocaine and $345.00 in cash in his pockets, but the record shows no evidence that people were coming and going from his home in a manner to suggest they were buying drugs. The officers who conducted the search did not discover any cutting devices, scales, cell phones, pagers, or containers to package the cocaine. Furthermore, defendant did not admit to selling the drugs; the alleged statement that he used the drugs to "get women" is not an admission of selling drugs or keeping drugs for an extended period of time. It should also be noted that the jury did not find defendant guilty of possession with the intent to sell or distribute, but did find him guilty of mere possession. Finally, there is not such a

large amount of cash, or drugs, or the two in combination to show intent to sell or distribute.

Taking into account the totality of the circumstances, the motion to dismiss the charge of maintaining a dwelling for the keeping and/or selling of controlled substances should have been granted. The trial court's decision is therefore reversed.[1]

III.

[2] Defendant next argues that the Court should remand this case for a new trial on the possession charge only because the trial court failed to intervene *ex mero motu* when the prosecutor made improper closing remarks. After reviewing the prosecutor's statements in context, we conclude that, while some were improper, they do not rise to the level of prejudice that would warrant a new trial.

N.C. Gen. Stat. § 15A-1230(a) (2005) states:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

In interpreting this statute, our state Supreme Court has held:

> A lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn "serves to sharpen and clarify the issues for resolution by the trier of fact," and should be limited to relevant legal issues. Closing argument is a "reason offered in proof, to induce belief or convince the mind," and "[t]he sole object of all [such] argument is the elucidation of the truth[.]"

State v. Jones, 355 N.C. 117, 127, 558 S.E.2d 97, 103-04 (2002) (citations omitted).

As in the case before us "[t]he standard of review for assessing alleged improper closing arguments that fail to provoke timely objec-

1. Because we reverse on these grounds, we do not address defendant's second argument that the trial court committed plain error in its instruction to the jury on this charge.

tion from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Id.* at 133, 558 S.E.2d at 107.

Defendant claims that the prosecutor demeaned the defense attorney when she stated: "And just because Mr. Turnage cannot pronounce, and I'm not going to try, or understand these tests, does not mean that they were not good tests. . . . This is not something really Mr. Turnage has the knowledge or skill to criticize because he really doesn't know what he's talking about[.]"

After making this comment, the prosecutor added, "I wouldn't know what I was talking about if I tried to either confirm or deny his test results." The Court does not find these two statements taken together to be improper.

Next, defendant claims that the prosecutor demeaned defendant and defendant's nephew, a testifying witness, when she said: "[D]on't look over the fact that [defendant], poor little old weak [defendant], let his parole violating, curfew breaking, prostitute hiring nephew in his house with a crackhead to have sex in his bedroom." There is some evidence in the record supporting this characterization, but taken as a whole, this statement demeans the integrity of the witness and is therefore improper.

Defendant also asserts that the prosecutor shared her personal opinions about the credibility of defendant's nephew, and the S.B.I. agent, both testifying witnesses. The prosecutor made the following statements:

> [I]f we were all in court and had to have one character witness come up here for us, we're all in trouble, if it's Eric Best that comes up here on our behalf. . . .
>
> If there has been a complete and credible witness in this case, it's [Agent Chris Starks]. . . .
>
> If Eric Best told you today was Friday I'd go look at the calendar. You cannot believe a word that guy says. He seemed pretty proud of himself, of his little antics and his criminal record. He's not credible at all. . . .

These statements certainly qualify as an improper injection of the prosecutor's opinion regarding the character of these witnesses.

Defendant further argues that the prosecutor improperly appealed to the passions of the jury; specifically, she referred to

defendant as a "link in th[e] chain" of the drug supply line and asked the jury "not to be weak, because you have a chance to make a dent today in that drug trade, a small one, but an important one." We do not find these statements by the prosecutor to be improper.

Where the prosecutor demeaned the witness and injected her personal opinion as to the truthfulness of the evidence, her remarks were clearly improper, but defendant carries the heavy burden of showing that the trial court erred in not intervening on his behalf. In *State v. Davis*, 45 N.C. App. 113, 262 S.E.2d 329 (1980), the Court found that the defendant did not receive a fair trial because the prosecutor called the defendant an " 'S.O.B.' " in his closing argument, which was "highly improper, objectionable, and clearly used to prejudice the jury against defendant." *Id.* at 115, 262 S.E.2d at 330. The Court held "[o]rdinarily, an appellate court does not review the exercise of the trial judge's discretion in controlling jury argument unless the impropriety of the counsel's remarks is extreme and is clearly calculated to prejudice the jury." *Id.*

In *State v. Nance*, 157 N.C. App. 434, 579 S.E.2d 456 (2003), the defendant asserted that he did not receive a fair trial because the prosecutor referred to him as " 'a woman beater, a liar, and a murderer,' " while glaring at the defendant. *Id.* at 442-44, 579 S.E.2d at 461-62. There, however, the defendant objected to each statement, and therefore an abuse of discretion standard applied on appeal. *Id.* at 440, 579 S.E.2d at 460. This Court chose only to reprimand the prosecutor, finding that the "defendant [did] not carr[y] the burden of establishing that the impropriety resulted in prejudice such that his conviction was a denial of due process." *Id.* at 443, 579 S.E.2d at 462.

While *Nance* is analogous in principle, in the instant case defendant did not preserve an objection for appeal, and therefore he now faces an even heavier burden in showing that the trial court erred in not intervening on his behalf. Although some comments were improper in this case, defendant has not proven that they were extreme and calculated to prejudice the jury such that the trial court should have intervened *ex mero motu*.

IV.

[3] Defendant's final argument is that the trial court erred by admitting evidence of the results of the chemical lab tests because the tests were performed by a non-testifying witness, which deprived defendant of his right to confrontation under Article I, Section 23 of the North Carolina Constitution and the Sixth and Fourteenth

Amendments of the United States Constitution. This argument is without merit.

"[A]n expert may base his opinion on tests performed by others if those tests are the type reasonably relied upon by experts in the field." *State v. Carmon*, 156 N.C. App. 235, 244, 576 S.E.2d 730, 737 (2003) (citing *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d. 500, 522 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002)). "The opportunity to fully cross-examine an expert [e]nsures that the defendant's right of confrontation guaranteed by the Sixth Amendment is not violated." *Id*. In the case before us, Agent Stark was qualified as an expert, and defendant had the opportunity to cross-examine him at trial. As such, there was no error.

V.

In summary, the trial court erred in failing to grant defendant's motion to dismiss the charge of maintaining a dwelling used for the keeping and/or selling of controlled substances, and as such, that portion of the conviction is reversed. The conviction for possession of cocaine is affirmed because the prosecutor's closing remarks were not so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*, and the testimony of Agent Stark was properly allowed.

No error in part, reversed in part, and remanded for resentencing.

Judges McGEE and BRYANT concur.

TONDI HOLT, Plaintiff v. ALBEMARLE REGIONAL HEALTH SERVICES BOARD, and JERRY L. PARKS, in his official capacity as Health Director, Defendants

No. COA07-262

(Filed 15 January 2008)

1. Public Officers and Employees— retaliatory discharge— whistleblower action—conduct not protected

Summary judgment was correctly granted for defendants in a whistleblower action alleging retaliatory discharge where plaintiff was not able to establish that her conduct was protected within the meaning of the Whistleblower Act. Plaintiff alleged

protected activity in stating that she would testify truthfully if a dismissed employee brought litigation, but the dispute ultimately was an individual termination action that did not implicate broader matters of public policy.

2. Public Officers and Employees— retaliatory discharge— whistleblower action—legitimate reason for discharge

Summary judgment was properly granted in a whistleblower action where defendant offered a legitimate, nonretaliatory reason for plaintiff's discharge. Plaintiff, who worked for a regional health services board, committed a breach of confidentiality in disclosing patient records, and there was also evidence that termination was appropriate.

3. Public Officers and Employees— retaliatory discharge— whistleblower action—no issue of pretext

Summary judgment was properly granted in a whistleblower action for retaliatory discharge where, after defendants established a nonretaliatory reason for the discharge, plaintiff was not able to raise a factual issue of pretext.

Appeal by plaintiff from an order entered 20 November 2006 by Judge Clifton W. Everett, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 1 November 2007.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr. and Mary Nell Craven, for defendant-appellees.

HUNTER, Judge.

Tondi Holt ("plaintiff") appeals the trial court's grant of Albermarle Regional Health Services Board's ("ARHS") and Jerry L. Parks's ("Parks") (collectively "defendants") motion for summary judgment. After careful consideration, we affirm.

In early 2004, plaintiff was employed as a Finance Officer for ARHS. She was also involved with the personnel department and helped develop and implement agency policies. ARHS is a district health department and a public authority under N.C. Gen. Stat. § 130A-36(a) (2005) and N.C. Gen. Stat. § 159-7(b)(1) (2005). As a state institution, ARHS is barred from terminating an employee for reporting a violation of state policy as defined by N.C. Gen. Stat.

§ 126-84 (2005). N.C. Gen. Stat. § 126-85 (2005). No employee of a state agency who serves in a supervisory capacity may terminate an employee for reporting a violation of state policy. *Id.*

On 28 January 2004, plaintiff was terminated from her employment with ARHS by Parks. Plaintiff claims her termination is a violation of the above referenced statutes ("the Whistleblower Act"). *See* N.C. Gen. Stat. § 126-84, *et seq.* (2005). Defendants, however, argue that plaintiff was in fact terminated for breaching her confidentiality obligations, which defendants characterized as "unacceptable personal conduct[.]"

In November 2003, Parks told plaintiff that ARHS would terminate the agency's safety director, "L," an employee with thirty years' service to ARHS.[1] According to plaintiff, Parks informed her that a member of ARHS's executive board wanted to terminate L because L had not done his job in thirty years. Plaintiff also stated that Parks told her that L had been placed in the position of safety director until he could retire, and it was time to let L go. Plaintiff told Parks that there was no cause to fire L, and she did not want to be part of any termination proceeding against him.

During ARHS's executive board meeting, the discussion of terminating L came up. Plaintiff asked to be excused from the meeting and she was.

According to plaintiff, in December 2003, ARHS's personnel consultant, Sylvia Johnson ("Johnson"), told her that a reduction in work force would be used to terminate L. Plaintiff told Johnson that she thought such action was illegal and wrong, and she did not want to be part of any termination proceedings against L. Plaintiff also stated that she was warned not to meddle with the board's actions to terminate L, as the board was behind the decision.

On 19 December 2003, L met with Parks offsite in order that, according to plaintiff, she would not be involved in the termination. At the meeting, L was terminated. According to plaintiff, Parks informed L that if anyone else became involved with his termination that they were putting their jobs at risk.

On 6 January 2004, plaintiff met with Parks and Johnson. According to plaintiff, she told them that if there was litigation

1. In order to comply with the protective order entered by the trial court, ARHS employees whose confidential information is discussed are referenced by their last initial only.

between defendants and L, she would testify truthfully and felt that she needed her own legal representation. Johnson, however, testified that plaintiff provided little context as to why the meeting was being held and that she continually sought reassurances that her job would be protected were L to "do something." According to Johnson, Parks reassured her that her job would be protected. Johnson also said that there was no discussion as to whether plaintiff would be provided with legal representation were L to bring an action because they were unaware as to what L was planning. Plaintiff was ultimately terminated on 22 January 2004.

Defendants contend plaintiff was terminated for violating confidentiality requirements imposed by the Health Information Portability and Accountability Act ("HIPAA") and agency policy. Defendants' evidence is summarized below.

In January 2004, Parks was notified by Dennis Harrington ("Harrington") of the Department of Health and Human Services ("DHHS") of suspected violations of state and local law involving plaintiff and Allen Jones ("Jones"). According to Parks, he learned that during December 2003 confidential patient health information had been illegally generated at ARHS at plaintiff's direction. The reports contained confidential information for Medicaid clinical services provided at another county health department, the Martin Tyrrell Washington District Health Department ("WHD"). According to Parks, the reports indicated that WHD had approximately 1.6 million dollars in Medicaid funds which had gone uncollected. The records were given by plaintiff to Jones and contained plaintiff's handwritten notes.

Jones took the documentation to WHD and told its director, Keith Patton ("Patton"), that he would assist them in collecting the money owed in exchange for twenty-five percent of the funds collected. Jones told Patton that he received the documentation from ARHS and that it had been reviewed and given to him by plaintiff.

In January 2004, Patton logged a formal complaint against ARHS. The complaint alleged that ARHS staff had improperly accessed confidential patient information in the WHD. After meeting with state representatives about the incident, Parks understood that plaintiff's actions violated HIPAA, state, and local privacy laws.

After receiving assurances that plaintiff had violated the law from Jill Moore, a specialist with the Institute of Government, Parks sched-

uled a pre-dismissal conference with plaintiff. At the conference, plaintiff did not deny the allegations against her and conceded that she had written the summaries of the reports and given them to Jones. Defendants then terminated plaintiff.

Plaintiff raises the following issues for this Court's review: (1) whether the evidence establishes that plaintiff's conduct was protected under the Whistleblower Act; and (2) whether the evidence shows that defendants' reason for termination was a pretext for firing plaintiff for protected conduct.

We review a trial court's grant of summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "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.' " *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (alteration in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.*

I.

[1] The North Carolina Whistleblower Act, N.C. Gen. Stat. §§ 126-84 to 88 (2005), requires a plaintiff to prove the following three essential elements by a preponderance of the evidence in order to establish a *prima facie* case: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne v. Department of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

We first address whether plaintiff, taking the evidence in the light most favorable to her, engaged in protected conduct.[2] To be protected, the whistleblowing activity must constitute a report about "matters affecting general public policy." *Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 117, 622 S.E.2d 702, 707 (2005). The Whistleblower Act establishes a state policy to

> encourage its employees to report violations of state or federal law, rules or regulation; fraud; misappropriation of state re-

2. The parties do not dispute the second element, as defendants terminated plaintiff's employment.

> sources; "[s]ubstantial and specific danger to the public health and safety; or [g]ross mismanagement, a gross waste of monies, or gross abuse of authority;" and it further protects State employees from intimidation or harassment when they report on "matters of public concern." N.C. Gen. Stat. § 126-84 (2003). Employees who report activities under this statute are protected from retaliation under N.C. Gen. Stat. § 126-85 (2003).

Id. at 116, 622 S.E.2d at 706 (alterations in original).

In the instant case, plaintiff alleges that her protected activity was announcing that she intended to testify truthfully were L to bring litigation. In *Hodge*, the "plaintiff's 'report' was [a] lawsuit seeking reinstatement to his former position." *Id.* at 117, 622 S.E.2d at 707. This Court held that the lawsuit did not concern matters affecting general public policy because it "related only tangentially at best to a potential violation of the North Carolina Administrative Code." *Id.* This Court has therefore declined "to extend the definition of a protected activity to individual employment actions that do not implicate broader matters of public concern." *Id.* In so concluding, the Court in *Hodge* reasoned that "the General Assembly [did not] intend[] N.C. Gen. Stat. § 126-84 to protect a [s]tate employee's right to institute a civil action concerning employee grievance matters." *Id.*

Like the plaintiff in *Hodge*, plaintiff in this case has made only conclusory allegations that L's termination was the result of "unlawful age discrimination, and a violation of the State Personnel Act." Nowhere are there specific statements made by plaintiff that L was fired due to his age; instead, plaintiff concedes that L had a history of poor job performance, that plaintiff herself advocated his termination in prior years, and that defendants did not violate their own policy by not offering a new position to L. Ultimately, the dispute between the parties is an individual termination action that does not implicate broader matters of public concern.

This Court has applied whistleblower protection to those "who allege retaliation after cooperating in investigations regarding misconduct by their supervisors[.]" *Id.* at 116-17, 622 S.E.2d at 706 (citing *Caudill v. Dellinger*, 129 N.C. App. 649, 655, 501 S.E.2d 99, 103 (1998) "(employee terminated after cooperating with State Bureau of Investigation regarding misconduct by her supervisor was able to make out a *prima facie* case under N.C. Gen. Stat. § 126-84)").

Unlike in *Caudill*, however, plaintiff merely stated that she would testify truthfully and never actually testified or cooperated with

any investigating agency regarding the termination of L. Moreover, *Caudill* held that "[i]t is the public policy of this state that citizens cooperate with law enforcement officials in the investigation of crimes." *Caudill*, 129 N.C. App. at 657, 501 S.E.2d at 104. In the instant case, there has been no investigation or substantiated allegations that the termination of L was in violation of any state laws or regulations.[3] Instead, this case is more in line with *Hodge*: It involves an individual employment action, the termination of L, and there is no evidence that defendants engaged in "[g]ross mismanagement" or a "violation of State or federal law, rule or regulation" that would afford plaintiff protection under the Whistleblower Act. *See* N.C. Gen. Stat. § 126-84(a) (statement of policy). Instead, plaintiff could have filed a grievance with defendants after her termination. Accordingly, plaintiff's conduct, even construing the evidence in her favor, is insufficient to establish a *prima facie* case, and plaintiff's assignment of error as to this issue is rejected. As plaintiff is unable to establish that her conduct was protected within the meaning of the Act, we need not address whether the other elements of a *prima facie* case have been established. However, in the alternative, we also discuss in Section II of this opinion whether defendants presented a legitimate, non-retaliatory reason for terminating plaintiff.

II.

[2] Once a plaintiff has established a *prima facie* case, the employer must proffer a legitimate, non-retaliatory reason for firing the plaintiff. *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002). At that point, " 'the burden [of production] shifts to the plaintiff to present evidence, raising a genuine issue of fact, that his [engagement in a protected activity] . . . [was] *a substantial causative factor* in the adverse employment action, or provide an excuse for not doing so.' " *Id.* (citation omitted) (alterations in original).

Thus, even if we assume that plaintiff has established a *prima facie* case, we must determine whether defendant offered a legitimate, non-retaliatory reason to terminate plaintiff and whether plaintiff met her burden of production. Our review of the evidence reveals that defendant offered such a reason and plaintiff is unable to raise a genuine issue of material fact that the termination was a pretext for protected activity.

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3. Plaintiff's continued reference to the termination of L as "illegal" does not, absent some support of that allegation in the record, make the termination unlawful.

This Court has held that where a plaintiff acknowledges that an employer had "legitimate explanations for the actions [plaintiff] alleged were retaliatory[,]" summary judgment in favor of the employer is appropriate. *Hodge*, 175 N.C. App. at 118, 622 S.E.2d at 707. The undisputed evidence shows that plaintiff committed a breach of confidentiality by disclosing patient records to Jones. Jones later attempted to use those records for personal, monetary gain. Plaintiff acknowledged in her deposition that she gave Jones the stack of documents. Moreover, when confronted by Parks regarding the disclosure of confidential patient information, plaintiff did not dispute the allegation and acknowledged that she also gave Jones a handwritten summary of the information. Plaintiff also admitted that she did not generate the information as part of her job. Indeed, she knew that part of her job description was to safeguard such information and that HIPAA made it illegal for her to access the information when it was not necessary for her job duties. She also conceded that it was not part of her job description to be concerned as to what Medicaid funds were owed WHD.

In addition to plaintiff's own remarks, defendants have presented evidence that terminating plaintiff due to the breach of confidentiality was appropriate. Harrington, from DHHS, characterized plaintiff's conduct as a gross violation of law such that any disciplinary action short of termination would have been unacceptable. Harrington also said that plaintiff's disclosure violated the ethical duty imposed on county health departments and was "a severe breach of trust between the ARHS and its patients." Additionally, Curtis Dickson, the Director for Hertford County Public Health Authority, and Johnson, the former Regional Personnel Director for DHHS, both testified that plaintiff's actions were illegal and Johnson advised Parks that plaintiff committed a dismissible offense. Finally, the evidence shows that the breach of confidentiality was brought to Parks's attention by Patton, a third party with no knowledge of L's termination. This is not a case where defendants were creating a false paper trail in order to justify their termination of plaintiff on pretextual grounds.

We find additional support for our decision in *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746 (M.D.N.C. 2003). In that case, the plaintiff filed an employment discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. *Id*. at 749. The plaintiff admitted to disclosing information in violation of his confidentiality agreement with the defendant. *Id*. at 752. The *Shoaf* Court then granted summary judgment because the evidence presented

showed that defendant "focused only upon Plaintiff's breach of his duties of confidentiality and loyalty owed to Defendant as a basis for their decision to discharge Plaintiff." *Id.* at 758 (footnote omitted). The same circumstances being presented here, we thus conclude that defendants have established a legitimate non-retaliatory reason for their adverse employment decision. Accordingly, the burden now shifts to plaintiff to establish that her engagement in protected activity was a substantial causative factor of her termination.

[3] In order to raise a factual issue regarding pretext, "the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive." *Wells*, 152 N.C. App. at 317, 567 S.E.2d at 811. Plaintiff has failed to carry this burden.

In the instant case, the only direct evidence presented by plaintiff that defendants terminated her employment in retaliation for her opposition to L's release was a statement to L by Parks not to discuss his termination with anyone as it could cost them their jobs. That comment, however, was taken out of context. During L's and Parks's meeting together, L had requested a copy of his personnel file. At that point, Parks instructed L to go through appropriate channels for any information he needed because accessing such information through employees that did not have authorization to such information could cost them their jobs. L corroborates this during his deposition when he stated, in relation to the conversation he had with Parks, that: "I know it was in reference to some personnel issues and that I should keep those things in confidence, and that it could possibly cause other people problems." This evidence fails to discredit defendants' legitimate, non-retaliatory reason to terminate plaintiff.

Plaintiff argues that there was a close temporal proximity between her protected activity and her firing. This circumstantial evidence, plaintiff argues, is sufficient to prove retaliatory termination. In support of this proposition, plaintiff cites this Court's opinion in *Caudill*. In that case, the plaintiff was terminated "almost immediately" upon the defendant learning that the plaintiff was cooperating with the State Bureau of Investigation. *Caudill*, 129 N.C. App. at 655, 501 S.E.2d at 103. In this case, plaintiff was terminated ten weeks after her initial complaint and fourteen days after her last complaint regarding L's termination. More importantly, the plaintiff in *Caudill* forecasted evidence that she was performing her job satisfactorily up until the termination. Such is not the case here. As discussed above,

defendants have produced substantial evidence that plaintiff was not performing her job satisfactorily because she had disclosed confidential information to Jones. Because plaintiff has not presented evidence that she was performing her job satisfactorily, she is unable to rely on the temporal proximity of her termination after her protected activity as sufficient circumstantial evidence to prove retaliatory termination. Accordingly, plaintiff's assignments of errors are rejected, and the trial court's grant of summary judgment is affirmed.

III.

In summary, we hold that plaintiff's conduct was not protected under the Whistleblower Act. Alternatively, we hold that plaintiff has failed to raise a factual issue as to whether defendants' termination of her employment was pretexual. Accordingly, the ruling of the trial court is affirmed.

Affirmed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA, Plaintiff v. TARA NICOLE LABINSKI, Defendant

No. COA06-1617

(Filed 15 January 2008)

1. Appeal and Error— appellate rules violations—standard of review—citation of authority

Defendant violated Appellate Rule 28(b)(6) by neither stating the standard of review nor citing authority supporting a standard of review; however, defendant substantially complied with other aspects of the Rules of Appellate Procedure and her appeal was not dismissed. Defendant's counsel was ordered to pay printing costs.

2. Bail and Pretrial Release— pretrial release denied—violation of statutory right—not prejudicial

Defendant's pretrial motion to dismiss a DWI charge was properly denied where the magistrate substantially violated defendant's statutory right to pretrial release, but defendant did not demonstrate any prejudice to the preparation of her defense.

Although defendant argued that she lost the opportunity to gather evidence by having friends and family observe her and form opinions as to her condition following her arrest, she was not denied access to friends and family, she was informed of her right to have a witness present for the intoxilyzor test but did not request one, and she had full access to a telephone and made several calls.

Appeal by defendant from order entered 12 September 2006 *nunc pro tunc* 21 June 2006 by Judge William C. Griffin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 23 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John W. Congleton, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's order denying her pretrial motion to dismiss a charge of driving while impaired (DWI). Defendant's pretrial motion to dismiss was made pursuant to *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), on the grounds that she was irreparably prejudiced in the preparation of her defense by the denial of her statutory right to timely pretrial release. Because we conclude that defendant has failed to show any violation of her statutory rights caused prejudice in the preparation of her defense, we affirm.

I. Rule Violation

[1] We first note that defendant failed to comply with N.C.R. App. P. 28(b)(6) which provides that the brief shall contain "a concise statement of the applicable standard(s) of review for each question presented . . . and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6). Defendant has neither stated the standard of review nor cited any authority supporting any standard of review. However, given defendant's substantial compliance with other aspects of the Rules of Appellate Procedure, we find that this violation of Rule 28(b)(6) does not justify dismissal of this appeal. "[E]very violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pur-

suant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure." *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). Pursuant to N.C.R. App. P. 25(b), we order defendant's counsel to pay the printing costs of this appeal. *See Caldwell v. Branch*, 181 N.C. App. 107, 110-11, 638 S.E.2d 552, 555 (2007). We therefore respectfully instruct the Clerk of this Court to enter an order accordingly.

II. Factual Background

On 21 July 2005, defendant was operating a motor vehicle when she was stopped by Officer Styron and then arrested and charged with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1. Officer Styron transported defendant to the Pitt County Detention Center (PCDC) to administer an intoxilyzer test. During transport, defendant had her cell phone in the patrol car and she text-messaged her friend Brian Anderson to let him know she was in trouble. Upon arrival at the PCDC, Officer Styron, who is a certified chemical analyst, advised defendant of her intoxilyzer rights, including her right to have a witness present when the intoxilyzer test was administered, except that the test would not be delayed for more than 30 minutes for that purpose. Defendant chose not to exercise her right to have a witness present and made no efforts to make a phone call prior to the test administration. Defendant submitted to the Intoxilyzer 5000 test twice, at 3:00 a.m. and 3:01 a.m. The lower of the two tests indicated a blood alcohol concentration of .08.

At around 3:00 a.m., four of defendant's friends, including Brian Anderson, arrived at the PCDC. Defendant saw her four friends while she was walking with Officer Styron from the intoxilyzer room to the magistrate's office, but she did not request to speak to her friends then, nor did they ask to speak to her. The friends saw defendant walk by and sit down at a table in the PCDC for about 15 to 20 minutes. Defendant was then taken before Magistrate J. Keith Knox, at about 3:25 a.m. Officer Styron informed Magistrate Knox of the basis for probable cause and the facts of the case. Magistrate Knox also had information regarding defendant and the strength of the case against her. Magistrate Knox informed defendant of the charges against her; the general circumstances on which she could obtain her release; the conditions of pretrial release; and her right to communicate with counsel or friends in accordance with N.C. Gen. Stat. § 15A-534. Magistrate Knox set defendant's bond at $500 secured and her release was also conditioned upon release to a sober adult, release when she had a blood alcohol concentration of .05, or release

at 9:00 a.m. on July 21, 2005. Magistrate Knox informed defendant of the conditions of her pretrial release and gave her a copy of her release order. Magistrate Knox did not make an inquiry into the factors under N.C. Gen. Stat. § 15A-534(c).[1]

Defendant was then taken into the PCDC for booking by Sgt. Willis and Detention Officer Stewart, who noticed that defendant had a cut or injury under her left eye. Sgt. Willis called the detention center nurse to examine defendant's injury, but defendant refused all medical attention offered to her. The PCDC received defendant into custody at 3:47 a.m. Sgt. Willis informed defendant how she could obtain her release and of her right to use the telephone. Officer Stewart took defendant's belongings and cell phone, but placed defendant in an interview room with a phone which could be used to make free local phone calls. He explained to defendant how to use the phone and the process of obtaining release through a bail bondsman and provided a list of bail bondsmen. Defendant's friends and family all had long distance phone numbers, but she used 1-800-COLLECT to call her father in New Jersey. Officer Stewart got defendant's cell phone for her so that she could retrieve other phone numbers of friends and family to call, and defendant called three of her friends who were already at the PCDC. Defendant never called a bail bondsman or asked any of her friends or family to contact a bondsman for her. Defendant and her friends were confused as to who would call the bail bondsman to secure defendant's bond. A bail bondsman did post defendant's bond for her release, and she was released to Mr. Shasteen, one of her friends who had been waiting at the PCDC, and Mr. Johnson, the bail bondsman, at 5:02 a.m.

Defendant was found guilty of DWI in Pitt County District Court on 24 February 2006. On 22 May 2006, defendant filed a motion to dismiss in Pitt County Superior Court. The motion was heard by Judge William C. Griffin, Jr., on 25 May 2006 and 21 June 2006. The motion was denied by order rendered orally in open court on 21 June 2006,

1. (c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2005).

with the written order entered on 12 September 2006 *nunc pro tunc* 21 June 2006. Defendant pled guilty to DWI on 27 June 2006.

III. Standard of Review

Dismissal of charges for violations of statutory rights "is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted . . . it must appear that the statutory violation caused *irreparable prejudice* to the preparation of defendant's case." *State v. Rasmussen*, 158 N.C. App. 544, 549-50, 582 S.E.2d 44, 50 (emphasis added) (internal citations omitted), *disc. review denied*, 357 N.C. 581, 589 S.E.2d 362 (2003). On appeal of the denial of a motion to dismiss for failure of the magistrate to comply with his statutory duties,

> the standard of review is whether there is competent evidence to support the findings and the conclusions. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.

State v. Lewis, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (internal citations and quotation marks omitted). Findings of fact which are not challenged "are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (internal citations omitted).

IV. Pretrial release

Defendant assigns error to six different findings of fact in the trial court's order, but in the brief argues only that finding of fact number 17 was in error because it was not supported by competent evidence. All findings of fact other than number 17 are therefore presumed to be correct. Finding of fact number 17 stated:

> 17. That based on Magistrate Knox's opinion that anyone charged with driving while impaired who blows a .08 or above on the Intoxilyzer 5000 would possibly hurt himself or someone else, Magistrate Knox set the Defendant's bond at $500 secured. In addition, Defendant's release was conditioned upon release to a sober adult, release when Defendant had an alcohol concentration of .05, or release at 9:00 a.m. on July 21, 2005.

Defendant further contends that the trial court erred when it concluded from its findings that her statutory right to timely pretrial release and thereby, access to family and friends, had not been violated by the magistrate before whom she appeared pursuant to N.C. Gen. Stat. § 15-501 (2005).

[2] Specifically, defendant contends that the magistrate ordered her to be detained without considering whether she was so intoxicated that she posed a danger to herself and others as required by N.C. Gen. Stat. § 15A-534.2.[2] She also contends that the magistrate required a secured bond without making the findings required by N.C. Gen. Stat. § 15A-534(b), and without considering the factors listed in N.C. Gen. Stat. § 15A-534(c). She contends that the magistrate's failure, on these grounds, to grant her timely pretrial release and access to friends and family resulted in the loss of evidence, which further resulted in prejudice in her ensuing trial for DWI.[3] Relying on *Knoll*, she contends that the appropriate remedy for the violation of her statutory right to timely pretrial release is dismissal of the DWI charge. The State responds that defendant's statutory right to pretrial release and access to friends and family was not violated, and that even if her statutory rights were violated, she has not shown prejudice as required by *State v. Deitz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976), in order to result in dismissal of the charge.

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2. (b) If at the time of the initial appearance the judicial official finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger, if he is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until one of the requirements of subsection (c) is met; provided, however, that the judicial official must at this time determine the appropriate conditions of pretrial release in accordance with G.S. 15A-534.

(c) A defendant subject to detention under this section has the right to pretrial release under G.S. 15A-534 when the judicial official determines either that:

(1) The defendant's physical and mental faculties are no longer impaired to the extent that he presents a danger of physical injury to himself or others or of damage to property if he is released; or

(2) A sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired. If the defendant is released to the custody of another, the judicial official may impose any other condition of pretrial release authorized by G.S. 15A-534, including a requirement that the defendant execute a secured appearance bond.

N.C. Gen. Stat. § 15A-534.2 (2005).

3. Defendant's other assignments of error were not brought forward and argued in the brief and are therefore considered abandoned. N.C.R. App. P. 28(a).

Subject to exceptions not relevant to the case *sub judice*, a non-capital criminal defendant has the right to pretrial release, N.C. Gen. Stat. § 15A-533 (2005), in accordance with the conditions of N.C. Gen. Stat. § 15A-534 (2005). A defendant arrested for DWI is also subject to the pretrial release conditions of N.C. Gen. Stat. § 15A-534.2. If the provisions of the foregoing pretrial release statutes are not complied with by the magistrate, *and* the defendant can show irreparable prejudice directly resulting from a lost opportunity to "gather[] evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest . . . and to prepare a case in his own defense," the DWI charge must be dismissed. *Knoll*, 322 N.C. at 547, 369 S.E.2d at 565.

Magistrate Knox was authorized to hold defendant in custody if he found "clear and convincing evidence that the impairment of the defendant's physical or mental faculties present[ed] a danger, if [she was] released, of physical injury to [herself] or others or damage to property." N.C. Gen. Stat. § 15A-534.2(b). Otherwise, Magistrate Knox was required to either:

> (1) Release the defendant on [her] written promise to appear[;]
>
> (2) Release the defendant upon [her] execution of an unsecured appearance bond in an amount specified by the judicial official[;]
>
> (3) Place the defendant in the custody of a designated person or organization agreeing to supervise [her][; or,]
>
> (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.

N.C. Gen. Stat. § 15A-534(a).

Finding of fact number 17, set forth in full above, is the only finding in the order which addresses any of the factors listed in N.C. Gen. Stat. § 15A-534.2 or N.C. Gen. Stat. § 15A-534 and which could possibly support Magistrate Knox's determination to set a secured bond and the other conditions upon defendant's release. However, the first sentence of finding of fact number 17 is not supported by the evidence. Magistrate Knox did not testify as to his reason for setting a $500 bond. He said he required defendant to be released to a sober responsible adult "[b]ecause that's what the statute requires me to do." Magistrate Knox did not testify to any concern at all about

defendant hurting herself or anyone else and he stated that she was polite and cooperative. He did not testify to any opinion regarding the behavior of defendant or any other person based upon a particular blood alcohol concentration alone.

The release order also contains no indication that defendant presented a danger to herself or others.[4] There is no evidence in the record to support the finding that Magistrate Knox was of the opinion that defendant "would possibly harm herself or someone else."

There was no evidence or finding of fact that Magistrate Knox determined "by clear and convincing evidence" that defendant was required to be held because "the impairment of the defendant's physical or mental faculties present[ed] a danger, if [she were] released, of physical injury to [herself] or others or damage to property." N.C. Gen. Stat. § 15A-534.2. There was also no evidence which would support a finding pursuant to N.C. Gen. Stat. § 15A-534(b), that defendant "w[ould] pose a danger of injury to any person" if she were released under conditions other than a secured bond. Therefore, Magistrate Knox substantially violated defendant's statutory right to pretrial release, and the trial court erred by its conclusion of law to the contrary.

V. Prejudice

Since we have found that there was a substantial violation of defendant's statutory right to pretrial release, we must next consider whether the violation of defendant's statutory right caused irreparable prejudice to the preparation of her defense. "[P]rejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Knoll*, 322 N.C. at 545, 369 S.E.2d at 564. Defendant argues that she suffered irreparable prejudice to the preparation of her defense by the loss of the opportunity for her friends to observe her physical and mental condition at a crucial time at the PCDC because of her commitment to jail with improper release conditions.

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4. We note that N.C. Gen. Stat. § 15A-534(b) provides that the magistrate "*must* record the reasons for [requiring a secured bond] in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a)." N.C. Gen. Stat. § 15A-534(b) (emphasis added). The release order does not contain any indication of a reason that a secured bond was set. However, the record also contains no indication that there are any policies or requirements issued by the senior resident superior court judge in District 3-A which would require any such recordation of reasons.

However, the unchallenged findings of fact indicate that although defendant was not timely released from detention, she was not denied access to friends and family, such that she lost opportunity to "gather[] evidence in [her] behalf by having friends and family observe [her] and form opinions as to [her] condition following arrest . . . and to prepare a case in [her] own defense." *Knoll*, 322 N.C. at 547, 369 S.E.2d at 565; *see also State v. Gilbert*, 85 N.C. App. 594, 597, 355 S.E.2d 261, 263-64 (1987) (defendant not able to show prejudice when record did not contain evidence that he was denied access to family and friends); *Eliason*, 100 N.C. App. at 316-17, 395 S.E.2d at 704-05 (dismissal not warranted even though trial court failed to fully consider the conditions of N.C. Gen. Stat. § 15A-534(c) in setting the bond, because defendant was informed of his right to see family members and the record contained no evidence that anyone was denied access to him).

In the case *sub judice*, defendant was informed of her right to have a witness present for the intoxilyzer test but did not request a witness, even though four of her friends were in fact present at the PCDC at the proper time and could have witnessed the test. Defendant's four friends were present at the PCDC by the time defendant left the intoxilyzer room and they remained until her release. Defendant was able to see her friends and they could see her, but she did not ask to speak to them or that they be permitted to come to her. Defendant also had full access to a telephone and in fact made several phone calls from the PCDC.

We conclude that defendant has therefore failed to demonstrate any prejudice to the preparation of her defense from the violation of her statutory right to pretrial release. Accordingly, the order of the trial court denying defendant's motion to dismiss is affirmed.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

RAKESTRAW v. TOWN OF KNIGHTDALE

[188 N.C. App. 129 (2008)]

RITA RAKESTRAW, ERICH RAKESTRAW, KENNETH McKOY, ANGELA TERRERO, GENARO TERRERO, JIMMY KIMBALL, CLAUDE HARRIS, JACKIE HARRIS, MICHELLE DEAN, JOHN DEAN, PATRICE PIPKIN, SHERRI SCHULTHEISS, JANET DOLL, LAUREN YVES DOLL, MAX SILVER, ARLENE McCULLERS, AND PAUL TURNER, PLAINTIFFS v. TOWN OF KNIGHTDALE, DEFENDANT

No. COA07-866

(Filed 15 January 2008)

1. Zoning— notice of change—newspaper, sign, mailing

Summary judgment was properly granted for defendant town on a zoning matter where plaintiff contended that the town had not given proper notice. The town had published a notice of a public hearing in a local newspaper, posted a sign, and provided notification of the hearing by mail. There was no evidence tending to show a substantial change to the proposed ordinance, that those interested were not informed of when the additional meetings would be held, or of fraud in the mailing.

2. Zoning— conditional district exceptions—less restrictive conditions

The superior court properly found a town to have complied with a requirement in an ordinance allowing exceptions and less restrictive conditions in a conditional district.

Appeal by plaintiffs from order entered 1 May 2007 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 13 December 2007.

The Brough Law Firm, by Michael B. Brough, for plaintiffs-appellants.

Smith Moore LLP, by James L. Gale, Bradley M. Risinger, and James R. Holland, for defendant-appellee.

TYSON, Judge.

Rita Rakestraw, et al., ("plaintiffs") appeal from order entered by the superior court granting the Town of Knightdale's ("the Town") motion for summary judgment. We affirm.

I. Background

On 30 August 2006, plaintiffs filed a complaint and sought a declaratory judgment that an ordinance adopted by the Knightdale

Town Council ("the Council") was void and of no effect. The challenged ordinance and amendment rezoned an approximately 56.8 acre tract of land to a "highway commercial conditional district." Prior to the adoption of the ordinance, the northern portion of the property was zoned for highway business and the southern portion was zoned for urban residential. The tract of land is located on the south side of Knightdale Boulevard between Widewaters Parkway and Parkside Commons Drive.

Plaintiffs' complaint alleged: (1) the ordinance contained "some twenty variances" from the Town's Unified Development Ordinance ("UDO"); (2) the Town failed to properly send written notice to all property owners entitled to such notice; (3) the Town's Land Use Review Board ("the Board") failed to comply with any of the UDO notice requirements; (4) the ordinance had a "direct, substantial, and readily identifiable financial impact" on one of the Council's members and he was required to recuse himself from voting; (5) the Town failed to prepare a written decision as required by the UDO; and (6) the ordinance purports to change the zoning of some 5.5 acres not included in any of the public hearing notices.

On 16 October 2006, the Town filed a motion for summary judgment stating there is no genuine issue of material fact and it is entitled to judgment as a matter of law. On 17 November 2006, plaintiffs filed their motion for summary judgment stating there is no genuine issue of material fact, "other than plaintiff's [sic] contention that the ordinance is invalid because the [T]own failed to mail notices of the April 3, 2006 public hearing as required by state statute and local ordinance," and they are entitled to judgment as a matter of law. The case was heard in superior court on 30 November 2006.

On 1 May 2007, the superior court filed its "order granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment." The superior court ruled: (1) the Town "complied with its notice responsibilities, and with the overarching 'due process' concern which animates them;" (2) the Town complied with the requirements of N.C. Gen. Stat. § 160A-382 "by approving a conditional district in the [o]rdinance which meets the mandates of its UDO;" and (3) the Council member had "no direct, substantial or readily identifiable financial interest in the project underlying the [o]rdinance that he voted to approve." The superior court dismissed plaintiffs' declaratory judgment action with prejudice. Plaintiffs appeal.

II. Issue

Plaintiffs argue the superior court erred by granting the Town's motion for summary judgment.

III. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.
>
> We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

Wilkins v. Safran, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

IV. Motion for Summary Judgment

Plaintiffs argue the superior court erred by granting the Town's motion for summary judgment because: (1) the Town failed to comply with its own notice and public hearing requirements; (2) the public hearing notice posted on the tract of land did not meet the requirements of N.C. Gen. Stat. § 160A-384(c); (3) a genuine issue of material fact exists regarding whether notice was properly sent to all eligible property owners; and (4) N.C. Gen. Stat. § 160A-382 does not autho-

rize the Town to decrease certain requirements of the underlying base district. We disagree.

A. Notice and Public Hearing Requirements

[1] N.C. Gen. Stat. § 160A-364(a) (2005) states:

> Before adopting, amending, or repealing any ordinance authorized by this Article, the city council shall hold a public hearing on it. A notice of the public hearing shall be given once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. In computing such period, the day of publication is not to be included but the day of the hearing shall be included.

Section 15.1D of the Town's UDO states:

> Notification of all public hearings shall be as follows:
>
> 1. **Newspaper Notice:** A notice shall be published in a newspaper having general circulation in the Town once a week for two (2) successive weeks, the first notice to be published not less than ten (10) days nor more than 25 days prior to the date established for the hearing. The notice shall indicate the nature of the public hearing and the date, time and place at which it is to occur.
>
> 2. **Sign to be Posted:** A prominent sign shall be posted on the subject property(ies) beginning not less than ten (10) days nor more than 25 days prior to the date established for the hearing. Such notice shall state a phone number to contact during business hours for additional information. The sign shall remain until after the decision-making authority has rendered its final decision.
>
> 3. **First-Class Mail Notification:** A notice of the proposed action shall be sent by first class mail from the Administrator to the affected property owner and to all contiguous property owners within 200 feet.

Plaintiffs contend the Town failed to properly give "notification of all public hearings . . . ." as required by Section 15.1D of the Town's UDO. We disagree.

> The general requirement of notice and public hearing prior to the adoption or amending of a zoning ordinance is subject to modifi-

cation depending upon the substantiality of the change to be made following reconsideration.

Ordinarily, if the ordinance or amendment as finally adopted contains alterations substantially different (amounting to a new proposal) from those originally advertised and heard, there must be additional notice and opportunity for additional hearing. However, no further notice or hearing is required after a properly advertised and properly conducted public hearing when the alteration of the initial proposal is insubstantial. . . . Moreover, additional notice and public hearing ordinarily will not be required when the initial notice is broad enough to indicate the possibility of substantial change and substantial changes are made of the same fundamental character as contained in the notice, such changes resulting from objections, debate and discussion at the properly noticed initial hearing.

When reconsideration is followed by a vote to confirm an ordinance previously adopted or by a vote to make insubstantial modifications in the adopted ordinance, further notice and hearing are not called for: residents are already apprised of its text and effect and the Council has had the benefit of hearing the public's viewpoints.

Sofran Corp. v. City of Greensboro, 327 N.C. 125, 130-31, 393 S.E.2d 767, 770 (1990) (internal citation and quotation omitted).

1. Newspaper Notice

On 22 March and 29 March 2006, the Town published in the "Eastern Wake News" a notice of public hearing to be held by the Council on 3 April 2006. The notice stated:

ZMA-2-06 Village Park Commons: Application requesting a Zoning Map Amendment to rezone 51.3-acres of the 56.8-acre parcel located on the south side of Knightdale Boulevard between Widewaters Parkway and Parkside Commons Drive and identified as Wake County PIN 1744.09 84 3240 from Highway business (HB) and Urban Residential (UR12) zoning districts to Highway Business Conditional District (HB CD) in order to subdivide the property into 11 lots and to develop a shopping center—community center with approximately 430,650 square feet of retail and commercial use. The remaining 5.5-acres are to be rezoned from Urban Residential (UR 12) zoning district to Urban Residential Conditional District (UR CD). The applicant is

identified as Michael F. King of Kennedy, Covington, Lobdell & Hickman, LLP on behalf of the developer Wakefield Associates. The property owner [sic] is identified as Jane Suggs and Norwood and Nancy Hargrove.

Based on our Supreme Court's reasoning in *Sofran Corp.*, we hold the 22 March and 29 March 2006 newspaper publications are legally sufficient so long as no substantial change to the proposed ordinance occurred as it moved toward passage and those interested parties were informed when the additional meetings would be held. 327 N.C. at 130-31, 393 S.E.2d at 770. Plaintiffs presented no evidence tending to show either a substantial change to the proposed ordinance occurred or that those interested parties were not informed when the additional meetings would be held.

2. Sign to be Posted

Plaintiffs admit a sign was posted on the right-of-way of Knightdale Boulevard adjacent to the tract of land in question, prior to the first public hearing before the Council on 3 April 2006, and that this sign remained until after the rezoning amendment to the ordinance was adopted. Plaintiffs contend the sign gave no indication that the Board would hold public hearings on 10 April 2006 and 12 June 2006 and that the sign does not comply with the requirements of N.C. Gen. Stat. § 160A-384.

Here, the sign posted was approximately twenty-four by thirty-six inches in size and read: "Town of Knightdale PUBLIC HEARING PROPERTY NOTICE—For More Information: [phone number]." The sign met all requirements of section 15.1D, subsection 2 of the Town's UDO. Under the terms of the Town's UDO, the sign need not give notice of dates of the Board's subsequent meetings.

N.C. Gen. Stat. § 160A-384(c) (2005) states, "[w]hen a zoning map amendment is proposed, the city shall prominently post a notice of the public hearing on the site proposed for rezoning or on an adjacent public street or highway right-of-way." The statute does not state any required contents of the notice of public hearing. Plaintiffs contend the posted notice requirements should be governed by the same standards used for that of published notice: the sign must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed. *See Sellers v. City of Asheville*, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977) ("To be adequate, the notice of public hearing required by G.S. 160A-364 must fairly and

sufficiently apprise those whose rights may be affected of the nature and character of the action proposed.").

We agree with the superior court's order that other notice methods are designed to give the public more specific information, while the posted sign is designed as part of the overall notice scheme to identify and locate the property that is the subject of the public hearing process. The superior court properly found the Town's posted notice sufficient to meet the requirements of N.C. Gen. Stat. § 160A-384(c) and section 15.1D of the Town's UDO.

3. First-Class Mail Notification

Plaintiffs argue a genuine issue of material fact exists regarding whether all eligible property owners received written notification and the Town should have sent written notice to all eligible property owners of each meeting held regarding the rezoning application.

N.C. Gen. Stat. § 160A-384(a) (2005) requires the person or persons, who mailed the notice of public hearing to all eligible property owners, to certify that the notification was sent. N.C. Gen. Stat. § 160A-384(a) further states that "such certificate shall be deemed conclusive in the absence of fraud." Here, on 21 June 2006, Sheila H. Hardin, the Town's Zoning Technician, certified to the Council that she had mailed notice to all properties in accordance with the provisions of N.C. Gen. Stat. § 160A-384 and section 15.1D of the Town's UDO.

Plaintiffs contend the affidavits of thirteen property owners, alleging they did not actually receive written notice from the Town, creates a genuine issue of material fact regarding whether the Town complied with its mail notification requirements. Plaintiffs have not alleged any fraud in the mailing on the part of the Town or the Town's Zoning Technician. In the absence of fraud, Ms. Hardin's 21 June 2006 affidavit is deemed conclusive that the Town complied with the notice requirements. The superior court properly concluded no genuine issue of material fact existed, regarding whether all eligible property owners received notification as required by N.C. Gen. Stat. § 160A-384 and section 15.1D of the Town's UDO.

Based on our Supreme Court's reasoning in *Sofran Corp.*, we hold that the original written notification sent to eligible property owners was legally sufficient so long as there was no substantial changes to the proposed ordinance as it moved toward passage and those interested parties were informed when the additional meetings

would be held. 327 N.C. at 130-31, 393 S.E.2d at 770. Plaintiffs presented no evidence that tended to show either a substantial change to the proposed ordinance occurred, that those interested were not informed when the additional meetings would be held, or that any fraud had occurred in the mailing of the notices.

B. N.C. Gen. Stat. § 160A-382

[2] Plaintiffs argue N.C. Gen. Stat. § 160A-382 "allows the imposition of conditions that bring the project more into conformity with the requirements of the ordinance, but does not allow the Council to grant exceptions that lower the standards of the ordinance for a particular developer." We disagree.

N.C. Gen. Stat. § 160A-382(b) (2005) states:

> [c]onditions and site-specific standards imposed in a conditional district shall be limited to those that address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably expected to be generated by the development or use of the site.

Plaintiffs contend the Town can only enforce the standards of an underlying district or more restrictive conditions, and N.C. Gen. Stat. § 160A-382 does not permit exceptions or decreased standards. We disagree. Section 15.17 of the Town's UDO states, "when a Conditional District is . . . require[d] . . . petitioners may also ask that certain standards identified be decreased." The challenged rezoning ordinance lists twenty exceptions, or "decreased" standards.

"[A] duly adopted zoning ordinance is presumed to be valid and the burden is on the complaining party to show it to be invalid." *Williams v. Town of Spencer*, 129 N.C. App. 828, 830-31, 500 S.E.2d 473, 475 (1998) (citing *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971)). Here, plaintiffs merely state, "[n]one of the[] [twenty] exceptions brings the development more into compliance with the ordinance or helps lessen the adverse impacts of this massive commercial project. In fact, they have exactly the opposite effect. Accordingly, they are inconsistent with the enabling act . . . ."

The superior court properly found the Town to have complied "with this enabling requirement by approving a conditional district in the [o]rdinance which meets the mandates of its UDO." We hold plaintiffs have failed to carry their burden to show the Town's ordinance to be invalid. This assignment of error is overruled.

V. Conclusion

Reviewing the superior court's order granting the Town's motion for summary judgment *de novo*, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that [the Town] is entitled to a judgment as a matter of law." *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661 (quotation omitted). The superior court's order granting the Town's motion for summary judgment is affirmed.

Affirmed.

Judges STEELMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA v. FELTON IAN HANNER

No. COA07-757

(Filed 15 January 2008)

1. Probation and Parole— revocation—sentence changed from concurrent to consecutive

The trial court did not err by activating defendant's suspended sentences and specifying that the sentences should run consecutively instead of concurrently as originally imposed pursuant to N.C.G.S. § 15A-1344(d) and *State v. Paige*, 90 N.C. App. 142.

2. Sentencing— probation revoked—sentence changed from concurrent to consecutive—defendant not present

The trial court erred when revoking defendant's probation by changing some of defendant's terms to consecutive from concurrent (which it had the authority to do) but without defendant's presence.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 5 December 2005 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 29 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for Defendant.

ARROWOOD, Judge.

Defendant appeals from judgments entered revoking Defendant's probation and activating Defendant's suspended sentences. For the reasons discussed herein, we vacate the sentences imposed in 05 CRS 78686 and 05 CRS 86681 and remand 05 CRS 78686 and 05 CRS 86681 for a new sentencing hearing.

Defendant pled guilty to the following offenses pertinent to this appeal: five counts of breaking and entering, five counts of larceny after breaking and entering, three counts of obtaining property by false pretenses, two counts of possession of stolen property, and one count of financial transaction card theft. Defendant's plea agreement reflects that "[i]n exchange for [Defendant's] cooperation[,] these offenses shall be consolidated into [eight] consecutive . . . judgments." At Defendant's plea hearing on 6 March 2006, the trial court rendered judgment sentencing Defendant pursuant to Defendant's plea agreement, under eight distinct file numbers, to eight consecutive sentences of 8 to 10 months imprisonment.

The trial court entered, among other judgments, the following judgments pertinent to Defendant's appeal, setting two sentences to run concurrently that were announced in open court as running consecutively:

05 CRS 66373, Consolidated Judgment and Commitment on Breaking and Entering and Larceny. Suspended sentence of 8 months to a maximum term of 10 months.

05 CRS 66813, Consolidated Judgment and Commitment on Breaking and Entering and Larceny. Suspended sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 66373*.

05 CRS 78686 and *05 CRS 77933*, Consolidated Judgment and Commitment on Possession of Stolen Goods and Breaking and Entering. Suspended sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 66373*.

> *05 CRS 86681* and *05 CRS 86121*, Consolidated Judgment and Commitment on Larceny and Breaking and Entering. Suspended sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 66373*.

"The sentence actually imposed . . . was the sentence contained in the written judgment," not the sentence rendered in open court. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (citing *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997) ("[a]nnouncement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment")).

In open court on 8 November 2006, the trial court rendered judgment revoking Defendant's probation and placing "[Defendant's] sentence in effect just as it was given[.]" However, on 5 December 2006, when the judgments were entered, the trial court veered from the original judgments, setting two sentences to run consecutively which were set on 6 March 2006 to run concurrently. The court entered, among other judgments, the following judgments pertinent to Defendant's appeal:

> *05 CRS 66373*, Judgment and Commitment upon Revocation of Probation. Activated sentence of 8 months to a maximum term of 10 months.
>
> *05 CRS 66813*, Judgment and Commitment upon Revocation of Probation. Activated sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 66373*.
>
> *05 CRS 78686*, et al., Judgment and Commitment upon Revocation of Probation. Activated sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 76450*.
>
> *05 CRS 86681*, et al., Judgment and Commitment upon Revocation of Probation. Activated sentence of 8 months to a maximum term of 10 months, to begin at the expiration of the sentence imposed in *05 CRS 78686*.

The sentences imposed in 05 CRS 78686 and 05 CRS 86681 were originally entered to run concurrently with 05 CRS 66813 at the expiration of 05 CRS 66373. However, upon Defendant's revocation of probation, the sentences in 05 CRS 78686 and 05 CRS 86681 were entered to run

not as originally set, but rather, to run consecutively, which resulted in the extension of Defendant's term of imprisonment. From these judgments, Defendant appeals.

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[1] In his first argument, Defendant contends that the trial court erred by activating Defendant's suspended sentences such that two sentences which were set to run concurrently in the original judgments were set to run consecutively in the judgments upon the revocation of Defendant's probation. We find this argument to be without merit.

> N.C. Gen. Stat. § 15A-1344(d) (2005) states the following:
>
> A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

In *State v. Paige*, 90 N.C. App. 142, 143, 369 S.E.2d 606, 606 (1988), this Court interpreted G.S. § 15A-1344(d):

> As we read it, this section permits the trial court to impose a consecutive sentence when a suspended sentence is activated upon revocation of a probationary judgment without regard to whether the sentence previously imposed ran concurrently or consecutively. Thus, under this section, the trial court in the present case had the authority to order defendant's sentence for felonious breaking and entering to be served consecutively to his sentence for possession of stolen goods.

In *Paige*, the original judgments entered upon the defendant's convictions of felonious breaking and entering and possession of stolen goods did not specify whether the sentences would run concurrently or consecutively. If a judgment fails to specify whether multiple sentences are to run consecutively or concurrently, the sentences run concurrently. *See* N.C. Gen. Stat. § 15A-1354(a) (2005). The trial court, however, in activating the defendant's suspended sentences, specified that the sentences should run consecutively. This Court upheld the trial court's ruling.

Paige is binding authority in the case *sub judice*. Here, pursuant to G.S. § 15A-1344(d) and *Paige* the trial court did not err by activating Defendant's suspended sentences and specifying that the sen-

tences should run consecutively instead of concurrently. This assignment of error is overruled.

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[2] In his second argument, Defendant contends that the trial court violated Defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court rendered in open court at Defendant's revocation hearing. We agree.

"The Defendant had a right to be present at the time that sentence was imposed." *Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99 (citations omitted).

We find this Court's opinion in *Crumbley* authoritative here. In *Crumbley*, the trial court orally rendered judgment sentencing the defendant to concurrent terms of imprisonment; however, as here, the written judgment entered at a later date by the trial court provided that the sentences would run consecutively. In *Crumbley*, we held that the trial court erred and rejected the State's argument there was no error because the defendant was present in open court at the time the sentence was originally rendered. The Court reasoned that "[the] substantive change in the sentence could only be made in the Defendant's presence, where [the defendant or] his attorney would have an opportunity to be heard." *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99. This Court concluded that, "[b]ecause there is no indication in this record that Defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment." *Id.* at 66, 519 S.E.2d at 99.

Here, as in *Crumbley*, the trial court rendered judgment in open court on 8 November 2006, sentencing Defendant to two concurrent terms of imprisonment, because the trial court placed "[Defendant's] sentence in effect just as it was given[.]" The sentences imposed in 05 CRS 78686 and 05 CRS 86681 were originally entered on 6 March 2006 to run concurrently with 05 CRS 66813 at the expiration of 05 CRS 66373. Thereafter, on 5 December 2006, the court entered written judgments upon Defendant's revocation of probation, sentencing Defendant to consecutive rather than concurrent terms of imprisonment. The sentences imposed in 05 CRS 78686 and 05 CRS 86681 were entered to run not as originally set, at the expiration of 05 CRS 66373 and both concurrently with 05 CRS 66813, but rather, to run consecutively, which resulted in the extension of Defendant's term of impris-

onment. There is no indication in this record that Defendant was present at the time the written judgments were entered.

In light of *Crumbley*, we vacate 05 CRS 78686 and 05 CRS 86681 and remand this matter for the entry of new sentencing judgments not inconsistent with this opinion. We again note that the trial court has the authority pursuant to G.S. § 15A-1344(d) and *Paige* to enter judgments upon a defendant's revocation of probation sentencing a defendant to a consecutive prison term "without regard to whether the sentence previously imposed ran concurrently or consecutively[.]" *Paige*, 90 N.C. App. at 143, 369 S.E.2d at 606.

Vacated and Remanded in part and No Error in part.

Judge JACKSON concurs in the result.

Judge TYSON concurs in part and dissents in part in a separate opinion.

TYSON, Judge concurring in part and dissenting in part.

The majority's opinion holds the trial court: (1) properly activated defendant's suspended sentences and changed the sentences to run consecutively, instead of concurrently as originally imposed, and (2) erred when it entered a substantially different written judgment outside of defendant's presence. I concur to vacate and remand on entering the substantially different judgment outside of defendant's presence. I disagree with the majority's holding to affirm the consecutive sentences. I vote to reverse and respectfully dissent.

I. Probation Revocation

The majority opinion fails to include all relevant portions of N.C. Gen. Stat. § 15A-1344(d) in its analysis. The more relevant portion of N.C. Gen. Stat. § 15A-1344(d) (2005) states:

> *If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation*, *the court*, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, *may revoke the probation and activate the suspended sentence imposed at the*

> *time of initial sentencing*, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor.

(Emphasis supplied).

The majority incorrectly extends and misapplies this Court's reasoning in *State v. Paige*. 90 N.C. App. 142, 369 S.E.2d 606 (1988). In *Paige*, this Court held N.C. Gen. Stat. § 15A-1344(d) gave the trial court "authority to order defendant's sentence for felonious breaking and entering to be served consecutively to his sentence for possession of stolen goods." 90 N.C. App. at 143, 369 S.E.2d at 606. The facts of *Paige* are far different than and distinguishable from those at bar. *Id.* at 142, 369 S.E.2d at 606. In *Paige*, the defendant's sentences were entered in different proceedings more than two months apart and resulted in separate judgments that suspended the sentences and placed the defendant on probation for one and five year terms respectively. *Id.* at 142-43, 369 S.E.2d at 606.

Here, defendant's concurrent sentences were all entered on the same day as result of a plea agreement and defendant was sentenced to one probationary term of five years. The trial court activated defendant's suspended sentences ordered to to run concurrently by the judge who imposed the sentences. "[O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

The Rule of Lenity prevents courts from interpreting a criminal statute in a manner that would impose a penalty possibly greater than that intended by the General Assembly. *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681-82 (1985); *see also Albernaz v. United States*, 450 U.S. 333, 67 L. Ed. 2d 275 (1981) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." (Quotation omitted)).

Under the plain and unambiguous language of N.C. Gen. Stat. § 15A-1344(d) the trial court was only authorized to "revoke the probation and *activate the suspended sentence imposed at the time of initial sentencing . . . .*" (Emphasis supplied). The trial court erred

when it altered defendant's original sentence and sentenced defendant to eight consecutive terms of imprisonment rather than five as imposed in the suspended judgment.

I vote to reverse the trial court's judgment and remand to specify defendant's sentences run consecutively as imposed "at the time of [defendant's] initial sentencing . . . ." N.C. Gen. Stat. § 15A-1344(d). Under this analysis, it is unnecessary to reach defendant's second assignment of error. However, I concur with the majority's decision to vacate and remand for entering a substantially different judgment outside of defendant's presence.

II. Conclusion

The majority's opinion fails to analyze controlling statutory provisions and incorrectly extends and misapplies N.C. Gen. Stat. § 15A-1344(d) and this Court's reasoning in *Paige*, 90 N.C. App. at 142, 369 S.E.2d at 606. I vote to reverse the trial court's judgment and remand for re-sentencing and activation of the original concurrent sentences exactly as imposed at the time of defendant's initial sentencing.

Under the express language of the statute and the facts of this case, the trial court was without authority to re-sentence defendant contrary to his plea agreement and the suspended sentences in the judgment originally imposed. *Id.* Our holding in *Paige* is inapplicable to the facts in this case. *Id.* I respectfully dissent.

STATE OF NORTH CAROLINA, PLAINTIFF v. BILLIE JO COLEMAN, DEFENDANT

No. COA07-15

(Filed 15 January 2008)

1. Appeal and Error— Rule 2—confusion in case numbers and captions—notice of appeal sufficient—defendant not at fault

An appeal in a criminal contempt matter was heard to prevent manifest injustice where it arose from a civil case and there was confusion in the case numbers and captions, but the notice of appeal was sufficient to give notice of what was being appealed and the confusion was not caused by defendant.

2. Contempt— criminal—findings—events after show cause order

Findings of fact in a criminal contempt matter based solely on acts which occurred after the issuance of the show cause order were not sufficient. The trial court must make findings of fact beyond a reasonable doubt as to whether defendant committed the acts alleged in each show cause motion; although the record here contained evidence that defendant committed the acts alleged, the appellate court is not at liberty to make findings for the trial court.

Appeal by defendant from orders entered 25 May 2006 and 31 May 2006 by Judge Vance Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Lynne Weaver, for the State.

Robert W. Ewing, for defendant-appellant.

STROUD, Judge.

Defendant Billie Jo Coleman appeals from orders entered 26 May 2006 and 31 May 2006 finding her in indirect criminal contempt.[1] Defendant contends that the trial court erred because it found no facts to support a conclusion that she should be found in contempt of court. We agree. For the reasons which follow, we conclude that the

[1] 1. We note that this case arose in the course of a civil action, Guilford County No. 06 CVS 3527, but upon the filing of each contempt motion by the plaintiff in the civil action, the trial court established separate criminal file numbers for the two contempt actions. Defendant captioned her notice of appeal with only the civil case number, then mentioned only the criminal contempt orders in the notice of appeal. N.C.R. App. P. 3(d). We also note that the trial courts executed and entered an order bearing the civil case caption and file number on 31 May 2006, which contains findings of fact, conclusions of law, and decretal provisions. The trial court also executed two orders on the date of the hearing, 22 May 2006, both entered on 25 May 2006, each with the criminal caption and file number, which contain no findings of fact or conclusions of law but only order that the defendant was found in indirect criminal contempt and state the sentence imposed. In fact, the sentences imposed in the two previously executed orders in the criminal file numbers differ from the sentence imposed in the 31 May 2006 order in the civil file number, apparently upon defendant's request.

However, because defendant's notice of appeal was sufficiently clear to give notice to the State and to this Court exactly what was being appealed, and because any confusion as to the file numbers and captions upon the various orders was not created by defendant, we use our discretionary power under N.C.R. App. P. 2 to review this case on its merits in order to prevent manifest injustice to defendant.

trial court erred when it entered its orders finding defendant in indirect criminal contempt and therefore vacate those orders.

I. Background

In or about 2003, defendant had a romantic relationship with an employee of Asbury Automotive North Carolina, L.L.C, an automobile retailer operating dealerships under the name of Crown ("Asbury" or "Crown"). After the romantic relationship ended, defendant began to make numerous unwanted phone calls to the employees and officers of plaintiff. Plaintiff filed a verified complaint against defendant on 7 February 2006. The complaint alleged that defendant's phone calls were disruptive, interfered with plaintiff's business, and caused plaintiff's employees to fear for their safety. The complaint sought injunctive relief and damages for trespass to chattels. Also on 7 February 2006, plaintiff moved for a temporary restraining order (TRO) to forbid defendant from having any contact with, *inter alia*, plaintiff's employees. The trial court entered a TRO on 7 February 2006, enjoining plaintiff from:

> a. having any contact whatsoever with any employee of Plaintiff, which includes all employees of automobile dealerships operating under the "Crown" name, including but not limited to contact by telephone, cellular telephone, facsimile transmittal, email, voice mail, or regular mail;
>
> b. having any contact whatsoever with any customer, manufacturer, or other business associate of Plaintiff concerning Defendant's relationship with and opinion of Matthew Perry, including by [sic] not limited to contact by telephone, cellular telephone, facsimile transmittal, email, voice mail, or regular mail[.]

On 15 February 2006, plaintiff moved for a show cause order, attaching transcriptions of defendant's voice messages to plaintiff's employees left on 12 February 2006 (three messages) and 13 February 2006. The motion prayed that defendant be held in criminal contempt for willful refusal to comply with the TRO.

The trial court commenced a hearing on the show cause motion straightaway. The trial court entered a show cause order[2] during the hearing, but delayed ruling on criminal contempt, extending the TRO by order entered 24 February 2006, and continuing the show cause

2. Defendant was ordered to "show cause why she should not be held in criminal contempt of this Court for her failure to comply with the requirements of the Order granting Temporary Restraining Order date February 7, 2006."

hearing by a second order entered on 24 February 2006 to give defendant an opportunity to find legal counsel for the underlying civil lawsuit. In the continuance order, the trial court also found defendant indigent and appointed counsel for the purpose of her defense in the show cause hearing.

On 14 March 2006, plaintiff moved for a second show cause order, alleging that plaintiff's employees had received "literally hundreds" of hang-up calls and text messages very similar in content to the voice messages attached to the first show cause motion. The trial court again commenced a hearing on the show cause motion straightaway. The trial court entered a show cause order immediately following the hearing, with the same operative language as the 15 February 2006 show cause order. Proceedings were then delayed pending a psychiatric evaluation of defendant, in which she was found competent to stand trial.

On 22 May 2006, a hearing on the two show cause orders was held in Guilford County Superior Court before Judge Vance Bradford Long. Plaintiff presented evidence in the form of audio recordings, transcripts of cell phone text messages and witness testimony to show contact initiated by defendant. Defendant, represented by counsel, relied on a defense of irresistible impulse, a defense which she conceded has not previously been recognized in North Carolina.

At the close of the hearing, the trial court executed an order in each criminal file, but these orders contained no findings of fact or conclusions of law. The order in File No. 06 CRS 24257, regarding the show cause order issued on 7 [sic] February 2006, stated that "**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED** that the defendant is found in **IN-DIRECT CRIMINAL CONTEMPT** and shall serve **30 days** in the Guilford County Jail with credit for 32 days." (Emphasis in original.) The order in File No. 06 CRS 24258, regarding the show cause order issued on 15 [sic] March 2006, stated that "**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED** that the defendant is found in **IN-DIRECT CRIMINAL CONTEMPT** and shall serve **30 days at the expiration of 06CRS 24257** in the Guilford County Jail. No credit shall be assessed." (Emphasis in original.)

In an order entered 31 May 2006, with the civil case caption and file number, the trial court made findings of fact beyond a reasonable doubt, including:

> 9. . . . that *subsequent* to the issuance and service of the February 15, 2006 show-cause order, the Defendant did telephone Mr. Michael Kearney, President of Asbury Automotive North Carolina, leaving a lengthy message on Mr. Kearney's voice mail concerning Mr. Matthew Perry, an employee of Asbury Automotive.
>
> . . . .
>
> 12. That *subsequent* to the issuance of the March 14th show-cause order, the Defendant telephoned the Charlottesville, Virginia, BMW dealership owned by Asbury Automotive, where Mr. Perry is now employed and spoke with a lot attendant who was answering the telephone on this occasion. The Defendant informed the lot attendant that if he did not change his attitude, she would come to Virginia or that she could have his legs broken.
>
> (Emphasis added.)

On the basis of these findings, the trial court found that defendant had violated the TRO and accordingly found defendant in indirect criminal contempt. Defendant appeals.

II. Standard of Review

In contempt proceedings, the trial judge must make findings of fact beyond a reasonable doubt, and enter a written order. N.C. Gen. Stat. § 5A-15(f) (2005). On appellate review of a contempt order, "the trial judge's findings of fact are conclusive . . . when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." *O'Briant v. O'Briant*, 313 N.C. 432, 436-37, 329 S.E.2d 370, 374 (1985).

III. Analysis

[2] On appeal, defendant contends that the contempt orders should be vacated because she did not receive sufficient notice of the allegedly contemptuous actions. She argues, in effect, that evidence of acts which occurred after the show cause order are not competent as a matter of law, and that since the trial court's findings of fact are based only on actions which occurred after each show cause order, those findings should be set aside. She further contends that because there were no findings other than findings based on evidence of acts occurring after the issuance of each show cause order, the trial court's findings of fact do not support its conclusion that

she violated orders of the court and thereby should be found in criminal contempt.

The State responds that defendant received sufficient notice to be heard and defend against the charges. The State also argues that the record contains sufficient evidence to support the trial court's conclusion that defendant violated the terms of the TRO, on the grounds that evidence of events which occur after a show cause order is sufficient to support an adjudication of criminal contempt.

"[C]riminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards." *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373 (vacating a contempt judgment for insufficient notice when the show cause order was not clear about the acts which were deemed contemptuous). Notice and a hearing at which the State bears the burden of proving the alleged criminal acts beyond a reasonable doubt is the bedrock of constitutional due process. *Id.*; *In re B.E.*, 186 N.C. App. ——, ——, 652 S.E.2d 344, —— (2007); *State v. Simon*, 185 N.C. App. 247, 255, 648 S.E.2d 853, 858 (2007). For notice to be constitutionally sufficient, it must afford the defendant the opportunity to prepare an adequate defense. *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373; *State v. Glynn*, 178 N.C. App. 689, 694-95, 632 S.E.2d 551, 555, *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). For indirect criminal contempt[3] proceedings in which a trial court is not allowed to proceed summarily, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice. N.C. Gen. Stat. § 5A-15(a) (2005); *O'Briant*, 313 N.C. at 439-40, 329 S.E.2d at 375-76.

We note first that a 'show cause order,' in a criminal contempt proceeding is something of a misnomer. A show cause order in a *civil* contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official *shifts the burden of proof*

3. Direct criminal contempt:

(1) Is committed within the sight or hearing of a presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court.

. . . .

Any criminal contempt other than direct criminal contempt is indirect criminal contempt . . . .

N.C. Gen. Stat. § 5A-13 (2005).

to the defendant to show why he should not be held in contempt. N.C. Gen. Stat. § 5A-23(a) (2005); *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000); *but see* N.C. Gen. Stat. § 5A-23(a1) (placing the burden of proof on the movant in motions for contempt filed pursuant to N.C. Gen. Stat. § 5A-23(a1)); *State v. Salter*, 29 N.C. App. 372, 374, 224 S.E.2d 247, 249 (1976) ("In hearings to show cause why an injunction ought not to be continued pending final hearing on the merits, the burden of proof is on the [plaintiff], even though traditionally the notice order directs the defendant to show cause why the injunction should not be continued."). To the contrary, a show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State. *Simon*, 185 N.C. App. at 255, 648 S.E.2d at 858.

In correlating the notice requirement with the burden of proof, we agree that "[i]t is an elementary proposition of law, both sound and humane, that a person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed *other crimes* and offenses." *State v. Reineke*, 106 N.E. 52 (Ohio 1914) (emphasis added) (noting that this rule does not exclude evidence of subsequent bad acts for the purpose of showing intent or a common plan); *compare State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984) ("The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. . . . A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense."). While this proposition is apparently so elementary that we found no cases in support of it in North Carolina, we conclude that it is implicit in our cases requiring notice, hearing, and proof beyond a reasonable doubt as constitutional safeguards. *See*, *e.g.*, *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373; *In re B.E.*, 186 N.C. App. ——, ——, 652 S.E.2d 344, —— (2007); *State v. Simon*, 185 N.C. App. 247, 255, 648 S.E.2d 853, 858 (2007).

In its order entered 31 May 2006, the trial court found the following beyond a reasonable doubt:

> 9. . . . that *subsequent* to the issuance and service of the February 15, 2006 show-cause order, the Defendant did telephone Mr. Michael Kearney, President of Asbury Automotive North Carolina, leaving a lengthy message on Mr. Kearney's voice mail

concerning Mr. Matthew Perry, an employee of Asbury Automotive.

. . . .

12. That *subsequent* to the issuance of the March 14th show-cause order, the Defendant telephoned the Charlottesville, Virginia, BMW dealership owned by Asbury Automotive, where Mr. Perry is now employed and spoke with a lot attendant who was answering the telephone on this occasion. The Defendant informed the lot attendant that if he did not change his attitude, she would come to Virginia or that she could have his legs broken.

(Emphasis added.)

The trial court made no other findings of acts which it deemed contemptuous, and adjudged defendant to be in indirect criminal contempt based on these acts alone. The trial court made no findings regarding the acts alleged in the motions for contempt which led to the issuance of each show cause orders but *only* regarding events which occurred after the issuance of the show cause order.

IV. Conclusion

A defendant's constitutional right to notice and a hearing at which the State bears the burden of proving the alleged contemptuous acts beyond a reasonable doubt[4] compels us to hold that findings of fact based solely on acts which occurred after the issuance of the show cause order are insufficient to adjudge the defendant in criminal contempt. Although we recognize that the record in the case *sub judice* is replete with evidence that the defendant did commit the acts as alleged in each show cause motion, the trial court must make the findings of fact beyond a reasonable doubt as to whether the defendant committed these acts. N.C. Gen. Stat. § 5A-15. The findings of fact were not challenged on appeal, and we are not at liberty to make findings of fact for the trial court, *In re Estate of Lunsford*, 160 N.C. App. 125, 132, 585 S.E.2d 245, 250 (2003) ("It is not the role of this Court to consider what the trial court could have found or to make our own findings based on our review of the record."), *rvs'd on other grounds*, 359 N.C. 382, 610 S.E.2d 366 (2005), and we find no precedent or legal authority permitting us to remand for additional findings of fact by

4. We note that our holding does not, as the State contends, bar a party "from putting on *any* evidence of contempt that occurred after the issuance of a show cause order." (Emphasis added.)

the trial court in an indirect criminal contempt matter. "Instead, our review is limited to determining whether the court's actual findings of fact support the conclusion that it reached." 160 N.C. App. at 132, 585 S.E.2d at 250.

We therefore must conclude that the trial court erred when it entered its orders finding defendant in indirect criminal contempt based solely upon acts which occurred after the issuance of the show cause orders. Accordingly, we vacate the criminal contempt orders entered by the trial court.

VACATED.

Chief Judge MARTIN and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA v. HENRY ARTHUR LITTLE

No. COA07-128

(Filed 15 January 2008)

1. Evidence— expert DNA testimony—analysis based on data collection by another expert

The trial court properly allowed an SBI DNA expert to testify in a rape and assault trial where she personally analyzed the data collected by another agent before offering her opinion, and defendant had the opportunity to cross-examine her.

2. Rape— sufficiency of evidence—victim's testimony and DNA evidence

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree rape. Viewed in the light most favorable to the State, the victim's account of the attack, corroborated by DNA evidence, was sufficient.

3. Assault— strangulation—sufficiency of evidence—victim's account and photographs

The trial court properly denied defendant's motion to dismiss a charge of assault by strangulation. The victim's testimony and confirming photographs of cuts and bruises were sufficient.

STATE v. LITTLE

[188 N.C. App. 152 (2008)]

Appeal by defendant from judgment entered 21 September 2006 by Judge Jerry C. Martin in Beaufort County Superior Court. Heard in the Court of Appeals 10 October 2007.

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

Thomas R. Sallenger for defendant.

ELMORE, Judge.

Henry Arthur Little (defendant) was convicted by a jury of first-degree rape and assault by strangulation on 21 September 2006. Defendant now appeals.

The victim, Lorry Paggioli, lived in Beaufort County in June of 2005. She did not have a job or a home, and stayed with friends. She also abused alcohol and crack cocaine. Paggioli stayed with defendant for several weeks prior to 14 June 2005, and the two had consensual sex. On the night of 13 June 2005 and into the morning of 14 June 2005, Paggioli was drinking beer and smoking crack in the trailer of a friend, Mary Hardy. Hardy's boyfriend asked Paggioli to leave, and she went to defendant's trailer in a neighboring trailer park. They drank wine and smoked crack together. Paggioli then returned to Hardy's trailer and Hardy's boyfriend again told her to leave. Paggioli returned to defendant's trailer, and the two drank more wine and smoked more crack together.

Paggioli testified that defendant told her that he wanted to have sex with her, and when she declined, he told her "he wanted some anyway, he was going to get it anyway." She then testified that defendant pushed her down onto his sofa bed, and she fought him, attempting to kick him in the groin and hitting him with a wine bottle. Defendant then took the wine bottle from Paggioli and struck her on the side of the head with it, cutting her. By this point, defendant was in his underwear straddling Paggioli. She yelled for help, and then defendant choked her. She testified, "He had his thumbs—I don't know what this is called right here, but he had his thumbs—he was just choking me. I couldn't—I couldn't breath, and I passed out." After she regained consciousness, she said that she felt that he was overwhelming her. She testified that he penetrated her with his penis and that he did not use a condom. Defendant had a "gold-colored knife" in his hand at some point during the attack. She testified that she was "[a]fraid of being killed," and "at that time, I figured my only way of getting out of there alive was to pretend that I enjoyed it." She

explained, "I couldn't fight him anymore. I knew he was stronger than me." When defendant finished, he gave her a basin of water and a washcloth and told Paggioli to wash up and leave. She washed her head and face and left, but forgot her purse.

William Ragland, a Deputy Sheriff with the Beaufort County Sheriff's Office, responded to a 911 call that Paggioli asked a neighbor to make. Paggioli told Deputy Ragland that defendant had hit her and raped her. Deputy Ragland retrieved Paggioli's purse from defendant's trailer. Defendant told Deputy Ragland that Paggioli was already bleeding when she showed up at his trailer and denied having sex with her.

Paggioli was taken to a hospital and a nurse collected a rape kit. Amanda Fox, a special agent with the Forensic Biology Unit of the State Bureau of Investigation (SBI) Crime Lab testified that the DNA from Paggioli's rape kit was consistent with defendant's DNA. A computational biologist testified that it was 35 trillion times more likely that the DNA matched defendant than any other person.

Photographs of Paggioli taken on 14 June 2005 and 16 June 2005 showed evidence of marks, abrasions, and bruises on Paggioli's neck. She testified that the marks were the result of being choked by defendant.

[1] Defendant first argues that Special Agent Fox's testimony constituted inadmissible hearsay and violated the Confrontation Clause. We disagree.

Fox had been a forensic DNA analyst for four and a half years at the time she testified. She was accepted by the court, without objection by defendant, as an expert in forensic biology. She testified in place of her supervisor, Chris Parker, who was out of state and unable to testify. Parker analyzed the DNA from Paggioli's rape kit, but Fox testified in his place as to the findings. She stated that she also performed "a technical review," meaning that she "looked at all the technical aspects of the case, [and] reviewed them, to determine whether or not they were correct." She confirmed that she could review Parker's work, check the technical aspects of it, and verify his findings without conducting a new analysis of the sample. Defendant objected to Fox's testimony and, after *voir dire*, the judge overruled the objection, saying "the objections raised apply more to the weight and credence and credibility that might be given to the testimony" than its admissibility.

Defendant relies on our opinion in *State v. Cao*, in which we held that a police officer reading into evidence a laboratory report identifying a substance as cocaine might have violated the defendant's Sixth Amendment right because the lab technician who prepared the report was not available for cross-examination. 175 N.C. App. 434, 436, 438, 440, 626 S.E.2d 301, 302, 304-05 (2006). Defendant argues that Fox's testimony is analogous to the police officer's in *Cao* because Fox did not conduct the DNA analysis herself and instead sought to introduce analysis performed by Parker, who was not available to testify. In *Cao*, we stated

> that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst. While cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example.

Id. at 440, 626 S.E.2d at 305. There was insufficient documentation of the lab procedures in *Cao* for this Court to determine whether the procedure was mechanical or not, and we ultimately held that even if the officer's testimony violated the defendant's Sixth Amendment right, admitting the testimony was harmless error. *Id.* at 440-41, 626 S.E.2d at 305.

We distinguish the case at hand from *Cao*. On cross-examination, Fox stated that DNA analysts use an instrument to get their data, but then the analysts review each area of data, and use their training and experience to determine whether they agree with the data generated by the instrument. The instrument that generates the data is a capillary electrophoresis system, which separates DNA based on size and charge. A computer program captures the images of the DNA and assigns a numerical value for particular areas. The computer generates a printout "similar to an EKG." She also stated on cross-examination that "[t]he only thing that [DNA analysts] enter into the system is the item number," which is used to track the samples. It appears that Parker conducted the electrophoresis and analyzed the results. However, Fox then conducted her own analysis of the electrophoresis results and reached the same conclusion that Parker did. Fox completed the subjective portion of the analysis and defendant had an opportunity, of which he availed himself, to cross-examine Fox about her analysis.

The facts in this case are similar to those in our opinion in *State v. Shelly*, in which an SBI senior chemist, Agent McClelland, offered expert testimony about gunshot residue. 176 N.C. App. 575, 589, 627 S.E.2d 287 at 298-99 (2006). Another agent had conducted the tests on the residue, but that agent retired before trial and was therefore unavailable to testify. *Id.*, 627 S.E.2d at 298. We noted that it is "well-settled law that an expert may base an opinion on tests performed by others in the field . . . ." *Id.* at 591, 627 S.E.2d at 299-300. Agent McClelland testified that he had "personally examined the printout from the equipment used by [the other agent] to conduct the testing," before comparing his findings with the other agent's and then signing off on the report. *Id.* at 590, 627 S.E.2d at 299. This Court held that Agent McClelland's testimony did not violate the defendant's Sixth Amendment right to confrontation. *Id.* at 591, 627 S.E.2d at 300.

Here, as in *Shelly*, the testifying expert personally examined and analyzed data collected by another agent before offering her opinion on the application of those data to the case. Defendant had an opportunity to cross-examine the expert. Unlike the officer in *Cao*, Special Agent Fox was qualified as an expert in the area of her testimony and had also personally analyzed the data on which her conclusions were founded. In *Cao*, we noted that "the key focus of the Confrontation Clause is ensuring the availability of cross-examination," *Cao*, 175 N.C. App. at 439, 626 S.E.2d at 304, and here such cross-examination was available. Accordingly, we hold that defendant's first argument is without merit.

[2] Defendant next argues that the trial court erred by denying defendant's motion to dismiss the charges of first-degree rape and assault by strangulation. Defendant timely moved for dismissal at the close of the State's evidence, and again at the close of all evidence. "[T]he 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. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Dexter*, 186 N.C. App. 587, 595, 651 S.E.2d 900, ––– (2007) (citation and quotations omitted). When reviewing a denial of a motion to dismiss, "we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case." *Id.* at 595, 651 S.E.2d at ––– (citation and quotations omitted). Defendant argues that the State failed to produce substantial evidence of each essential element of the offenses.

The elements of first-degree rape are defined by N.C. Gen. Stat. § 14-27.2(a). The relevant elements[1] are (1) that a "person engages in vaginal intercourse," (2) "[w]ith another person by force and against the will of the other person," and (3) "[e]mploys or displays a dangerous or deadly weapon," *or* "[i]nflicts serious personal injury upon the victim . . . ." N.C. Gen. Stat. § 14-27.2(a) (2005). Because we view the evidence in the light most favorable to the State, we accept Paggioli's account of the attack. Paggioli testified that defendant entered her vagina with his penis; that he forced himself upon her; that she fought him and made known to him that she did not want to engage in sexual intercourse with him; that defendant hit her with a bottle, brandished a knife, and choked her to unconsciousness with his hands; and that Paggioli suffered bruises and cuts as a result of defendant's actions. Paggioli's testimony was corroborated by expert testimony that defendant's DNA was present in Paggioli's vagina at the time the rape kit was collected. Accordingly, we hold that the trial court did not err by denying defendant's motion to dismiss because the State presented sufficient evidence of each essential element of first-degree rape.

[3] The elements of assault by strangulation are defined by N.C. Gen. Stat. § 14-32.4(b): (1) an assault and (2) infliction of "physical injury by strangulation." N.C. Gen. Stat. § 14-32.4(b) (2005). "Strangulation" is not defined in the statute, but wrapping one's hands around another's throat and applying pressure until the person loses consciousness certainly falls well within the boundaries of the term. Paggioli testified that defendant attacked her and that she feared for her life, which is ample evidence of an assault. Paggioli testified that she received cuts and bruises on her neck as a result of being strangled. The cuts and bruises were confirmed by photographic evidence. Accordingly, we hold that the State presented sufficient evidence of each essential element of assault by strangulation and the trial court did not err by denying defendant's motion to dismiss.

Defendant received a trial free from error.

No error.

Judges McGEE and TYSON concur.

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1. First-degree rape contains other elements when the victim is a child. N.C. Gen. Stat. § 14-27.2(a) (2005).

DUNCAN W. PERRY AND WIFE, MARY L. LAVERY-PERRY, PLAINTIFFS v. BAXLEY DEVELOPMENT, INC., DEFENDANT

No. COA07-57

(Filed 15 January 2008)

1. Appeal and Error— notice of appeal—denial of motions to set aside—underlying order not included

The appellate court had jurisdiction to review motions to set aside a preliminary injunction but not the preliminary injunction itself where defendant's notice of appeal was only to the order denying the motions.

2. Appeal and Error— appealability—preliminary injunction without notice—substantial right affected

A preliminary injunction entered without notice, as here, affects a substantial right and is immediately appealable.

3. Injunction— preliminary—motion to set aside—notice not sufficient

The trial court abused its discretion by denying defendant's motion to set aside a preliminary injunction when defendant had no notice of the hearing in which the preliminary injunction was imposed. Defendant was not served with notice of the hearing until the day after, and although the attorney served for defendant was the attorney of record for defendant in an unrelated matter, he never made an appearance or representations or filed pleadings for defendant in this case. The fact that the clerk of court stated that the attorney was aware of the hearing is insufficient to satisfy the notice requirement.

Appeal by defendant from an order entered 29 June 2006 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 11 September 2007.

Block, Crouch, Keeter, Behm & Sayed, L.L.P., by Christopher K. Behm, for plaintiff-appellees.

Fletcher, Ray & Satterfield, L.L.P., by George L. Fletcher and Elizabeth Wright Embrey, for defendant-appellant.

HUNTER, Judge.

Baxley Development, Inc. ("defendant") appeals the denial of its motion to set aside a preliminary injunction obtained by Duncan W.

Perry and Mary L. Lavery-Perry ("plaintiffs"). After careful consideration, we reverse the trial court and remand with instructions to set aside the preliminary injunction.

On 25 January 2006, plaintiffs filed a notice of *lis pendens* and a complaint for specific performance of an offer to purchase real property located in Brunswick County, North Carolina. The complaint included a motion for a preliminary injunction to enjoin defendant, the prospective seller, from occupying, leasing, or committing waste with regard to the subject property and residence.

On 27 January 2006, plaintiffs' counsel, Wesley S. Jones ("Mr. Jones"), filed a notice of hearing on the motion for a preliminary injunction for 6 February 2006. Mr. Jones certified service of the notice of hearing upon Gary S. Lawrence ("Mr. Lawrence"), whom Mr. Jones referred to as "counsel for the opposing parties," by mail and fax on 26 January 2006. On 2 February 2006, Mr. Jones served the summons and complaint upon defendant via United Parcel Service. Defendant was also served with the summons and complaint via certified mail on 7 February 2006—one day after the hearing. There is no evidence in the record that defendant ever received notice of the hearing. The Brunswick County Sheriff did not serve Mr. Lawrence until 1 March 2006.

At the 6 February 2006 hearing, neither defendant nor Mr. Lawrence was present. The clerk of court stated that Mr. Lawrence knew he was to be present. Mr. Jones told the court that he had served defendant via United Parcel Service the week before. The trial court, on 15 February 2006, granted plaintiffs' motion for a preliminary injunction.

Defendant filed a motion to set aside the preliminary injunction on 23 February 2006 pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. That motion was denied by the trial court on 29 June 2006.

Defendant presents the following issues for this Court's review: (1) whether this Court has jurisdiction to review the preliminary injunction issued against defendant and the denial of its motions to set aside that order; and (2) whether the trial court erred in denying defendant's motions to set aside the preliminary injunction where defendant did not receive notice of the motion for a preliminary injunction before it was issued. For the following reasons, we find that this Court does not have jurisdiction to review the trial court's

entry of the preliminary injunction but does have jurisdiction to review its denial of the motion to set aside the same. Since defendant did not receive proper notice of the hearing, we reverse the decision of the trial court.

I.

[1] Defendant argues that this Court has jurisdiction to review the preliminary injunction entered against it on 15 February 2006 and the denial of its motions to set aside that order. We only find jurisdiction to review defendant's motions to set aside the order.

Defendant's notice of appeal only provided notice of appeal of the 29 June 2006 order, in which its motions to set aside the preliminary injunction were denied.[1] Defendant did not give notice of appeal on the preliminary injunction entered on 15 February 2006. Rule 3 of the North Carolina Rules of Appellate Procedure "requires that a notice of appeal designate the judgment or order from which appeal is taken; this Court is not vested with jurisdiction unless the requirements of this rule are satisfied." *Boger v. Gatton*, 123 N.C. App. 635, 637, 473 S.E.2d 672, 675 (1996) (citing *Smith v. Insurance Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979)). Accordingly, we limit our review to the trial court's denial of defendant's motion to set aside the preliminary injunction. *See Brewer v. Spivey*, 108 N.C. App. 174, 176, 423 S.E.2d 95, 96 (1992) (no review of underlying judgment where the defendants only appealed the trial court's denial of their motion for judgment notwithstanding the verdict, but the denial of the motion reviewable).

[2] The denial of a motion to set aside a preliminary injunction is not a final judgment; accordingly it is an interlocutory order. *See Helbein v. Southern Metals Co.*, 119 N.C. App. 431, 458 S.E.2d 518 (1995) (reviewing the denial of a motion to set aside a preliminary injunction). As a general rule, no appeal may be taken from interlocutory orders. *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). An appeal may be taken, however, when an interlocutory order affects a substantial right of the appellant. N.C. Gen. Stat. § 7A-27(d)(1) (2005). In this case, defendant argues that the substantial right affected is the right to receive notice of a hearing before a preliminary injunction is granted.

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1. The notice of appeal provides that:

> Defendant, Baxley Development, Inc., hereby gives notice of its appeal to the Court of Appeals of North Carolina, from the Order entered on June 29, 2006, in the Superior Court of Brunswick County wherein Superior Court Judge, Ola M. Lewis, denied Defendant's Motion to Set Aside Preliminary Injunction.

"The facts and circumstances of each case and the procedural context of the orders appealed from are the determinative factors in deciding whether a 'substantial right' is affected." *Schneider v. Brunk*, 72 N.C. App. 560, 562, 324 S.E.2d 922, 923 (1985) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978)). Under the circumstances presented here, we find lack of notice to be a substantial right.

First, under Rule 65(a) of the North Carolina Rules of Civil Procedure, the notice requirement is mandatory before a preliminary injunction can be issued. N.C. Gen. Stat. § 1A-1, Rule 65(a) (2005). Second, this Court has stated that a preliminary injunction " 'can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf[.]' " *Lambe v. Smith*, 11 N.C. App. 580, 582, 181 S.E.2d 783, 784 (1971) (quoting 7 Moore's Federal Practice § 65.05 (2d ed. 1970)). Accordingly, we hold that a preliminary injunction entered without notice affects a "substantial right" and is immediately appealable to this Court. *See Harris County, TX v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 326 (5th Cir. 1999) (the notice requirement in Federal Rule of Civil Procedure 65(a)(1) is mandatory and failure to provide adequate notice requires that the injunction be vacated) (citing *Parker v. Ryan*, 960 F.2d 543, 544 (5th Cir. 1992)). To hold otherwise would eviscerate the legislative mandate that parties receive notice of a preliminary injunction as the notice requirement affords the "parties a full and fair investigation and determination according to strict legal proofs and the principles of equity." *Jolliff v. Winslow*, 24 N.C. App. 107, 109, 210 S.E.2d 221, 222 (1974). We now turn to the merits of defendant's appeal.

II.

[3] In this case, defendant moved under Rule 59(e) and Rule 60(b) to set aside the preliminary injunction. The trial court denied those motions. A motion under Rule 59 "is 'addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal.' " *Hamlin v. Austin*, 49 N.C. App. 196, 197, 270 S.E.2d 558, 558 (1980) (citation omitted). Similarly, "relief under Rule 60(b) is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion." *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978). Rule 60(b), however, only applies to final judgments, not interlocutory appeals. *Rupe v. Hucks-Follis*, 170 N.C. App. 188, 191, 611 S.E.2d 867, 869 (2005). Accordingly, we limit our review to the trial court's denial of defendant's Rule 59 motion.

The trial court granted plaintiffs' motion for a preliminary injunction pursuant to Rule 65. Preliminary injunctions are interlocutory in nature and restrain a party from engaging in certain conduct until there has been a trial on the merits. *Setzer v. Annas*, 286 N.C. 534, 536-37, 212 S.E.2d 154, 156 (1975). Preliminary injunctions, however, cannot be granted "without notice to the adverse party." N.C. Gen. Stat. § 1A-1, Rule 65(a) ("[n]o preliminary injunction shall be issued without notice to the adverse party"). Defendant argues that the trial court abused its discretion by failing to set aside the preliminary injunction because defendant did not receive proper notice of the hearing on the issuance of the preliminary injunction. We agree.

In order to properly serve defendant with notice of the hearing on the motion for preliminary injunction, the service must be made upon either defendant or its attorney of record. N.C. Gen. Stat. § 1A-1, Rule 5(a)-(b) (2005). Plaintiffs make no argument that service upon defendant was proper as to the hearing because defendant was not served with such notice until one day after the hearing. Instead, plaintiffs argue that service upon defendant's purported attorney was sufficient. Thus, this Court must determine whether Mr. Lawrence was the "attorney of record" when plaintiff faxed the notice of the hearing to Mr. Lawrence on 26 January 2006. *See Griffith v. Griffith*, 38 N.C. App. 25, 29, 247 S.E.2d 30, 33 (service upon the attorney of record is service on the party), *disc. review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).

In order to become the "attorney of record," the attorney must make at least some representation of the client before the trial court, institute an action on behalf of the client, or make responsive pleadings. *See id.* at 28-29, 247 S.E.2d at 32-33. In the instant case, Mr. Lawrence never made any such appearances, representations, or filed any responsive pleadings on behalf of defendant. Mr. Lawrence was an attorney of record for defendant in an unrelated matter that plaintiffs' counsel was defending. However, that is immaterial, as Mr. Lawrence was not the attorney of record in this action. Moreover, the fact that the clerk for the trial court stated that Mr. Lawrence was aware of the hearing, absent some supporting documentation in the record indicating that Mr. Lawrence was the "attorney of record," is insufficient to satisfy the notice requirement. Accordingly, defendant never received notice as required under Rule 65 and the failure to set aside the preliminary injunction granted under that rule constitutes an abuse of discretion. We thus reverse and remand to the trial court with instructions to set aside the preliminary injunction.

III.

In summary, we hold that the trial court abused its discretion in denying defendant's motion to set aside the preliminary injunction because defendant had no notice of the hearing in which the preliminary injunction was imposed. Accordingly, we reverse and remand to the trial court with instructions to set aside the preliminary injunction.

Reversed and remanded.

Judges WYNN and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 JANUARY 2008

BOWLIN v. CORNERSTONE REALTY TR. No. 07-224	Ind. Comm. (I.C. 407143)	Affirmed
BROWN v. BROWN No. 06-682	Mecklenburg (03CVD3161)	Affirmed in part; and remanded in part
BURNETTE v. CITY OF GOLDSBORO No. 06-1672	Wayne (05CVS1992)	Affirmed
CARROLL v. PERRY No. 07-76	Nash (06CVD469)	Affirmed
CARVER v. CARVER No. 07-263	Person (06CVS384)	Affirmed
DEP'T OF TRANSP. v. JAMESTOWN VILL. ASSOCS., L.L.C. No. 07-381	Guilford (05CVS4161)	Dismissed and remanded
ENGLISH v. NIXON No. 07-388	Mecklenburg (01CVD218)	Vacated and remanded
FAIRVIEW DEVELOPERS, INC. v. MILLER No. 07-439	Union (04CVS1916)	Dismissed
GATLIN v. GATLIN No. 06-858	Pasquotank (01CVD17)	Reversed
GATLIN v. GATLIN No. 06-859	Pasquotank (01CVD17)	Affirmed in part; reversed in part
GROVE v. BAR CONSTR. CO. No. 06-1412	Ind. Comm. (I.C. 278724)	Affirmed in part, remanded in part
HONEYCUTT v. HONEYCUTT No. 07-29	Wake (05CVD14562)	Affirmed
IN RE D.C.H. No. 07-1008	Randolph (06JT94)	Dismissed
IN RE D.W. No. 07-948	Wake (06JT31)	Affirmed
IN RE J.D.W. No. 07-1010	Nash (05JA173)	Affirmed
IN RE J.F. No. 07-998	Mecklenburg (07J128)	Affirmed

IN RE J.J. No. 07-1042	Durham (04J249)	Affirmed
IN RE J.M. No. 07-1056	Cumberland (04JT522)	Affirmed
IN RE J.S.R. No. 07-992	Orange (05JA111)	Reversed and remanded
IN RE J.W.H. No. 07-1126	Johnston (07JT36)	Affirmed
IN RE M.K.B. No. 07-1044	Mecklenburg (06JT449)	Affirmed
IN RE M.S.C. No. 07-1058	Gaston (02JT25)	Reversed
IN RE R.L.M. No. 07-822	Gaston (06JT359)	Affirmed
IN RE S.L.E. No. 07-560	Buncombe (02CVD2235) (06J139)	Vacated in part
IN RE S.M.F. & J.M.F. No. 07-982	Randolph (05JT88-89)	Affirmed
IN RE S.W. No. 07-910	Buncombe (03JA245)	Vacated
KELLEY v. WAKE CTY. SHERIFF'S DEP'T No. 06-1127	Ind. Comm. (I.C. 190804)	Affirmed
KEYZER v. AMERLINK, LTD. No. 06-1675	Nash (02CVS2462)	Affirmed
LAWSON v. WHITE No. 07-296	Sampson (05CVS964)	Dismissed
MASON v. FREEMAN No. 07-17	Mecklenburg (04CVD2056)	Affirmed in part and remanded in part
McCARVER v. HUNTER MOTORS, INC. No. 07-346	Ind. Comm. (I.C. 397085)	Affirmed
ODOM v. CLARK No. 07-775	Mecklenburg (05CVS18159)	Dismissed
ROYAL v. PATE No. 07-529	Lenoir (05CVS502)	Dismissed

SAMPSON v. PILKINGTON N. AM., INC. No. 07-353	Ind. Comm. (I.C. 132597)	Appeal dismissed
SHEPHERD v. NATIONAL FED'N OF INDEP. BUSINESSES No. 07-27	Ind. Comm. (I.C. 357500)	Affirmed
STARK v. RATASHARA-STARK No. 07-665	Stokes (02CVD733)	Affirmed
STATE v. ARREOLA No. 07-538	Orange (05CRS51615) (06CRS1246)	Affirmed
STATE v. BERRY No. 07-450	Washington (05CRS50554-55)	No error
STATE v. BULLOCK No. 07-559	Wilson (06CRS52945)	Vacated
STATE v. CAUDILL No. 07-96	Cabarrus (04CRS13569-73)	No error
STATE v. COCHRANE No. 07-394	Caldwell (03CRS2327)	No error
STATE v. COLE No. 06-1595	Guilford (03CRS99364) (03CRS24682)	Remanded for a new sentencing hearing
STATE v. CRAIG No. 06-1061	Mecklenburg (02CRS204851) (05CRS48516-17)	Vacated in part; no prejudicial error in part
STATE v. DICKERSON No. 07-14	Forsyth (03CRS58418) (03CRS58019)	No error
STATE v. FERGUSON No. 07-667	Alamance (06CRS21895) (06CRS50782) (06CRS51384-85)	Affirmed
STATE v. GRAVERAN No. 07-379	Harnett (04CRS51252-53)	No error
STATE v. GREEN No. 07-722	Columbus (04CRS50337-38) (04CRS50561) (04CRS50594) (04CRS50967)	Dismissed
STATE v. HAGEN No. 07-433	Robeson (02CRS55646-47)	No error; remanded to correct clerical error

STATE v. HANTON No. 07-313	Cleveland (98CRS8537)	Affirmed in part; no error in part
STATE v. HARRISON No. 07-756	Forsyth (02CRS50265) (03CRS58786)	Vacated
STATE v. HOLT No. 07-435	Mecklenburg (04CRS228184-86) (04CRS228188) (04CRS228189-92)	No error
STATE v. JACOBS No. 06-1652	New Hanover (05CRS14256) (05CRS53291) (04CRS64856)	Jacobs appeal: No error in part, dismissed in part and dismissed in part without prejudice. Criego Appeal: No error
STATE v. JOHNSON No. 07-915	Cumberland (05CRS70520)	Affirmed
STATE v. JORDAN No. 07-484	Orange (05CRS8513)	No prejudicial error
STATE v. KELLEY No. 07-481	Guilford (03CRS107419)	No error
STATE v. LASH No. 07-920	Guilford (06CRS72598)	No error
STATE v. MAI No. 07-691	Mecklenburg (05CRS220759-60)	Dismissed
STATE v. MINTZ No. 07-167	New Hanover (05CRS51687)	No error
STATE v. QUIROZ No. 07-585	Guilford (05CRS24535) (05CRS82028)	No error
STATE v. ROSS No. 07-358	Wake (05CRS117332) (05CRS122348)	No error
STATE v. SCRIVEN No. 07-797	Hoke (06CRS50067-69) (06CRS50073)	No error
STATE v. STOKES No. 07-110	Wake (04CRS115562)	No error
STATE v. THOMPSON No. 06-1604	Guilford (92CRS69514) (92CRS20763)	Affirmed

WHITLEY v. WILSON WOODWORKS No. 07-758	Ind. Comm. (I.C. 428287)	Affirmed
WILLIAMSON v. WOODARD FUNERAL HOME, INC. No. 07-182	Guilford (05CVS10071)	Affirmed

STATE OF NORTH CAROLINA v. KENNETH WAYNE MAREADY

No. COA07-171

(Filed 15 January 2008)

1. Search and Seizure— investigatory stop—anonymous tipster—lack of reasonable suspicion—fruit of poisonous tree

Deputies did not have a reasonable suspicion of criminal activity to conduct an investigatory stop of a vehicle driven by defendant, and all evidence and the testimony derived from the stop and related to defendant leaving the stop must be suppressed as fruits of unlawful conduct by the deputies, where (1) a minivan driver told the deputies that they might want to stop defendant's car because he was driving erratically and was running through stoplights and stop signs; (2) the minivan driver cannot be classified as a citizen informant because she was not named or identified; (3) the confidential and reliable informant standard could not be used because there was no indication that the minivan driver had previously given accurate information, that her statement was against penal interest, or that there was any other indicia of reliability; (4) the anonymous tip standard must thus be applied, and the deputies' investigation did not corroborate the tip but actually discredited it in that they testified that they did not observe defendant driving in an erratic or illegal manner when they followed his car before stopping it; and (5) the informant's tip thus did not provide the deputies with reasonable suspicion necessary to stop defendant.

2. Evidence— prior crimes or bad acts—intent inferred from bare fact of prior convictions

Although the trial court did not err or commit plain error by admitting into evidence the bare fact of defendant's prior convictions and by instructing the jury that this evidence could be used to prove malice or intent as to the charge of second-degree murder, the trial court committed plain error and defendant is entitled to a new trial for the remaining charges including assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, double assault with a deadly weapon, driving while license revoked, and misdemeanor larceny, because: (1) the trial court's erroneous instruction allowed the jury to infer the intent requirement of these crimes from the bare fact of defendant's prior convictions; and (2) the error had a probable impact on the jury's verdicts of guilty.

3. Evidence— prior crimes or bad acts—remoteness in time—beyond sixteen years

The trial court committed plain error by admitting defendant's prior convictions including his entire driving record, based on remoteness in time, and defendant is entitled to a new trial on the charge of second-degree murder, because: (1) our Court of Appeals has previously held in *Miller*, 142 N.C. App. 435 (2001), that a defendant's prior driving convictions dating as far back as sixteen years could be used to establish defendant acted with malice when he hit decedent while driving under the influence of alcohol; (2) although defendant had four convictions for driving while impaired within the sixteen years prior to the date of the offenses in the present case, the trial court allowed introduction of several other convictions that were too remote in time; (3) the evidence was of a fundamental nature and had a probable impact on the jury's finding of guilt; and (4) the trial court allowed the foregoing evidence to establish malice for the charge of second-degree murder.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 24 April 2006 by Judge Abraham P. Jones in Superior Court, Durham County. Heard in the Court of Appeals 19 September 2007.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant-Appellant.

McGEE, Judge.

Kenneth Wayne Maready (Defendant) was convicted of second-degree murder, assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, driving while impaired, two counts of assault with a deadly weapon, driving while license revoked, misdemeanor larceny, and reckless driving to endanger. The jury also found that Defendant had attained the status of habitual felon and found, as an aggravating factor, that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person[.]" The trial court sentenced Defendant to a term of 270 months to 333 months for second-degree

murder, 150 months to 189 months for assault with a deadly weapon inflicting serious injury, 150 months to 189 months for felony fleeing/eluding arrest with a motor vehicle, 24 months for driving while impaired, 150 days for each count of assault with a deadly weapon, 120 days for driving while license revoked, 120 days for misdemeanor larceny, and 60 days for reckless driving to endanger.

Prior to trial, Defendant filed a motion to suppress. Defendant sought to suppress "all testimony by any State's witnesses as to the initial stop of . . . Defendant's vehicle based upon the lack of reasonable suspicion that . . . Defendant had committed a criminal offense."

At trial, Deputy Morial Whitaker (Deputy Whitaker) testified that he and Deputy Norman Perry (Deputy Perry) (collectively, the deputies) were on patrol on 12 February 2005. The deputies passed a minivan that was driving slowly and had its flashers illuminated. The deputies also saw a silver Honda Civic (the Honda) driving behind the minivan. The minivan stopped and the Honda also stopped. When the two vehicles stopped, an apparently intoxicated pedestrian, whom the deputies had been watching, got into the passenger side of the Honda. The Honda then pulled around the minivan and continued driving. Deputy Whitaker testified that Deputy Perry drove the patrol vehicle alongside the minivan and that Deputy Whitaker talked with the female driver of the minivan. Defendant objected to this testimony, and the trial court held a hearing outside the presence of the jury on Defendant's objection and motion to suppress.

Deputy Whitaker testified during the *voir dire* hearing that the female driver of the minivan pointed at the Honda and told the deputies that they might "want to stop [the Honda]. The driver is driving erratic[ally], driving a little crazy, running through stoplights and stop signs." Deputy Whitaker testified that he and Deputy Perry then stopped the Honda for investigatory purposes. Deputy Whitaker testified in further detail about the circumstances leading to the stop of the Honda. After Deputy Whitaker completed his *voir dire* testimony, the trial court overruled Defendant's objection. The trial court also entered a written order on 26 April 2006 denying Defendant's motion to suppress.

Deputy Whitaker continued his testimony before the jury. He testified that after the female driver of the minivan told the deputies that they might want to stop the Honda, the deputies caught up with the Honda, pulled behind it, and activated the blue lights of their patrol vehicle. The driver of the Honda pulled to the right side of

the road and stopped. The driver and the passenger got out of the Honda and started walking towards the deputies. The deputies ordered both of them to get back in the Honda, and they complied. The driver of the Honda, whom Deputy Whitaker later identified as Defendant, again got out of the Honda and started walking towards the deputies. The deputies ordered Defendant to get back in the Honda, and Defendant complied.

Deputy Whitaker testified that he approached the Honda and smelled a strong odor of alcohol, and that Defendant was "very lethargic, fumbling with his wallet to get his ID out." Deputy Whitaker asked Defendant if Defendant had been drinking, and Defendant replied "yes, I have been drinking." Deputy Whitaker then asked Defendant to step out of the Honda, but Defendant refused. The deputies then attempted to extract Defendant from the Honda, but Defendant said he was "not going back to the penitentiary," and put the Honda into gear and sped off.

Deputy Whitaker testified that he and Deputy Perry immediately ran back to their patrol vehicle and began following the Honda. Deputy Whitaker testified that as the deputies rounded a curve approximately .7 of a mile down the road, he "saw a lot of smoke and debris. [He] saw the Honda flipping continuously. [He] saw a red pickup truck also flipping at the same time." Deputy Whitaker saw the passenger of the Honda, who had been ejected, lying "face down" in the road.

Deputy Whitaker testified that he saw a little girl in the passenger seat of the red pickup truck, and a female, who appeared to be deceased, lying on the side of the road. Deputy Perry testified that he saw a woman standing beside another vehicle that had been involved in the wreck, and that the woman was "okay."

The State introduced, without objection, Exhibit 64, Defendant's certified driving record from the Division of Motor Vehicles. Kenneth Cassidy (Mr. Cassidy), an assistant supervisor with the Division of Motor Vehicles License and Theft Bureau, testified that the driving record showed Defendant had six prior convictions for driving while impaired. The State also introduced, over Defendant's objection, Exhibits 66 through 69, which were certified copies of court records of several of Defendant's prior convictions. Mr. Cassidy further testified that four of the six convictions listed in Exhibit 64 also appeared in Exhibits 66 through 69. Defendant appeals.

I.

[1] Defendant argues the trial court erred by denying his motion to suppress. Specifically, Defendant contends that a portion of finding of fact number eight was not supported by the evidence, and that the trial court erred by concluding that the deputies had reasonable suspicion to stop Defendant's vehicle.

> Our standard of review of an order granting or denying a motion to suppress is "strictly limited to determining whether the trial [court'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 [trial court's] ultimate conclusions of law."

State v. Ortez, 178 N.C. App. 236, 243-44, 631 S.E.2d 188, 194-95 (2006) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *disc. review denied*, 361 N.C. 434, 649 S.E.2d 642 (2007). "However, the trial court's conclusions of law are fully reviewable on appeal. At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. The trial court must make findings of fact resolving any material conflict in the evidence." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (citations omitted).

In the present case, the trial court made the following findings of fact related to Defendant's motion to suppress:

> 4. Deputy Whitaker testified that he, along with Deputy Norman Perry also with the Durham County Sheriff's Office, observed an intoxicated person walking along Sherron Road in Durham County around 3:00 p.m. on Saturday, February 12, 2005. These deputies observed this person stagger out to the roadway, at which time they pulled their vehicle out onto Sherron Road to investigate his status and to possibly assist him in getting out of the way of any oncoming traffic.
>
> 5. As they were approaching this intoxicated person, the deputies observed a minivan being driven at a slow pace in the opposite direction with its hazard lights on. Behind the minivan was a silver Honda Civic motor vehicle that stopped when it reached the location of the intoxicated person.
>
> 6. The deputies then saw the intoxicated person run across the roadway and get into the stopped Honda Civic.

7. The deputies passed by these vehicles from the other direction in their marked patrol car and made a U-turn to come back to these vehicles from behind. As they approached the vehicles from behind, the Honda Civic passed the now stopped minivan and continued in the same direction on Sherron Road.

8. The deputies pulled up alongside the minivan with the activated hazard lights and the female driver of this vehicle started to wave at them. This female driver appeared to be distraught and told the deputies that they needed to check on the driver of the silver car that just passed her because he may be drunk and was driving crazy, including running stop signs and stop lights. This driver was also pointing in the direction of the silver Honda Civic just seen by the deputies.

9. The deputies went up Sherron Road and found the silver Honda Civic stopped at the stop light at the next major intersection, which was Highway 98, also known as Wake Forest Highway.

10. When the deputies caught up to the Honda Civic they activated their blue lights to conduct an investigative vehicle stop. At that moment the light at the intersection turned green and the Honda Civic proceeded through the intersection and stopped immediately on the other side of that intersection on what now becomes Patterson Road.

11. The Defendant was found to be driving this silver Honda Civic motor vehicle.

The trial court then concluded that the deputies had reasonable suspicion to stop Defendant's vehicle for investigatory purposes.

In finding of fact number eight, the trial court found that the female driver who waved the deputies over "told the deputies that they needed to check on the driver of the silver car that just passed her because he may be drunk[.]" However, Deputy Whitaker testified during the *voir dire* hearing that the female driver "didn't mention that the person . . . was impaired. She didn't say the person was impaired. She said the person was driving erratic[ally]." Accordingly, this finding of fact was not supported by competent evidence and should be disregarded.

We next inquire whether the remaining findings of fact support the trial court's conclusion that the deputies had reasonable suspi-

cion to stop Defendant's vehicle. Resolution of this issue depends upon the test to be applied to the information given by the female driver of the minivan. Defendant argues that the female driver of the minivan was an anonymous tipster while the State argues she was a citizen-informant. For the reasons that follow, we agree with Defendant. We further hold that pursuant to the rules related to an anonymous tipster, the information provided by the female driver of the minivan lacked sufficient indicia of reliability and was not corroborated by further police investigation.

"[B]efore the police can conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion of criminal activity." *McArn*, 159 N.C. App. at 212, 582 S.E.2d at 374. "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "In determining whether reasonable suspicion exists, a court must consider the totality of the circumstances." *McArn*, 159 N.C. App. at 213, 582 S.E.2d at 374.

Citing *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991), the State argues that the female driver of the minivan was a citizen-informant, and that "[w]hen a citizen comes forward with a report of criminal activity, there is no need to subject the information to the same special scrutiny given information supplied by unidentified or 'confidential' informants."

However, *Eason* is clearly distinguishable from the present case. In *Eason*, the defendant argued that the statements of the informant in the search warrant affidavit did not possess "sufficient aspects of reliability and credibility to establish probable cause." *Id.* at 419, 402 S.E.2d at 813. Applying the totality of the circumstances test, our Supreme Court recognized that "the informant who provided the information for the search warrant was Doris T. Hoffman, a 'citizen-informant' whose name appeared in the search warrant affidavit." *Id.* at 419-20, 402 S.E.2d at 814. Our Supreme Court concluded that the fact that the citizen-informant was named and identified "provided the magistrate with enough information to permit him to determine that [Doris T.] Hoffman was reliable." *Id.* at 420, 402 S.E.2d at 814. Moreover, the affidavit stated that Doris T. Hoffman was the defendant's mother and that she gave detailed information that implicated the defendant in the crimes at issue. *Id.* Our Supreme Court held that "there was more than a 'substantial basis' for [the magistrate's] determination that probable cause existed." *Id.*

In the present case, the findings demonstrate that the only information the deputies knew about the female driver of the minivan was that she was "distraught." Moreover, Deputy Whitaker testified as follows:

> Q Now, did you get the name of the person in the van?
>
> A No, she immediately took off.
>
> Q Didn't get a phone number, didn't get a license number?
>
> A No.
>
> Q So you got no information to be able to assess this woman's—I assume this was a woman. I apologize.
>
> A It was a female.
>
> . . .
>
> Q To assess her credibility to determine whether or not the information she was giving you was, in any way, shape, or form, accurate.
>
> A No, we didn't.

Because the female driver in the present case was not named or identified, she cannot be classified as a citizen-informant pursuant to *Eason*.

Moreover, we cannot apply the confidential and reliable informant standard to the female driver in the present case. In *Hughes*, our Supreme Court had to determine "whether the information received by the officers was obtained from an anonymous informant or a confidential and reliable informant." *Hughes*, 353 N.C. at 203, 539 S.E.2d at 628. Our Supreme Court first recognized that in applying the totality of the circumstances test, "the principles underlying *Aguilar* and *Spinelli*, mainly that evidence is needed to show indicia of reliability, [are] important components[.]" *Id.* at 204, 539 S.E.2d at 628. Pursuant to the *Aguilar-Spinelli* test,

> [r]eliability could be established by showing that the informant had been used previously and had given reliable information, that the information given was against the informant's penal interest, that the informant demonstrated personal knowledge by giving clear and precise details in the tip, or that the informant was a member of a reliable group such as the clergy.

Id. at 203, 539 S.E.2d at 628. Our Supreme Court stated:

> [T]he evidence shows that Detective Imhoff had never spoken with the informant and knew nothing about the informant other than Captain Matthews' claim that he was a confidential and reliable informant. There was no indication that the informant had been previously used and had given accurate information or that his statement was against his penal interest nor, as will be discussed later, was there any other indication of reliability.

Id. at 204, 539 S.E.2d at 628. The Court then concluded that "[w]ithout more than the evidence presented, we cannot say there was sufficient indicia of reliability to warrant use of the confidential and reliable informant standard. Accordingly, we analyze the anonymous tip standard in evaluating this case." *Id.* at 205, 539 S.E.2d at 629.

Likewise, in the present case, there is insufficient evidence of the reliability of the female driver of the minivan to warrant application of the confidential and reliable informant standard. As we recognized above, the female driver was not named or identified, and the deputies did not record her telephone number or license tag number. There is no indication that she had ever given any, much less reliable, information to police in the past, nor was her statement against her penal interest. Moreover, the reliability of the female driver, and the credibility of the information she supplied, was undermined by Deputy Whitaker's own knowledge that there were no stop lights, and few stop signs, in the immediate vicinity of the stopped minivan. Deputy Whitaker testified as follows:

> Q Let's do stoplights first. Are there any stoplights along Sherron Road until it intersects with U.S. 70?
>
> A No.
>
> Q Are you aware of any stoplights down—if you take a right on Holder Road, heading south down Sherron, take a right on Holder, are there any stoplights down Holder Road?
>
> A No.
>
> Q So the only stop sign that you are aware of is the one at the intersection of Sherron Road and Holder Road?
>
> A Stop sign, yes.
>
> . . .
>
> Q In fact, based on what you know of the neighborhood, there's no stoplights for a reasonable distance for that silver Honda to have run through; isn't that correct?

A That's correct.

Q Or, in that case, other than the stop sign at Holder Road and Sherron Road, you're not aware really of any stop signs that would have come off a major road, either Sherron or Holder Road.

A There were several side streets where there are stop signs, but, no.

Based on the evidence presented, we hold there was insufficient "indicia of reliability to warrant use of the confidential and reliable informant standard. Accordingly, we analyze the anonymous tip standard in evaluating this case." *Hughes*, 353 N.C. at 205, 539 S.E.2d at 629.

"Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990)). "An anonymous tip may provide reasonable suspicion if it exhibits sufficient indicia of reliability and if it does not, then there must be sufficient police corroboration of the tip before the stop can be made." *McArn*, 159 N.C. App. at 213, 582 S.E.2d at 374.

In the present case, we have already held that the information provided by the female driver of the minivan was severely lacking in reliability. Therefore, we must determine whether the information was "buttressed by sufficient police corroboration." *Id.* However, rather than corroborating the information, police investigation actually discredited it. The trial court's findings reflect that after the deputies received the information, "[t]he deputies went up Sherron Road and found the silver Honda Civic stopped at the stop light at the next major intersection[.]" The findings further reflect that the deputies activated their blue lights and "[a]t that moment the light at the intersection turned green and the Honda Civic proceeded through the intersection and stopped immediately on the other side of that intersection[.]"

Deputy Whitaker's testimony also demonstrates that the deputies did not observe the Honda driving in an erratic or illegal manner. Prior to pulling up alongside the minivan, Deputy Whitaker observed the Honda driving slowly behind the minivan. The Honda was not

weaving or swerving and in response to the State's question: "[T]here was nothing in regard to the operation of the Honda that would have led you to believe that it was being driven by an impaired driver[,]" Deputy Whitaker replied, "Right." Deputy Whitaker further testified that after the minivan stopped, the driver of the Honda made a controlled maneuver around the minivan and kept driving. Again, in response to the State's question: "Nothing in that action would have indicated any sort of impairment[,]" Deputy Whitaker responded: "At that time, no." Deputy Whitaker also testified that after the deputies began following the Honda, they did not observe it being operated in a suspicious manner. In fact, Deputy Whitaker testified as follows:

> Q So you did not—again, separate and apart from [the female driver's] statement, [the Honda] did nothing that would constitute a reason that would have made you—constitute what we designate as reasonable suspicion that [the driver of the Honda] had been driving while impaired, that the driver was driving while impaired.
>
> A No, sir.

Based upon Deputy Whitaker's testimony, the sole source for any claimed reasonable suspicion came from the information provided by the female driver of the minivan. As we have already held, that information lacked both reliability and credibility. " 'The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.' " *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *Florida*, 529 U.S. at 272, 146 L. Ed. 2d at 261). In the present case, although the information identified a determinate person, the driver of the Honda, the information was not reliable in its assertion of illegality. As we stated above, the female driver of the minivan was not identified and the information she provided was undermined by the knowledge of the deputies. Furthermore, the information was not corroborated by police investigation. Rather, the information was discredited by the investigation of the deputies. Accordingly, we hold that the deputies lacked reasonable suspicion to stop the Honda.

"When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). In the present case, all evidence and testimony derived from the stop, and all evidence and testimony related to Defendant leaving the stop, should be

suppressed as fruits of the unlawful conduct. *See State v. Ivey*, 360 N.C. 562, 566, 633 S.E.2d 459, 462, *reh'g denied*, 360 N.C. 655, 636 S.E.2d 573 (2006) (holding: "Because the fruit of [the officer's] search of the vehicle arose from the illegal stop, all evidence seized during the search should have been excluded by the trial court, and it was therefore error to deny [the] defendant's motion to suppress."). Because this evidence was crucial to the State's theory of the case and bears on every crime with which Defendant was charged, Defendant is entitled to a new trial on all charges.

We next address the issues related to Defendant's prior convictions because they are likely to recur upon retrial. However, the errors raised by Defendant's remaining assignments of error are not likely to recur upon retrial and we do not address them.

II.

[2] Defendant argues the trial court erred or committed plain error by (1) admitting into evidence the bare fact of Defendant's prior convictions, and (2) by instructing the jury that this evidence could be used to prove malice or intent in all of the cases against Defendant. "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." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

At trial, Defendant objected when the State sought to introduce Exhibits 66 through 69, which were certified copies of court records of several of Defendant's prior convictions. However, the State had previously introduced, without objection, similar evidence, Exhibit 64, Defendant's certified driving record from the Division of Motor Vehicles. Mr. Cassidy had also previously testified, without objection, that pursuant to Exhibit 64, Defendant had six prior convictions for driving while impaired. Mr. Cassidy further testified that four of the six convictions listed in Exhibit 64 also appeared in Exhibits 66 through 69. Because the same evidence had previously been admitted into evidence without objection, Defendant waived his subsequent objection to Exhibits 66 through 69. *See Whitley*, 311 N.C. at 661, 319 S.E.2d at 588.

Because Defendant lost the benefit of his objection, we review the introduction of Defendant's prior convictions for plain error.

> Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice can-

> not have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[I]n order to prevail under the plain error rule, [a] defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

Defendant argues that pursuant to *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5, *rev'd per curiam for reasons stated in the dissent*, 356 N.C. 418, 571 S.E.2d 583 (2002), the trial court erred by admitting into evidence the bare fact of Defendant's prior convictions. In *Wilkerson*, our Supreme Court adopted Judge Wynn's dissent, in which Judge Wynn stated that the admission of the bare fact of a defendant's prior conviction violates Rule 404(b) and Rule 403. *Id.* at 327-28, 559 S.E.2d at 16. However, Judge Wynn stated that our Courts have recognized a categorical exception to this rule in second-degree murder cases where prior traffic-related convictions may be introduced to show malice. *Id.* Moreover, in *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, *disc. review denied*, 359 N.C. 854, 619 S.E.2d 853 (2005), our Court recognized that "*Wilkerson* did not alter this Court's precedent involving traffic convictions in second degree murder cases." *Id.* at 386, 612 S.E.2d at 397.

In the present case, we hold that the trial court did not err by admitting the bare fact of Defendant's prior convictions as to the charge of second-degree murder because this evidence was admissible to show malice. *See id.*; *see also Wilkerson*, 148 N.C. App. at 327-28, 559 S.E.2d at 16. However, the bare fact of Defendant's prior convictions was not admissible to show intent as to the other crimes with which Defendant was charged. *See Wilkerson*, 148 N.C. App. at 327-28, 559 S.E.2d at 16. Nevertheless, the trial court instructed the jury as follows:

> Now, evidence has been received tending to show that . . . [D]efendant previously, prior to this case, had been convicted of Driving While Impaired.
>
> This evidence was received solely for the purpose of showing that . . . [D]efendant had the requisite malice or intent which is a

> necessary element of crimes charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it has been received.

Defendant did not object to this instruction.

Defendant now argues the trial court committed plain error by instructing the jury that Defendant's prior convictions could be used to prove intent in all of the cases. Clearly, this instruction was erroneous because Defendant's prior convictions were not admissible to establish the intent element of the other crimes with which Defendant was charged.

We also hold that this error amounted to plain error. In *Wilkerson*, the dissent, which was adopted by our Supreme Court, recognized that

> introducing the bare fact of a prior conviction under Rule 404(b) fails to satisfy the Rule 403 balancing test, as the only fair interpretation of the purpose behind the State's introduction of such evidence is impermissible: that the evidence is being offered to show the defendant's predisposition to commit the crime charged.

Id. at 328, 559 S.E.2d at 16. The dissent further recognized that the admission of the bare fact of a prior conviction is prejudicial:

> Because the jury was permitted to infer [the] defendant's intent to sell or deliver the cocaine from the bare fact of his prior convictions, I cannot say that the introduction of those prior convictions was harmless error as to his current conviction for possession with intent to sell or deliver cocaine. Furthermore, as the jury was allowed to infer from his prior convictions [the] defendant's knowledge of his possession of the cocaine, as well as his intent to control the cocaine, I cannot say that introduction of those convictions was harmless error as to his conviction for trafficking in cocaine. The defense was inescapably tainted and unfairly prejudiced by the admission of [the] defendant's prior convictions, despite (or indeed as a result of) the independent evidence of [the] defendant's knowledge and intent elicited from Officer Pyrtle and Agent Long.

Id. at 328-29, 559 S.E.2d at 16-17 (citations omitted).

In the present case, in addition to second-degree murder, Defendant was also charged with, and convicted of, the following

crimes: assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, driving while impaired, two counts of assault with a deadly weapon, driving while license revoked, misdemeanor larceny, and reckless driving to endanger. Defendant argues that each of these crimes contains an intent element. Therefore, Defendant argues the trial court's instruction amounted to plain error because the instruction allowed the jury to use the prior convictions to establish the intent element of each of these crimes.

We disagree with Defendant that each of the crimes with which Defendant was charged contains an intent element. However, intent is an element in several of them. The trial court instructed the jury that to find Defendant guilty of assault with a deadly weapon inflicting serious injury, the jury must find, *inter alia*, that "[D]efendant assaulted [the passenger in the Honda] by intentionally and without justification or excuse, by using a 1997 Honda Civic, caused an auto collision in which [the passenger of the Honda] sustained blunt force trauma to his head and body[.]" As to the charge of fleeing/eluding arrest with a motor vehicle, the trial court instructed the jury that it must find, *inter alia*, that Defendant acted "with a purpose of getting away in order to avoid arrest or apprehension by the officer." Our Court has recognized that a defendant accused of fleeing/eluding arrest with a motor vehicle "must actually intend to operate a motor vehicle in order to elude law enforcement officers," even though there is no intent requirement for the aggravating factors necessary to raise the offense to a felony. *State v. Woodard*, 146 N.C. App. 75, 80, 552 S.E.2d 650, 654 (2001), *disc. review improvidently allowed*, 355 N.C. 489, 562 S.E.2d 420 (2002). As to the charges of assault with a deadly weapon, the trial court instructed the jury that to find Defendant guilty, it must find, *inter alia*, that "[D]efendant assaulted the victims . . . intentionally and without justification or excuse [by] . . . striking the vehicle that [one of the victims] was driving, and . . . by striking the vehicle in which [another victim] was a passenger[.]" Finally, the trial court instructed the jury that to find Defendant guilty of the charge of misdemeanor larceny, the jury would have to find, *inter alia*, that Defendant took property "intending at the time to deprive the victim of its use permanently[.]"

Because the trial court's erroneous instruction allowed the jury to infer the intent requirement of these crimes from the bare fact of Defendant's prior convictions, we hold that the trial court's error had a probable impact on the jury's verdicts of guilty. *See Najewicz*, 112

N.C. App. at 294, 436 S.E.2d at 141. Accordingly, independent of our holding in Section I of this opinion, we hold that Defendant is entitled to a new trial on the charges of assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, two counts of assault with a deadly weapon, and misdemeanor larceny.

III.

[3] Defendant also argues the trial court committed plain error by admitting Defendant's prior convictions because many of the convictions were too remote in time. In *State v. Goodman*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), *rev'd in part per curiam for reasons stated in the dissent*, 357 N.C. 43, 577 S.E.2d 619 (2003), the defendant argued that the trial court committed plain error by admitting his entire driving record. *Id.* at 66-67, 560 S.E.2d at 202-03. Specifically, the defendant argued the trial court violated Rule 404(b) because many of the previous convictions were too remote in time. *Id.* at 66-68, 560 S.E.2d at 202-03.

In *Goodman*, the majority recognized that in *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001), this Court held that "the defendant's prior driving convictions dating as far back as sixteen years could be used to establish the defendant acted with malice when he hit the decedent while driving under the influence of alcohol." *Goodman*, 149 N.C. App. at 61, 560 S.E.2d at 199 (citing *Miller*, 142 N.C. App. at 439, 543 S.E.2d at 204). The majority in *Goodman* held that the trial court erred by admitting the defendant's entire driving record, which stretched back thirty-seven years, because some of the convictions were too remote in time and were not probative of the defendant's malice in the crime charged. *Id.* at 68, 560 S.E.2d at 203. However, the majority stated that "in light of [the] defendant's numerous convictions, including four convictions for driving while intoxicated or impaired which occurred within the approximate time-frame held to be permissible in *Miller*, we hold admission of the entire record did not prejudice [the] defendant to the extent required under a plain error analysis." *Id.*

The dissent stated as follows:

> In this case, the admission of [the] defendant's driving record dating back to 1962 (some 37 years) violates the temporal proximity requirement of Rule 404(b) and thus constitutes error. Although [the] defendant has six prior driving while impaired convictions dating back to 1962, only one of those occurred in the sixteen

> years prior to the crime at issue and none within the eight years prior to the crime at issue. Furthermore, [the] defendant's driving record contained convictions older than sixteen years of reckless driving, driving while license suspended, hit and run with property damage, unsafe moving violations, speeding, driving too fast for conditions, and driving on the wrong side of the road.

Id. at 73, 560 S.E.2d at 206 (footnote omitted). The dissent also noted: "Although I am bound by this Court's holding in *State v. Miller*, . . . that driving convictions dating back sixteen years are admissible to prove malice, any conviction dating beyond sixteen years, however slight, runs afoul of the temporal proximity requirement of Rule 404(b)." *Id.* at 73 n.1, 560 S.E.2d at 206 n.1. The dissent further stated that the error was "of a fundamental nature and . . . had a 'probable impact on the jury's finding of guilt' and thus constitute[d] plain error." *Id.* at 73, 560 S.E.2d at 206 (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379). Adopting the dissent, our Supreme Court reversed the majority decision of our Court. *Goodman*, 357 N.C. at 43, 577 S.E.2d at 619.

In the present case, although Defendant had four convictions for driving while impaired within the sixteen years prior to the date of the offenses in the present case, the trial court allowed the introduction of several other convictions that were too remote in time. Specifically, the trial court allowed the State to introduce evidence that Defendant was convicted of driving with no operator's license on 4 November 1988, on 20 October 1986, and on 12 February 1986. The trial court also allowed evidence that Defendant was convicted of failing to reduce speed on 26 June 1985, and of larceny of a motor vehicle and of driving while license revoked on 29 October 1981. The trial court further allowed evidence that Defendant was convicted of driving while intoxicated on 29 October 1981 and on 11 August 1980.

Because these convictions occurred beyond the sixteen-year time frame held permissible in *Miller*, we hold that the introduction of these convictions "[ran] afoul of the temporal proximity requirement of Rule 404(b)." *Goodman*, 149 N.C. App. at 73 n.1, 560 S.E.2d at 206 n.1. As in *Goodman*, we hold that the error in the present case was "of a fundamental nature and . . . had a 'probable impact on the jury's finding of guilt' and thus constitute[d] plain error." *Id.* at 73, 560 S.E.2d at 206 (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379). Therefore, independent of our holding in Section I of this opinion, we hold that Defendant is entitled to a new trial on the charge of second-

degree murder because the trial court allowed the foregoing evidence to establish malice. *See id.*

Reversed and remanded for a new trial.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion awards defendant a new trial on three alternative grounds: (1) the trial court's denial of defendant's motion to suppress; (2) the trial court's admittance of defendant's prior convictions and its jury instruction, stating this evidence could be used to prove malice or intent in all the charges against defendant; and (3) the trial court's admittance of defendant's entire driving record containing prior convictions dating beyond sixteen years. I find no prejudicial error and respectfully dissent.

I. Motion to Suppress

Defendant argues the trial court erred by denying defendant's motion to suppress. I disagree.

A. Standard of Review

> Review of a trial court's denial of a motion to suppress is limited to a determination whether the trial court's findings of fact are supported by competent evidence and whether those findings support the trial court's ultimate conclusions of law. The trial court's findings are conclusive if supported by competent evidence, even if the evidence is conflicting.

State v. Sutton, 167 N.C. App. 242, 244, 605 S.E.2d 483, 484-85 (2004) (internal citations omitted), *disc. rev. denied*, 359 N.C. 326, 611 S.E.2d 847 (2005).

B. Analysis

Defendant only assigns error to findings of fact numbered five and eight contained in the trial court's order denying defendant's motion to suppress. Defendant failed to present any argument pertaining to finding of fact numbered five. This portion of defendant's assignment of error is abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008).

The majority's opinion correctly holds that the portion of finding of fact numbered eight that states, "may be drunk" is not supported by competent evidence. Despite this error, defendant has failed to show any prejudice. The remaining portion of finding of fact numbered eight is clearly supported by competent evidence, is conclusive and binding upon this Court.

Defendant argues the trial court's findings of fact do not support its only conclusion of law: "[based] on the foregoing findings of fact, the Court concludes as a matter of law that considering *the totality of the circumstances* these deputies had a reasonable suspicion to stop the [d]efendant's vehicle for investigative purposes." (Emphasis supplied). I disagree.

Our Supreme Court has held:

> Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists.* The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.*

State v. Campbell, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (emphasis supplied) (internal citations and quotations omitted). Defendant and the majority's opinion assert that the sole source for any claimed reasonable suspicion resulted from information provided by an anonymous driver, who without being identified lacked reliability and credibility. I disagree.

Here, the investigatory stop was not based solely on the anonymous driver's information, but also on Deputies Whitaker and Perry's personal observations. The State presented evidence that tended to show Deputies Whitaker and Perry had observed: (1) an intoxicated subject walking along the side of Sherron Road; (2) a tan minivan with its "flashers" activated traveling at a very slow speed; (3) a silver Honda following the minivan "almost bumper to bumper;" (4) the minivan and Honda both completely stop in the middle of the road;

(5) the intoxicated subject run from across the road and enter the passenger side of the Honda; (6) the Honda drive around the minivan; (7) the minivan pull over to the side of the road; and (8) a "distraught" female in the driver's seat of the minivan motioning for the deputies to stop.

Further, Deputy Whitaker testified that while he was watching the intoxicated subject walk along Sherron Road, he made "a phone call to a deputy who had a prior call and asked him what was the description of the subjects that he had dealt with earlier." Deputy Whitaker testified "we had the suspicion that it was possibly one of the two subjects that they had dealt with earlier," due to the temporal and geographical proximity of the two incidents.

Deputy Whitaker's testimony referred to an incident which had occurred less than one hour earlier. At approximately 2:05 p.m., Deputies Brian O'Briant and John Hammond received a call to check on two subjects located at Highway 98 and Sherron Road. The deputies responded to the call and found defendant and another man walking along the shoulder of Holder Road intoxicated. The deputies asked the men for identification and checked for outstanding warrants. The deputies determined the men appeared to be at their final destination and cleared the call at 2:32 p.m., approximately thirty minutes prior to when Deputies Whitaker and Perry observed an intoxicated subject walking along Sherron Road.

I agree with the trial court and would hold these "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of . . . reasonable, cautious officer[s], guided by [their] experience and training" are sufficient to establish a reasonable suspicion that defendant was involved in criminal activity based on the totality of the circumstances. *Id*. It is unnecessary for this Court to determine whether the unidentified driver of the tan minivan was an "anonymous informant" or a "citizen informant." The trial court's findings of fact support its ultimate conclusion of law that under the totality of the circumstances, Deputies Whitaker and Perry had reasonable suspicion to initiate an investigatory stop of defendant's vehicle. *Id*. The trial court properly denied defendant's motion to suppress.

II. Prior Convictions

Defendant argues the trial court committed plain error by admitting into evidence the "bare fact" of defendant's prior convictions

and instructing the jury that this evidence could be used to prove malice or intent in all of the charges against defendant. Defendant also argues the trial court committed plain error by admitting some of defendant's prior convictions that were too remote in time. I disagree.

A. Standard of Review

In the absence of any objection, we review defendant's assignments of error under plain error analysis:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Our Supreme Court has stated that "plain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2002).

B. Jury Instruction

In its charge to the jury, the trial court stated:

> Now, evidence has been received tending to show that the defendant previously, prior to this case, had been convicted of Driving While Impaired.
>
> This evidence was received solely for the purpose of showing that the defendant had the requisite malice or intent which is a necessary element *of crimes charged* in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it has been received.

(Emphasis supplied). The majority's opinion correctly states, "that the trial court did not err by admitting the bare fact of [d]efend-

ant's prior convictions as to the charge of second-degree murder because this evidence is admissible to show malice." *See State v. Wilkerson*, 148 N.C. App. 310, 327-28, 559 S.E.2d 5, 16 (Wynn, J., dissenting) (acknowledging multiple precedents allowing the bare fact of defendant's prior traffic-related convictions as admissible to prove malice in second-degree murder cases), *rev'd*, 356 N.C. 418, 571 S.E.2d 583 (2002) (reversing *per curiam* for reasons stated in the dissenting opinion); *see also State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000).

However, the majority's opinion ultimately holds the trial court committed both plain and prejudicial error and awards defendant a new trial on the charges of assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, two counts of assault with a deadly weapon, and misdemeanor larceny. The majority's opinion bases its holding on the trial court's instruction allowing the jury to use the "bare fact" of defendant's prior convictions to establish the intent element in the crimes with which defendant was charged. *Id.* I disagree.

"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 378-79 (citation and quotation omitted). Our Supreme Court has stated, "when the plain error rule is applied, it is *the rare case* in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 660-61, 300 S.E.2d 378 (citation and quotation omitted) (emphasis supplied).

After a thorough review of the record, the State presented other overwhelming evidence sufficient to establish each element of intent for the charges of: (1) assault with a deadly weapon inflicting serious injury; (2) felony fleeing/eluding arrest with a motor vehicle; (3) two counts of assault with a deadly weapon; and (4) misdemeanor larceny. Defendant has failed to demonstrate how the trial court's instructional error had "a probable impact on the jury's finding that the defendant was guilty" of the crimes charged such that defendant should be awarded a new trial under plain error review. *Id.* at 660, 300 S.E.2d 378. Without a showing of prejudice, these facts do not elevate defendant's convictions to the "rare case" to award defendant a new trial. *Id.*

C. Temporal Proximity

Defendant also argues the trial court committed plain error by admitting defendant's entire driving record into evidence because some of his prior convictions were "too remote in time." I disagree.

In *State v. Miller*, this Court unanimously held that driving convictions occurring sixteen years prior to the current charges were admissible to prove malice in second-degree murder cases. 142 N.C. App. 435, 440, 543 S.E.2d 201, 205 (2001). *See also Rich*, 351 N.C. at 400, 527 S.E.2d at 307 (upholding admission of a nine-year-old speeding conviction to show malice). In *State v. Goodman*, a majority of this Court held that it was not plain error to admit a driving record that contained convictions dating back thirty-seven years. 149 N.C. App. 57, 70, 560 S.E.2d 196, 205 (2002). Judge Greene dissented and asserted the admission of defendant's entire thirty-seven year driving record violated the temporal proximity requirement of Rule 404(b) and constituted error. *Id.* at 73, 560 S.E.2d at 206. As the basis of his holding, Judge Greene stated:

> Although defendant has six prior driving while impaired convictions dating back to 1962, *only one of those occurred in the sixteen years prior to the crime at issue and none within the eight years prior to the crime at issue*. Furthermore, defendant's driving record contained convictions older than sixteen years of reckless driving, driving while license suspended, hit and run with property damage, unsafe moving violations, speeding, driving too fast for conditions, and driving on the wrong side of the road. This error is of a fundamental nature and, in my opinion, had a "probable impact on the jury's finding of guilt" and thus constitutes plain error. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). From the record, it appears *the jury had difficulty in determining whether defendant had acted with malice because during its deliberations, the jury requested to have the definition of malice read twice. The jury later requested the trial court permit it to have a written definition of malice along with defendant's driving record to consider during its deliberations*. Accordingly, I would grant defendant a new trial.

Id. (emphasis supplied). On appeal, our Supreme Court *per curiam* reversed the majority for the reasons stated in Judge Greene's dissenting opinion. *State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003).

Here, the facts before us are clearly distinguishable from the facts presented in *Goodman*. 149 N.C. App. at 59-61, 560 S.E.2d at 198-99. Defendant's record showed six prior driving while impaired convictions. Four of the six prior driving while impaired convictions occurred well within the sixteen year time-frame this Court articulated in *Miller*. 142 N.C. App. at 440, 543 S.E.2d at 205. Defendant's most recent driving while impaired conviction occurred on 27 August 2004, only six months prior to the occurrence of the crimes charged in this case. Also, unlike *Goodman*, nothing in the record shows "the jury had difficulty in determining whether defendant had acted with malice." *Goodman*, 149 N.C. App. at 73, 560 S.E.2d at 206.

Defendant states in his brief, "[t]he driving record showed the bare fact defendant had 36 prior criminal convictions, 44 prior DMV administrative driver license suspensions, 3 prior civil license revocations, and 6 prior accidents."

Without articulating any prejudice to defendant and under plain error review, the majority awards defendant a new trial because the trial court admitted evidence of eight prior convictions that were dated beyond the sixteen year time-frame: (1) driving with no operator's license on 4 November 1988, 20 October 1986, and 12 February 1986; (2) failing to reduce speed on 26 June 1985; (3) larceny of a motor vehicle and driving while licensed revoked on 29 October 1981; and (4) driving while impaired on 29 October 1981 and 11 August 1980. Defendant has wholly failed to show any prejudice or demonstrate how this unobjected to plain error was "of a fundamental nature and . . . had a 'probable impact on the jury's finding of guilt.' " *Goodman*, 149 N.C. App. at 73, 560 S.E.2d at 206 (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379).

III. Conclusion

Under the totality of the circumstances, the trial court's findings of fact support its conclusion that Deputies Whitaker and Perry had a reasonable suspicion to initiate an investigatory stop of defendant's vehicle. The trial court properly denied defendant's motion to suppress.

Defendant failed to object and has failed to show any prejudice from the trial court's admittance of defendant's prior convictions under plain error review. Defendant is not entitled to a new trial on any grounds articulated in the majority's opinion. I vote that defendant has made no showing of prejudicial error occurred and respectfully dissent.

STATE OF NORTH CAROLINA v. CRISTANTO R. HERNANDEZ AND MAGDALENA GARCIA PEDRO

No. COA06-1591

(Filed 15 January 2008)

1. Appeal and Error— appealability—dismissal of charges—standard of review—double jeopardy

N.C.G.S. § 15A-1445(a)(1) provides that unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division when there has been a decision or judgment dismissing criminal charges as to one or more counts. Double jeopardy does not prohibit prosecution in this case when the jury already rendered the verdicts. If the State succeeds in its appeal, then defendants would not be subject to retrial, but instead the court would reinstate the jury's verdicts.

2. Motor Vehicles— driving under influence—driving without operator's license—motion to dismiss improperly granted

The trial court erred by granting defendants' motion to dismiss the charges of driving under the influence and driving without an operator's license against defendant Hernandez, and the jury's guilty verdicts should be reinstated for these charges, because: (1) the State presented substantial evidence for a rational juror to infer that Hernandez was driving including physical evidence such as the officers' observations of defendant Pedro's right shoulder burn consistent with a passenger side seatbelt injury, the lack of blood on the passenger's side, the blood on the driver's side of the air bag and blood on Hernandez, and the driver's seat was pushed back too far for Pedro to drive; (2) the fact that Pedro and her sister-in-law insisted Pedro was the driver did not prevent a rational juror from inferring from the physical evidence that Hernandez was the driver; (3) the totality of the physical evidence, although circumstantial, was sufficient to withstand a motion to dismiss; and (4) a defendant's evidence on a motion to dismiss, unless favorable to the State, is not to be taken into consideration.

3. Motor Vehicles— accident—giving false report

The trial court erred by granting defendants' motion to dismiss the charge of giving a false report in violation of N.C.G.S.

§ 20-279.31(b), and the conviction on this charge against Pedro should be reinstated, because: (1) regardless of defendant Pedro's argument, the Court of Appeals did not need to determine whether N.C.G.S. §§ 20-166 or 20-166.1 imposed a duty on passengers who falsely assert they are drivers to provide information since the State produced substantial evidence that Pedro violated N.C.G.S. § 20-279.31(b); (2) the State only needed to present substantial evidence that Pedro gave information required in a report of a reportable accident knowing or having reason to believe the information was false; (3) the State presented sufficient evidence for a rational juror to determine that Hernandez was the driver, and thus, a rational juror could also infer Pedro gave false information knowing that information was false when she told a trooper that she was driving; and (4) it can be inferred that the identity of the driver is required to be included in a reportable accident report under N.C.G.S. § 20-279.31(b) in order to impose financial responsibility.

4. Trials— motion to dismiss—reserving ruling until after jury verdict

Although the trial court erred in a driving under the influence, driving without an operator's license, and giving a false report case by reserving its ruling on defendants' motions to dismiss at the close of all evidence under N.C.G.S. § 15A-1227(c), the error did not warrant reversal, because: (1) defendants would not be subject to retrial if the dismissal was reversed on appeal; and (2) the judge's comments both before and after the jury verdicts suggested that he would have denied the motions had he ruled before the verdicts, and there was sufficient evidence in the record to withstand a motion to dismiss.

Appeal by the State from judgments entered 26 July 2006 by Judge Ernest B. Fullwood in Pender County Superior Court. Heard in the Court of Appeals 22 August 2007.

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

Anne Bleyman, for defendant-appellee Cristanto R. Hernandez.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellee Magdalena Garcia Pedro.

CALABRIA, Judge.

The State of North Carolina appeals from judgments vacating the jury's guilty verdicts against Cristanto R. Hernandez ("Hernandez") for driving while impaired and driving without a license and against Magdalena Garcia Pedro ("Pedro") for giving false information required in a report of a reportable accident. We reverse.

On 17 September 2005, Hernandez and Pedro were traveling home from a child's birthday party when they were involved in an automobile accident at approximately 9 p.m. at the intersection of N.C. 210 and Little Kelly Road in Pender County. Their vehicle hit a ditch, and landed approximately thirty to forty feet in a bean field. Two North Carolina Highway Patrol Troopers, Allen Dezso ("Trooper Dezso") and Barry Henline ("Trooper Henline"), arrived after the accident occurred. When Trooper Dezso arrived, no one was in the vehicle. Trooper Dezso observed the steering wheel air bag had deployed and there was blood on the air bag. Trooper Dezso noticed Hernandez had blood near his nose and on his shirt. Trooper Henline observed Pedro had a fabric burn extending from her right shoulder to her collarbone, Hernandez's nose was bleeding, and bloodstains were on his shirt. Trooper Henline asked Hernandez to produce a driver's license. Hernandez did not have a North Carolina driver's license in his possession. Later, Pedro told Trooper Henline, through the assistance of a translator, that she was the driver of the vehicle.

Trooper Henline detected a strong odor of alcohol from Hernandez. Trooper Henline properly transported Hernandez to a law enforcement center and an Intoxilyzer test was administered. The test revealed Hernandez's blood alcohol concentration level was .26. Hernandez was charged with driving while impaired under N.C. Gen. Stat. § 20-138.1, operating a motor vehicle without a valid driver's license under N.C. Gen. Stat. § 20-7(a), and possession of an open container. Pedro was charged with giving false information for a motor vehicle crash report in violation of N.C. Gen. Stat. § 20-279.31(b).

On 14 December 2005, Pender County District Court Judge James H. Faison, III found Hernandez guilty of driving while impaired and operating a motor vehicle without a valid driver's license and not guilty of the open container charge. Pedro was found guilty of providing false information in violation of N.C. Gen. Stat. § 20-279.31(b).

Hernandez and Pedro appealed to Pender County Superior Court. This case came to trial in the Superior Court of Pender County on 25

July 2006, the Honorable Ernest B. Fullwood presiding. On 26 July 2006, the jury returned a verdict of guilty against Hernandez for driving while impaired and operating a motor vehicle without a valid operator's license, and a guilty verdict against Pedro for giving false information required in a report of a reportable accident.

Both Hernandez and Pedro moved to dismiss the charges at the close of the State's evidence. The trial court denied their motions. The defendants again moved to dismiss the charges at the close of all the evidence. The trial court reserved its ruling on those motions. After the jury returned the guilty verdicts, defendants moved for a judgment notwithstanding the verdicts and asked the trial court for a decision on the motions to dismiss at the close of all the evidence. The trial court granted the defendants' motions to dismiss at the close of all the evidence and vacated the guilty verdicts. The State appealed.

The State assigns as error the trial court's dismissal of the charges and vacating the jury's guilty verdicts on the grounds that the evidence was sufficient to submit the case to the jury and the court erroneously relied on the principle that stacking inferences is not permitted in determining guilt or innocence on a motion to dismiss, a principle of law that was overruled by *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987).

Hernandez and Pedro cross-assign prejudicial error to the trial court's decision to reserve its ruling on defendants' motions to dismiss at the close of all the evidence in violation of N.C. Gen. Stat. § 15A-1227(c) and defendants' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, section 19 of the North Carolina Constitution.

I. Standard of Review

[1] The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and "defendant's being the perpetrator." *State v. Nettles*, 170 N.C. App. 100, 102-03, 612 S.E.2d 172, 174, *review denied by*, 359 N.C. 640, 617 S.E.2d 286 (2005) (citations omitted). Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion. *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174 (citing *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The court reviews the evidence in the light most favorable to the State, giving every reasonable inference arising from that evidence to the State, even if the same evi-

dence supports reasonable inferences of the defendant's innocence. *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002); *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174. Where the evidence is contradictory, "[a]ll contradictions must be resolved in favor of the State." *State v. Myers*, 181 N.C. App. 310, 313, 639 S.E.2d 1, 3 (2007). Whether the evidence is circumstantial or direct does not preclude a reasonable inference of defendant's guilt. *Id.* (citing *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998)).

However, where the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citation omitted). "This is true even though the suspicion aroused by the evidence is strong." *Id.*

The grounds for the State's appeal are provided in N.C. Gen. Stat. § 15A-1445(a)(1) which states "[u]nless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division: (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C. Gen. Stat. § 15A-1445(a)(1) (2007).

Here, the State appeals the trial court's dismissal of charges of driving while impaired, driving without a license, and giving a false report. Double jeopardy does not prohibit prosecution because the jury already rendered the verdicts. *State v. Scott*, 146 N.C. App. 283, 286, 551 S.E.2d 916, 918-19 (2001), *rev'd on other grounds by*, 356 N.C. 591, 573 S.E.2d 866 (2002). If the State succeeds in its appeal, then defendants would not be subject to re-trial. The court would reinstate the jury's verdicts. *Id.*

The substantial evidence standard of review is applied on a case-by-case basis and the outcome varies depending on the facts of each case. *State v. Bell*, 65 N.C. App. 234, 240, 309 S.E.2d 464, 468 (1983) ("[E]xisting case law and the necessity to retain flexibility are aligned against temptation to construct a bright-line test, we are left with the standard of reviewing motions to dismiss . . . 'in the light of all the circumstances,' which at least has the blessings of precedent although it lacks predictability.").

II. Driving While Impaired

[2] Hernandez was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and operating a motor vehicle on a

street or highway without a license in violation of N.C. Gen. Stat. § 20-7(a). The essential elements of driving while impaired are (1) driving any vehicle, (2) upon any highway, any street, or any public vehicular area within the State, and (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a) (2007); *State v. Tedder*, 169 N.C. App. 446, 450, 610 S.E.2d 774, 777 (2005) (citation omitted). Defendants do not contest that Hernandez was impaired, that the vehicle was driven on a public vehicular area, or that Hernandez was not in possession of a driver's license. Therefore, in order to determine whether the motion to dismiss by Hernandez was properly granted, the issue is whether the State presented substantial evidence for a rational juror to infer that Hernandez was the driver.

The State argues that the trial court should have denied defendants' motions to dismiss because the State's evidence, although circumstantial, was sufficient for a reasonable mind to determine that Hernandez was driving the vehicle, and therefore guilty of the charges. According to the State, a jury could reasonably infer from the physical evidence that Hernandez was the driver. We agree. Specifically, the officers' observations of Pedro's right shoulder burn, the lack of blood on the passenger's side, the blood on the driver's side of the air bag, and blood on Hernandez are sufficient to support an inference that Hernandez was the driver.

In *State v. Scott*, the State appealed the trial court's dismissal of a driving while impaired charge granted after the jury returned a guilty verdict. *Scott*, 356 N.C. at 593, 573 S.E.2d at 867. The State presented evidence that defendant had been speeding in excess of sixty miles per hour and failed to immediately stop although the police officer activated his blue lights and blew his airhorn more than once. *Id.*, 356 N.C. at 597, 573 S.E.2d at 869. When the defendant stopped his vehicle in the "T" intersection, he blocked the intersection. *Id.* More importantly, when the officer interacted with the defendant, he smelled a strong odor of alcohol and noticed defendant's speech was slurred. *Id.*, 356 N.C. at 597, 573 S.E.2d at 869-70. The North Carolina Supreme Court reversed the dismissal concluding that "a reasonable inference of defendant's guilt may be drawn from the direct and circumstantial evidence presented by the State." *Id.*, 356 N.C. at 598, 573 S.E.2d at 870.

In *State v. Ray*, this Court found insufficient evidence to support a charge for driving while impaired where the only evidence offered by the State to show defendant was driving was that defendant was

sitting "approximately halfway in the front seat, between the driver and passenger area in the front seat." *State v. Ray*, 54 N.C. App. 473, 475, 283 S.E.2d 823, 825 (1981). The officer responded to an accident call and observed the defendant seated in a car which had hit two parked cars. *Id.*, 54 N.C. App. at 474, 283 S.E.2d at 824. The officer noticed defendant smelled of alcohol and had a gash above his nose. *Id.* No other circumstantial evidence was presented to suggest that defendant had been driving. *Id.*, 54 N.C. App. at 475, 283 S.E.2d at 825. This Court was unable to support a conclusion that defendant was the driver without more circumstantial or direct evidence. *Id.*

However, in *State v. Dula*, the State's circumstantial evidence conflicted with the defendant's direct evidence, yet was sufficient to withstand a motion to dismiss, 77 N.C. App. 473, 474-75, 335 S.E.2d 203, 204 (1985). In *Dula*, the only question was whether the defendant was operating the vehicle. *Id.*, 77 N.C. App. at 474, 335 S.E.2d at 204. A witness testified observing black tire marks on the highway and a car "with its headlights on, lying on its top in a field near the highway." *Id.*, 77 N.C. App. at 474, 335 S.E.2d at 204. When the witness went to the vehicle, defendant was inside with the windows rolled up and the car doors closed. *Id.* The Court held:

> This evidence is clearly sufficient, in our opinion, to justify the inference that defendant was driving the car before it left the public highway; and its sufficiency is not affected by the fact that other evidence tended to show that defendant was not driving. The other evidence consisted of an admission extracted from the investigating patrolman that defendant told him he was not the driver, and testimony by a witness for the defendant to the effect that: He drove the car, was thrown out through a door which opened while the car was turning over, and left the scene quickly because he was afraid. The State was not required to disprove this version of the matter; nor did it have to prove to a scientific certainty that defendant was the driver of the car; it only had to present evidence from which that fact could be deduced by reasonably minded people. And it matters not that the State's evidence was entirely circumstantial, while the defendant's evidence was direct and by a professed participant and eyewitness. The weight of all evidence is for the jury, which often finds physical circumstances more reliable than the testimony of eyewitnesses, as our courts have noted many times.

Dula, 77 N.C. App. at 474-75, 335 S.E.2d at 204.

The case at bar is more like the *Dula* case than the *Ray* case. Here, the State presented physical evidence from Trooper Dezso who observed bloodstains on the driver's side air bag and blood on Hernandez, but no blood on the passenger side. In addition, the driver's seat was pushed back too far for Pedro to drive. Trooper Henline further observed that a fabric burn two and a half to three inches wide extending from Pedro's right shoulder to her collarbone was consistent with a passenger side seatbelt injury. Pedro's sister-in-law, Sonia Rodriguez-Hernandez, presented conflicting testimony. She testified at trial that Pedro was driving when Hernandez and Pedro left the birthday party because Hernandez had been drinking. However, the fact that Pedro and her sister-in-law insisted she was the driver does not prevent a rational juror from inferring from the physical evidence that Hernandez was the driver. *Dula*, 77 N.C. App. at 474-75, 335 S.E.2d at 204. The evidence is viewed in the light most favorable to the State. *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174. The totality of the physical evidence, although circumstantial, is sufficient to withstand a motion to dismiss. *Dula*, 170 N.C. App. at 474-75, 335 S.E.2d at 204.

Pedro's testimony that Hernandez left blood on the air bag when he assisted her because she was stuck against the steering wheel could support the inference that Pedro was the driver. However, "[e]vidence in the record supporting a contrary inference is not determinative on a motion to dismiss." *Scott*, 356 N.C. at 598, 573 S.E.2d at 870 (citation omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (citation omitted). In ruling on the motion, evidence favorable to the State is to be considered as a whole in determining its sufficiency. *Id.*

The State's evidence considered as a whole constitutes substantial evidence that Hernandez was the driver. *Scott*, 356 N.C. at 598, 573 S.E.2d at 870. The jury's guilty verdicts against Hernandez for driving under the influence and driving without an operator's license should be reinstated. *Scott*, 146 N.C. App. at 286, 551 S.E.2d at 918-19.

III. Giving False Information

[3] The next issue is whether the State presented substantial evidence that Pedro gave false information in violation of N.C. Gen. Stat. § 20-279.31(b). Pedro argues in her brief, *inter alia*, that if the State's evidence is to be believed, she is not the driver and therefore cannot be guilty of failure to give information in a reportable accident under

§ 20-166 or § 20-166.1 because the duty to give information is imposed on drivers and not passengers. Pedro asserts that non-drivers are not required to provide information under § 20-166.1 and therefore cannot be found guilty of violating § 20-279.31(b)(1).

The State contends this Court should not consider Pedro's argument because she raises this issue for the first time on appeal. Even if Pedro's argument is properly preserved without a cross-assignment of error, an examination of her assertions reveal that they are without merit. In particular, we need not determine whether § 20-166 or § 20-166.1 imposes a duty on passengers who falsely assert they are drivers to provide information because we find the State produced substantial evidence that Pedro violated § 20-279.31(b)(1).

Section 20-279.31(b)(1) states in pertinent part: "[a]ny person who does any of the following commits a Class 1 misdemeanor: (1) Gives information required in a report of a reportable accident, knowing or having reason to believe the information is false." N.C. Gen. Stat. § 20-279.31(b)(1) (2007). Pedro contends dismissal was proper since the State failed to present substantial evidence that Pedro's statements could be characterized as a "report of a reportable accident." Pedro asserts that the statute requires a written report, and that her oral statements to the officer do not constitute a report under the definition of the statute, therefore she did not violate it. We disagree.

The relevant subsection establishes criminal liability for "[a]ny person" who "gives information required in a report of a reportable accident, knowing or having reason to believe the information is false." N.C. Gen. Stat. § 20-279.31(b)(1). The State need only present substantial evidence that Pedro (1) gave information; (2) required in a report of a reportable accident; (3) knowing or having reason to believe the information was false. *Id.* Pedro "gave information" when she told Trooper Henline at the hospital that she was the driver. Since we conclude the State presented sufficient evidence for a rational juror to determine that Hernandez was the driver, a rational juror could also infer Pedro gave false information knowing that information was false when she told Trooper Henline she was driving. The issue then is whether the identity of the driver is required to be included in a reportable accident report under § 20-279.31(b)(1).

Reportable accidents are defined in N.C. Gen. Stat. § 20-4.01 which states: "[u]nless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and

phrases and their cognates: . . . (33b) Reportable Crash—A crash involving a motor vehicle that results in one or more of the following: a. Death or injury of a human being. . . .” N.C. Gen. Stat. § 20-4.01(33b) (2007).[1] Neither defendant contests that the accident was a reportable crash under the provisions of the statute.

Article Three of the Motor Vehicle Act of 1937 § 20-166.1 prescribes the type of reports and investigations that are required in the event of an accident. N.C. Gen. Stat. § 20-166.1 (2007). N.C. Gen. Stat. § 20-166.1(h) delineates the requirements for information on forms and the procedures to follow “for submitting crash data to persons required to make reports . . . .” N.C. Gen. Stat. § 20-166.1(h) (2007). In pertinent part the statute reads: “The following information shall be included about a reportable crash: (1) The cause of the crash. (2) The conditions existing at the time of the crash. (3) The persons and vehicles involved.” *Id.*

Pedro asserts this section does not require reporting the driver’s identity. Pedro argues that because she named the persons involved in the accident, she complied with the statute. We disagree.

Interpretation of criminal statutes requires strict construction against the State. *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (citation omitted). However,

> [t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the ‘narrowest meaning’; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

State v. Hearst, 356 N.C. 132, 137, 567 S.E.2d 124, 128 (2002) (internal quotations and citations omitted).

Although the particular subsection does not list “driver’s identity” with the information that “shall be included,” the remaining portions of the statute preceding and following that section impose an explicit duty on drivers to provide their name, address, and other

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1. “Reportable accident” and “reportable crash” are used interchangeably throughout Chapter 20. *See* use of term “reportable crash” in N.C. Gen. Stat. §§ 20-4.01(33b) and 20-166.1(h) (2007); use of term “reportable accident” in §§ 20-37.13(c)(1)(d), -166(c)(2), -166.1(a-c)(e-f), -166.2(a), -179(d)(3), -279.5(a), -279.31(a)(b)(1) (2007).

information in the event of a reportable accident. *See* N.C. Gen. Stat. § 20-166(b)(c1) (2007); N.C. Gen. Stat. § 20-166.1(a-c) (2007). From this, we can infer that the term "persons and vehicles involved" would necessarily include the identity of the driver. N.C. Gen. Stat. § 20-166.1(h). This interpretation is consistent with the policy behind both the Motor Vehicle Act governing § 20-166.1(h) and the Motor Vehicle Safety & Financial Responsibility Act under which § 20-279.31(b)(1) applies. The general purpose of N.C. Gen. Stat. § 20-166 is two-fold: to promote safety and to facilitate investigation of accidents. *State v. Smith*, 264 N.C. 575, 577, 142 S.E.2d 149, 151 (1965) (purpose of the statute is to facilitate investigation); *State v. Fearing*, 48 N.C. App. 329, 334, 269 S.E.2d 245, 248 (1980), *aff'd in part, rev'd in part on other grounds by*, 304 N.C. 471, 284 S.E.2d 487 (1981) (purpose of statute is to facilitate investigations and insure immediate aid to injured persons); *Powell v. Doe*, 123 N.C. App. 392, 398, 473 S.E.2d 407, 412 (1996). N.C. Gen. Stat. § 20-166 (b) imposes a duty on drivers of motor vehicles involved in a reportable crash to give the driver's name, address, license number, and license plate number to the persons struck or occupants of any vehicle collided with. N.C. Gen. Stat. § 20-166(b). N.C. Gen. Stat. § 20-166.1(a) imposes a duty on drivers of vehicles involved in a reportable accident to notify "the appropriate law enforcement agency of the accident." N.C. Gen. Stat. § 20-166.1(a). Consequently, this duty presupposes disclosure of a driver's identity.

N.C. Gen. Stat. § 20-279.31(b)(1) falls under Article 9A of the Motor Vehicle Safety and Financial Responsibility Act. The object of the Motor Vehicle Safety and Financial Responsibility Act is to provide protection for persons injured in automobile accidents and require financial responsibility for operators of motor vehicles. *Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*, 262 N.C. 691, 696, 138 S.E.2d 512, 515 (1964); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967). Naturally, the driver's identity is necessary to impose financial responsibility.

Because we find the driver's identity is the type of information required to complete a reportable accident report, Pedro's statement to Trooper Henline that she was the driver was substantial evidence of the essential elements of the crime charged. N.C. Gen. Stat. § 279.31(b)(1); *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174. The jury's guilty verdict as to Pedro should be reinstated. *Scott*, 146 N.C. App. at 286, 551 S.E.2d at 918-19.

IV. N.C. Gen. Stat. § 15A-1227(c)

[4] Hernandez and Pedro cross-assign as error the trial court's decision to reserve ruling on their motions to dismiss at the close of all the evidence under N.C. Gen. Stat. § 15A-1227(c).

N.C. Gen. Stat. § 15A-1227(c) provides that "[t]he judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c) (2007). Here, the trial judge deferred ruling on defendants' motions to dismiss at the close of all the evidence. Although defendants did not properly object to the reservation of ruling, "[w]hen a trial court acts contrary to a statutory mandate, no objection is necessary to preserve the error." *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000) ("statutory violations, regardless of objections at the trial court, are reviewable").

To establish reversible error, a defendant must show "a reasonable possibility that had the error not been committed a different result would have been reached at the trial." *State v. Childress*, 321 N.C. 226, 232-33, 362 S.E.2d 263, 267 (1987) (citing N.C. Gen. Stat. § 15A-1443; *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981)).

Defendants contend that if the trial court had ruled on their motions before the jury verdict, then the court's decision would not be appealable under § 15A-1445(a). N.C. Gen. Stat. § 15A-1445(a)(1) grants the State a right to appeal when there is a judgment or decision dismissing criminal charges as to one or more counts, unless "the rule against double jeopardy prohibits further prosecution." N.C. Gen. Stat. § 15A-1445(a)(1) (2007).

In *State v. Murrell*, this Court held that double jeopardy barred the State's appeal of a dismissal at the close of all the evidence, 54 N.C. App. 342, 344, 283 S.E.2d 173, 174 (1981). Double jeopardy protects against "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Sparks*, 182 N.C. App. 45, 48, 641 S.E.2d 339, 341 (2007) (quoting *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 334 (1999)). When a motion to dismiss for insufficient evidence is granted, that judgment has the "force and effect of a verdict of not guilty as to such defendant . . . ." *Murrell*, 54 N.C. App. at 344, 283 S.E.2d at 174, (internal quotations omitted) (quotation omitted). A verdict of not guilty is the

same as an acquittal. *State v. Allen*, 144 N.C. App. 386, 388, 548 S.E.2d 554, 555 (2001) (dismissal of charges based on insufficiency of the evidence is an acquittal for the purposes of the Double Jeopardy Clause). A dismissal granted before a jury verdict bars appeal because a reversal on appeal would subject the defendant to a new trial. *Id.*, 144 N.C. App. at 388, 548 S.E.2d at 555. By contrast, in the case *sub judice*, dismissal after a jury verdict is appealable because the defendant would not be subject to re-trial if the dismissal is reversed on appeal.

Defendants presume that if the court ruled on their motions to dismiss at the close of all the evidence as mandated, the trial judge would have ruled as he did after the jury verdicts and dismissed the charges.

To determine whether or not the error was prejudicial, the issue is whether there is a reasonable possibility that the trial court would have granted defendants' motions to dismiss. N.C. Gen. Stat. § 15A-1443(a) (2007).

This case seems to be a case of first impression since there are no North Carolina cases examining the issue of whether an error resulting in an appealable verdict was prejudicial to defendants. However, in *State v. Garnett*, 4 N.C. App. 367, 167 S.E.2d 63 (1969), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 540-41, 380 S.E.2d 118, 119-20 (1989), this Court addressed a similar issue. In *Garnett*, the defendant appealed his conviction, *inter alia*, based on the trial court's failure to rule on his motion to dismiss at the close of all the evidence. *Garnett*, 4 N.C. App. at 371, 167 S.E.2d at 65. The trial court "did not specifically rule upon this latter motion but submitted the case to the jury. Judges should rule on each motion for nonsuit. However, under the circumstances presented here, there was no prejudicial error . . . ." *Id.* Because there was "ample evidence" against the defendant to withstand the motion, this Court held no prejudicial error. *Garnett*, 4 N.C. App. at 371, 167 S.E.2d at 66.

In the instant case, the trial judge denied defendants' motions to dismiss at the close of the State's evidence. Hernandez declined to present any evidence, and at the close of all the evidence, defendants again moved to dismiss for insufficient evidence:

THE COURT:	All right. At this stage of the trial is there anything that either party would have the Court to consider?

MR. KIELMANOVICH:	Nothing from the State, Your Honor.
MR. HOWLAND:	Motion to dismiss at the close of all the evidence, Your Honor.
MR. HECKART:	And I would also make the same motion, Your Honor.
THE COURT:	It's a close case. But let's see what the jury will do.
MR. HECKART:	All right. Very well, sir.
THE COURT:	Let's see what the jury will do with it.
MR. HECKART:	Very well.
THE COURT:	Let the record reflect that the defendants object and except to the Court's ruling at this stage. The ruling of the Court is that the Court will reserve its ruling on this until after the jury returns.

After the jury returned the verdicts, defendants moved for a judgment notwithstanding the verdict and renewal of their earlier motions to dismiss. The trial court judge expressed his thoughts about the jury verdicts, stating "I think they're wrong. I think they're wrong . . . I wanted to see what they would do with the case . . . . [T]he judgment of the Court that [sic] the motion to dismiss at the close of all the evidence is granted."

The judge's comments both before and after the jury verdicts suggest that the judge would have denied the motions had he ruled before the verdicts. Only if there was a reasonable possibility that their pre-verdict motions would be granted would the error be considered prejudicial error. Here, it is more likely that the court would have denied the motion, since the trial court denied earlier motions to dismiss and deferred ruling on the motions made at the close of all the evidence in order to "see what [the jury] would do." Furthermore, we conclude there is sufficient evidence in the record to withstand a motion to dismiss and the court's error was not prejudicial error.

The case is remanded with an order to the trial court to reinstate the jury's verdicts and sentence the defendants accordingly.

Reversed and remanded.

Judges GEER and JACKSON concur.

STATE OF NORTH CAROLINA v. SENECA LEVARTUS SMITH

No. COA06-1631

(Filed 15 January 2008)

1. Criminal Law— jury questions—supplemental instructions—review by defense counsel not required

The trial court did not violate defendant's statutory rights under N.C.G.S. § 15A-1234 by refusing to allow defense counsel to review questions from the jury before providing instructions in response to the questions because: (1) where instructions given do not add substantively to previous instructions, the latter instructions are not additional instructions as that term is contemplated in N.C.G.S. § 15A-1234(c), and the trial judge need not consult with the parties or give them an opportunity to be heard in advance of giving such instructions; and (2) a review of the court's instructions in response to the jury questions in the instant case revealed that they were simply a reiteration of the court's original instructions and cannot be characterized as additional instructions. Assuming arguendo that the court's subsequent instructions were additional instructions within the meaning of N.C.G.S. § 15A-1234, defendant did not object to the instructions and failed to show that absent the additional instructions the jury would have reached a different result.

2. Constitutional Law— right to be present—refusing to allow defendant to review jury questions

Although the trial court violated defendant's right under Article I, § 23 of the North Carolina Constitution to be present at every stage of the proceeding in a first-degree murder case by refusing to allow defense counsel to review the jury questions before giving supplemental instructions in response thereto, the State met its burden to show the violation was harmless beyond a reasonable doubt, because: (1) the record revealed that the questions indicated that the jury had already agreed unanimously on second-degree murder, and was confused as to whether their rejection of first-degree murder had to be unanimous; (2) the court correctly instructed the jury as to their duty by reiterating its original instructions; and (3) defendant was ultimately convicted of second-degree murder, and the court's instructions did not contribute to the verdict obtained.

3. Constitutional Law— effective assistance of counsel—failure to inform defense counsel of contents of questions from jury

Although the trial court erred by refusing to inform defense counsel of the contents of the questions from the jury in a first-degree murder case, it did not violate defendant's Sixth Amendment right to effective assistance of counsel, because: (1) this case did not present a situation where there was a likelihood that any lawyer would have been prevented from rendering effective assistance of counsel; (2) after the trial court received the questions, it repeated its original instructions; and (3) the circumstances did not rise to the level of a total deprivation of counsel.

4. Criminal Law— right to remain silent—prosecutor's argument—defendant's failure to present evidence of alibi

The trial court in a first-degree murder case did not improperly allow the prosecutor to comment on defendant's decision not to testify because the prosecutor's comments did not touch on defendant's decision not to testify, but instead reminded the jury that no alibi witnesses had been presented; furthermore, the prosecutor's opening statement that defendant was the last person to see the victim alive was supported by the evidence.

5. Criminal Law— supplemental instructions—no coercion of verdict

The trial court's supplemental instructions to the jury in a first-degree murder case were not coercive because: (1) defendant's contention that the jury was deadlocked was not supported by the record; (2) assuming arguendo the jury was deadlocked, the instructions were nothing more than a reiteration of the court's original charge; (3) at no time did the trial court inform the jurors that they would not be able to go home until they reached a unanimous verdict or that they would remain together until they reconciled their differences; and (4) the court gave instructions that the members of the jury should not compromise their beliefs to reach a verdict.

6. Homicide— first-degree murder—instruction on second-degree—invited error

The trial court in a first-degree murder prosecution did not commit plain error by instructing the jury on the offense of second-degree murder because: (1) defendant expressly requested an instruction on second-degree murder during the charge con-

ference; and (2) assuming arguendo that defendant is entitled to review on this issue, defendant failed to show plain error even though a rational jury could infer that there had been premeditation and deliberation since rejecting that inference was the jury's prerogative, and the evidence presented at trial did not preclude a finding of provocation on the part of decedent.

7. Homicide— murder—motion to dismiss—sufficiency of evidence

The trial court did not commit plain error by denying defendant's motion to dismiss the charge of murder because the State presented substantial evidence of an unlawful killing and that defendant was the perpetrator.

Appeal by defendant from judgment entered 10 October 2006 by Judge James E. Hardin, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

STEELMAN, Judge.

When the trial court's supplemental jury instructions are not additional instructions within the meaning of N.C. Gen. Stat. § 1234, the court does not err when it does not consult with the parties or give them an opportunity to be heard before giving the instructions. When the State shows that the violation of defendant's right to presence under Article I, § 23 of the North Carolina Constitution was harmless beyond a reasonable doubt, a new trial is not warranted. When the defendant does not suffer a total deprivation of counsel, a new trial is not warranted. When the prosecutor's closing argument is proper, the trial court's failure to intervene *ex mero motu* is not an abuse of discretion. When the jury is not deadlocked, and the court's instructions are not coercive, a new trial is not warranted. When defendant requests an instruction on the lesser-included offense, and the evidence supports the instruction, the trial court does not err in giving the instruction. When the State presented sufficient evidence of murder and that defendant was the perpetrator, the court does not err in denying defendant's motion to dismiss.

I. Factual Background

On 5 November 2003, Seneca Levartus Smith (defendant), defendant's cousin, Shelvekkeo Smith (Smith), and a man named Daniel went to the apartment of Latasha Renee Alexander. The men drank and smoked for several hours, after which time Smith and Daniel left the apartment. At approximately 3 a.m., defendant called a cab to take him back to Smith's house, where he resided. Defendant went inside to get money from Smith to pay for the cab and returned with a $20 bill. The cab driver drove defendant to a nearby gas station to get change, and then drove him back to Smith's home. The cab driver's testified that he saw defendant enter Smith's house after he dropped him off the second time.

According to defendant, he did not go into Smith's home, but instead went to a friend's house and then to his mother's home. Defendant returned to Smith's house at approximately 3:00 p.m. on the afternoon of 6 November 2003, at which point he and his brother, Jermaine Jackson, discovered Smith's body in a bedroom of the home.

The High Point Police officer who responded to the 911 call found Smith's body in the bedroom in a pool of blood, covered by a mattress from the waist up. Police officers found two samurai swords in the home; one lay in the bedroom near the body, and one was found in another bedroom.

On 29 September 2004, defendant was indicted for first degree murder of Smith. The jury returned a verdict of guilty of second degree murder. The trial court found defendant to be a prior record Level IV for felony sentencing purposes and entered judgment imposing 251 to 311 months imprisonment. Defendant appeals.

II. Jury Questions

A. Statutory Violation

[1] In his first argument, defendant contends that the trial court erred in refusing to allow defense counsel to review questions from the jury before providing instructions in response to the questions. Defendant claims this violated his statutory rights under N.C. Gen. Stat. § 15A-1234. We disagree.

After the jury has retired to deliberate, the trial court "may give appropriate additional instructions to . . . respond to an inquiry of

the jury made in open court[.]" N.C. Gen. Stat. § 15A-1234(a) (2005). The statute further provides that:

> Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard.

N.C. Gen. Stat. § 15A-1234(c). However, where instructions given do not add substantively to previous instructions, "the latter instructions are not 'additional instructions' as that term is contemplated in section 15A-1234(c), and the trial judge need not consult with the parties or give them an opportunity to be heard in advance of giving such instructions." *State v. Rich*, 132 N.C. App. 440, 448, 512 S.E.2d 441, 447 (1999) (citation omitted).

The trial court originally instructed the jury as follows:

> The defendant, Seneca Levartus Smith, has been charged with first degree murder. Under the law and evidence in this case, it is your duty to return one of the following verdicts: Guilty of first degree murder; or, guilty of second degree murder; or, not guilty. . . .
>
> If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder. If you do not find the defendant guilty of first degree murder, you must then determine whether he is guilty of second degree murder. . . .
>
> 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 not guilty. . . .
>
> Ladies and gentlemen, you may not return a verdict until all twelve jurors agree unanimously. You may not render a verdict by majority vote.

The jury deliberated for five days before returning a verdict. On the afternoon of the fourth day of deliberations, the trial court received two questions from the jury, the first of which stated:

> This note divulges our deliberations! We would appreciate this not read in open court! We the jury request *instruction* on our *method* of deliberations as to coming to a unanimous verdict. We all agree that 2nd degree murder criteria is met. All but one juror

> is comfortably convinced of 2nd degree[.] This lone juror has the attached question.
>
> (In short, if we unanimously agree on 2nd degree murder criteria, and one juror is more convinced of 1st degree also, then do we interpret your instructions as now having to return a 2nd degree verdict.)
>
> See lone juror's attached question.

(emphasis in original). The second question stated:

> We are unanimous that the criteria for 2nd degree has been met. Some jurors are convinced that the criteria for first degree has also been met. One juror interprets the instructions to say that as long as they are convinced that first degree has been proven, they are not to agree to a second degree verdict. The other jurors interpret the instructions to say that if we can't unanimously agree on first degree, we should then return the verdict of second, despite some jurors think that both second and first have been proven. Which interpretation is correct?

The court did not permit either party to review the questions, did not inform the parties of the instructions he intended to give in response, and did not give either party an opportunity to be heard. Instead, the court gave the following instructions:

> The defendant, Seneca Levartus Smith, has been charged with first degree murder. Under the law and evidence in this case, it is your duty to return one of the following verdicts: Guilty of first degree murder; or, guilty of second degree murder; or, not guilty. You may not return a verdict until all twelve jurors agree unanimously. You may not render a verdict by majority vote. I think what you are asking me and I will instruct you to consider first degree murder first, and to determine if the defendant is guilty or not guilty beyond a reasonable doubt unanimously. And depending upon what your verdict is with respect to that charge, if you find the defendant not guilty of first degree murder, then you would move on to second degree murder.

Neither defense counsel nor the State objected to the court's instructions, and both parties answered in the negative when the court inquired if they had additional requests.

A careful review of the court's instructions in response to the jury questions reveals that they were simply a reiteration of the court's

original instructions and cannot be characterized as additional instructions. We therefore hold that it was unnecessary for the court to inform the parties of the supplemental instructions it intended to give. *See Rich*, 132 N.C. App. at 448, 512 S.E.2d at 447. This argument is without merit.

Assuming *arguendo* that the court's subsequent instructions were additional instructions within the meaning of the N.C. Gen. Stat. § 15A-1234, defendant did not object to the instructions. When a defendant does not object to instructions, the alleged error is subject to review for plain error only. *State v. Odom*, 307 N.C. 655, 659-61, 300 S.E.2d 375, 378-79 (1983).

> 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. To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result.

State v. Ramirez, 156 N.C. App. 249, 256, 576 S.E.2d 714, 720 (2003) (citations and quotations omitted).

Defendant has made no showing that, absent the additional instructions given to the jury, the jury would have reached a different result. To the contrary, the contents of the questions reveals that, at the time the additional instructions were given, the jury had independently reached a unanimous verdict regarding the charge of second degree murder.

When viewed as a whole, we are not "convinced that absent the error the jury probably would have reached a different verdict." *See State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citation omitted). Defendant has not demonstrated that the alleged additional instructions had an impact on the jury's verdict. This argument is without merit.

B. Right to Presence

[2] In his second argument, defendant contends that the trial court's refusal to allow defense counsel to review the jury questions deprived him of his right under Article I, § 23 of the North Carolina Constitution to be present at every stage of the proceeding. Although we agree that defendant was denied his right to presence, we hold that the violation was harmless beyond a reasonable doubt.

Article I, § 23 of the North Carolina Constitution requires that a defendant be present at every stage of the proceeding in a capital case. *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). When a trial court communicates with a juror without disclosing the contents of the communication to the defendant, the defendant's actual presence in the courtroom can be negated by such communication. *State v. Jones*, 346 N.C. 704, 709, 487 S.E.2d 714, 718 (1997) (citation omitted).

Where a defendant is prejudiced by errors relating to rights arising under the United States Constitution, the burden is upon the State to demonstrate that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005). Although the right to presence arises under the North Carolina Constitution, the North Carolina Supreme Court has held that "the proper standard of reversal in reviewing violations under article I, section 23, of defendant's right to be present at all stages of his capital trial is the rigorous standard prescribed for review of violations of defendant's right to be present at trial under the federal Constitution." *State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 653 (1989), *vacated and remanded on other grounds*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990). Thus, a new trial is appropriate unless the State proves the error to be harmless beyond a reasonable doubt. *Jones*, 346 N.C. at 710, 487 S.E.2d at 718. If the transcript shows the substance of the court's conversation with the juror or the court reconstructs the substance of the conversation on the record, the State may show that the error was harmless beyond a reasonable doubt. *Id.* (citation omitted).

The record reveals that the questions indicated that the jury had already agreed unanimously on second-degree murder, and was confused as to whether their rejection of first-degree murder had to be unanimous. The court correctly instructed them as to their duty by reiterating its original instructions. Defendant was ultimately convicted of second degree murder, and the court's instructions "did not contribute to the verdict obtained." *Huff*, 325 N.C. at 33-34, 381 S.E.2d at 653-54 (quoting *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967)).

We hold that the State has shown that the error was harmless beyond a reasonable doubt, and a new trial is not warranted. This argument is without merit.

C. Right to Effective Assistance of Counsel

[3] In his third argument, defendant contends that the trial court's refusal to inform defense counsel of the contents of the questions from the jury violated his Sixth Amendment right to effective assistance of counsel. We disagree.

A criminal defendant is guaranteed the right to be represented by counsel, and this right has been interpreted as the right to effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654-55, 80 L. Ed. 2d 657, 664-65 (1984). A defendant is entitled to relief for denial of effective assistance of counsel without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *Cronic*, 466 U.S. at 659 n.25, 80 L. Ed. 2d at 668 n.25. If the circumstances of the trial establish the likelihood that even the most competent attorney would be prevented from providing effective assistance, prejudice to the defendant is presumed. *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336 (1993) (citation omitted).

Defendant claims that the trial court's decision not to disclose the questions to defense counsel created circumstances under which no lawyer could have rendered effective assistance. Defendant attempts to equate the circumstances of his trial with those in *State v. Pait*. We disagree. In *Pait*, the court vacated the defendant's sentence due to improper pressure exerted by the trial judge. *State v. Pait*, 81 N.C. App. 286, 290, 343 S.E.2d 573, 576 (1986). In that case, when defendant entered a plea of not guilty, the trial judge "became visibly agitated," "said in what appeared to be an angry voice that he was tired of 'frivolous pleas,' " and "directed counsel to confer with defendant and return with an 'honest plea.' " *Pait*, 81 N.C. App. at 287-88, 343 S.E.2d at 575. This Court held that, due to the trial judge's improper comments and the "unusual celerity with which the State and court moved," defendant was denied effective assistance of counsel. *Pait*, 81 N.C. App. at 290, 343 S.E.2d at 576.

This case does not present a situation where there is a likelihood that any lawyer would have been prevented from rendering effective assistance. After the trial court received the questions, it repeated its original instructions. Although the court erred in refusing to allow defense counsel to examine the questions, we hold that these circumstances do not rise to the level of a total deprivation of counsel. This argument is without merit.

III. Argument by Prosecutor

[4] In his fourth argument, defendant contends that the trial court erred in allowing the prosecutor to comment on defendant's decision not to testify. We disagree.

Although a prosecutor may not comment on the defendant's decision not to testify, the prosecutor may point out to the jury the defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. *State v. Parker*, 350 N.C. 411, 430-31, 516 S.E.2d 106, 120 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681, 120 S. Ct. 808 (2000) (quoting *State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986)). A trial court is not required to intervene "unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000) (citation omitted). Where a defendant does not object to the statements, the standard of review on appeal is whether the prosecutor's remarks were so grossly improper that the trial court's failure to intervene ex mero motu constituted an abuse of discretion. *State v. Barden*, 356 N.C. 316, 356, 572 S.E.2d 108, 134 (2002).

In the State's closing argument, the Assistant District Attorney pointed out that the defendant had not presented evidence of an alibi, arguing:

> But the defendant has not put up on[e] single solitary witness to show evidence of any alibi, that he was anywhere else. Somebody from—he tells Detective O'Connor he ran into somebody later that morning. He went down to the curb market. He was with his brother for a period of time, Jermaine Jackson. He's apparently been sitting in the courtroom. Not one single bit of evidence of alibi that he was anywhere else . . .

In his opening statement, the prosecutor stated that defendant "was the last one that you'll hear from that saw Shelvekkeo [Smith] alive during the morning hours of November the 6th of 2003."

Defendant contends that the comments were improper and that the court should have intervened to admonish the prosecutor, or should have given a curative instruction. However, read in the context of the entire closing argument, it appears that the prosecutor was not referring to defendant in his remarks to the jury. As defendant had obviously been sitting in the courtroom for the entire trial, the prosecutor's statement about the individual who had "apparently

been sitting in the courtroom" refers to defendant's brother, Jermaine Jackson. The prosecutor's comments did not touch on defendant's decision not to testify, but instead reminded the jury that no alibi witnesses had been presented.

Regarding the prosecutor's opening statement, the record shows that evidence was in fact presented that defendant was the last person who saw the victim alive. This evidence fulfilled the Assistant District Attorney's forecast in his opening statement. The prosecutor's comments were permissible and not grossly improper, and we hold that the trial court did not abuse its discretion in failing to intervene under the facts of this case. This argument is without merit.

IV. Jury Instructions

[5] In his fifth argument, defendant contends that the trial court's supplemental instructions to the jury were coercive. We disagree.

N.C. Gen. Stat. § 15A-1235 (2005) provides guidelines for instructing deadlocked juries. The statute provides in pertinent part:

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> . . .
>
> (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.

N.C. Gen. Stat. § 15A-1235(b).

Defendant contends that the jury questions indicated that the jury was deadlocked, and that the court erred when it failed to inform jurors that they should not forsake their own "well-founded convictions or judgment to the views of the majority . . ." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978) (citations omitted).

Defendant's contention that the jury was deadlocked is not supported by the record. On more than one occasion, the court asked the jury foreman whether the jury was making progress towards a verdict. Each time he was asked, the foreman indicated that the jury was making progress. Thus, at no time was the jury deadlocked, and N.C. Gen. Stat. § 15A-1235 is inapplicable.

Assuming *arguendo* that the jury was deadlocked, we hold that the trial court's instructions of which defendant complains were not

coercive. The instant case is distinguishable from *State v. Roberts*, 270 N.C. 449, 154 S.E.2d 536 (1967). In *Roberts*, the trial court used the problematic language "I am going to ask that you again retire and consider the case until you reach a unanimous verdict[]" at the end of its jury instruction. *Roberts*, 270 N.C. at 451, 154 S.E.2d at 537. This sort of compelling, coercive language is absent from the instant case. The instructions here are nothing more than a reiteration of the court's original charge. At no time did the trial court inform the jurors that they would not be able to go home until they reached a unanimous verdict or that they would remain together until they reconciled their differences.

Further, in *Roberts*, the trial judge altogether failed to instruct the jury that no one was to surrender his personal beliefs in order to agree with a majority on a verdict. In contrast, the court in the instant case gave instructions that the members of the jury should not compromise their beliefs to reach a verdict.

When viewed in the context of the entire trial, we hold that the court's instructions were not coercive. This argument is without merit.

V. Instructions on Lesser-Included Offense

[6] In his sixth argument, defendant contends that the trial court committed plain error when it instructed the jury on the offense of second-degree murder as there was insufficient evidence to support that instruction. We disagree.

N.C. Gen. Stat. § 15A-1443(c) (2005) provides that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." *Id.* A defendant who invites error will not be heard to complain on appeal. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993) (noting "defendant foreclosed any inclination of the trial court to instruct on the lesser-included offense of second-degree murder"); *State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993); *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992).

Defendant cites *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981) for the proposition that a court cannot give jury instructions which are not supported by the evidence. However *Taylor* did not address the issue of invited error and therefore is inapplicable to the facts of this case.

In the instant case, counsel for defendant expressly requested an instruction of second-degree murder during the charge conference. Thus, defendant is not entitled to relief for any alleged error in the trial court's instructions. This argument is without merit.

Assuming *arguendo* defendant is entitled to review on this issue, he is limited to plain error review since he did not object to the instructions. *State v. Duke*, 360 N.C. 110, 133, 623 S.E.2d 11, 26 (2005). Accordingly, defendant must show that "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) (citation omitted).

> Defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater . . . due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

State v. Leazer, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citations and quotations omitted). The weight to be given circumstantial evidence is a decision for the jury. *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). Likewise, issues of credibility are matters solely within the province of the jury. *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988).

Defendant contends the evidence only supported instructions on premeditated and deliberated murder. Defendant cites evidence that the victim suffered 73 wounds, and that, based on this number, no rational jury could conclude that the killer did not act with premeditation and deliberation.

The State presented evidence at trial which would support a verdict of second-degree murder. Lieutenant George Ferguson, a responding officer to the crime scene, testified "[t]he bedroom was in disarray. Appeared to have been some type of struggle or some type of fight inside the bedroom." The victim's mother, Marisa Hussain, testified that her son collected swords and practiced martial arts.

While a rational jury could infer that there had been premeditation and deliberation, rejecting that inference was the jury's prerogative, and the evidence presented at trial did not preclude a finding of provocation on the part of decedent.

Defendant has failed to show plain error on the part of the trial court in instructing the jury on the offense of second-degree murder. This argument is without merit.

V. Denial of Defendant's Motion to Dismiss

[7] In his final argument, defendant contends that the trial court committed plain error when it denied his motion to dismiss on the grounds that the State did not present sufficient evidence of murder. We disagree.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Murray*, 154 N.C. App. 631, 634, 572 S.E.2d 845, 847 (2002) (citation omitted). The court must view 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. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000).

The elements of a charge of murder are: (1) the unlawful killing, (2) of another human being, (3) with malice. *State v. McAllister*, 138 N.C. App. 252, 256, 530 S.E.2d 859, 862 (2000).

Evidence was presented at trial of an unlawful killing of Shelvekkeo Smith. There was also sufficient evidence presented of defendant being the perpetrator. The cab driver who drove defendant home from Ms. Alexander's apartment testified that defendant entered the house on Ragan Avenue upon exiting the cab. Defendant's statements to officers placed him in the presence of the victim at 4:00 or 5:00 a.m. on 6 November 2003. In his statement to Detective O'Connor, defendant recounted that, when he discovered the body of Shelvekkeo Smith, although he never entered the bedroom, he could see cuts on the victim's face and neck. However, the investigating officer testified that there was a mattress covering the victim from the waist up, such that the head and neck were not visible.

At trial, the victim's mother, Marisa Hussain, testified that she had a conversation with defendant concerning Indian death ceremonies

in which defendant stated he had "talked with an American Indian Chief and the Chief said to him that when their people died, they sprinkled a powder . . . [like] Comet, Ajax or something . . . because it makes it easier to go into the next life . . ." Police officers observed a white powder sprinkled around the body of Smith, on the floor throughout the house, and down the rear steps. Officers later found a pair of blue work boots in the trash can outside of the back door which contained the white powder substance in the tread. Defendant's girlfriend testified that defendant was wearing the same type and style of boots the previous evening.

The State presented substantial evidence of an unlawful killing and that defendant was the perpetrator. We hold that the trial court properly denied defendant's motion to dismiss, and this argument is without merit.

Defendant has failed to argue his remaining assignments of error, and they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2007).

NO PREJUDICIAL ERROR.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA v. JOHNNIE HAL MONCREE, JR.

No. COA07-159

(Filed 15 January 2008)

1. Discovery— expert testimony regarding substance in defendant's shoe—harmless error

The trial court committed harmless error in a double misdemeanor possession of up to one-half ounce of marijuana, possession of drug paraphernalia, and possession of a controlled substance on the premises of a local confinement facility case by allowing the State to introduce expert testimony by an SBI agent regarding the substance in defendant's shoe in violation of discovery requirements under N.C.G.S. § 15A-903(a)(2), because: (1) althought the trial court determined the agent would not be testifying as an expert concerning the substance found in the

shoe, the agent's testimony at trial regarding his education, training, and experience in forensic analysis revealed the agent was testifying as an expert witness; (2) defendant was not prejudiced by the expert testimony since two officers testified that based upon their training and experience, they believed marijuana was the substance found in defendant's shoe; and (3) defendant should have anticipated this evidence and should not have been unfairly surprised by the agent's testimony since he was charged with one count of possession of a controlled substance on the premises of a local confinement facility, and he knew the two officers would testify about the substance found in his shoe at the sheriff's department.

2. Drugs— possession of controlled substance on premises of local confinement facility—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a controlled substance on the premises of a local confinement facility because: (1) contrary to defendant's assertion, the Court of Appeals has never concluded the State must prove the offense occurred in an area accessible only to officers and their detainees in order for the area to be determined a local confinement facility under N.C.G.S. § 90-95(e)(9); and (2) after defendant was taken before a magistrate, he was taken to the sheriff's department, a local confinement facility, as standard procedure to be processed since he was given a secured bond.

3. Drugs— multiple counts of possession of marijuana— simultaneous possession and same purpose

The Court of Appeals determined ex mero motu that the trial court erred by denying defendant's motions to dismiss and entering judgments against him for three counts of possession of marijuana including misdemeanor possession of up to one-half ounce of marijuana found in an officer's automobile, misdemeanor possession of up to one-half ounce of marijuana found in his shoe, and felony possession of marijuana on the premises of a local confinement facility, and defendant's convictions of the lesser two offenses should be arrested, because: (1) all three counts arose from one continuous act of possession; (2) in regard to the misdemeanor possession charges, there was no evidence that defendant possessed the marijuana for two distinct purposes, and defendant possessed both the marijuana in the automobile and in

his shoe simultaneously; (3) the State presented no evidence showing defendant came into possession of the marijuana in his shoe after he was arrested; and (4) an officer testified that both amounts of marijuana in the automobile and the shoe would have been discovered at the scene had an adequate search of defendant been conducted.

4. Sentencing— habitual felon status—facially defective indictment—stipulation

The trial court lacked subject matter jurisdiction to accept and enter defendant's plea to attaining habitual felon status based on a facially defective indictment, and the case is remanded for resentencing based on this issue, because: (1) the indictment failed to set forth three predicate felony offenses as required by N.C.G.S. § 14-7.l since defendant's conviction in New Jersey was considered a high misdemeanor and not a felony; (2) defendant did not waive his right to appeal since the issue he raised, that the indictment failed to include each of the elements specified in § 14-7.3, is jurisdictional and may be raised at any time; and (3) defense counsel's stipulation to the three convictions set out in the habitual felon indictment, even though the New Jersey conviction was not a felony, has no bearing on whether the indictment was valid since generally parties may not stipulate as to what the law is.

Appeal by defendant from judgment entered 13 September 2006 by Judge James Hardin, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 12 September 2007.

Attorney General Roy Cooper, *by Assistant Attorney General Lisa G. Corbett*, *for the State.*

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Emily H. Davis*, *for defendant-appellant.*

CALABRIA, Judge.

Johnnie Hal Moncree, Jr. ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of two misdemeanor counts of possession of up to one-half ounce of marijuana, one count of possession of drug paraphernalia, and one count of possession of a controlled substance on the premises of a local confinement facility. We remand for resentencing.

At approximately 12:51 a.m. on 13 August 2004, Officer Brent Roberts ("Officer Roberts") of the Gaston County Police Department stopped defendant when he noticed defendant's automobile had a broken taillight. As Officer Roberts approached defendant's automobile, he noticed defendant moved his arm towards Tisha Mote ("Tisha"), the passenger in the automobile. It appeared Tisha fumbled around her waistband after defendant handed an object to her. When Officer Roberts stood beside defendant's automobile and asked defendant for his driver's license, he noticed a strong odor of marijuana coming from inside the automobile. Officer Roberts asked defendant to step outside the automobile. Subsequently, defendant consented to a search of his automobile.

After defendant consented to the search, Officer Roberts proceeded to pat down defendant for weapons and told Tisha to step out of the automobile. As Tisha stepped out of the automobile, Officer Roberts noticed a marijuana joint and a chunk of marijuana in the front passenger seat where Tisha had been seated. Officer Roberts subsequently restrained both defendant and Tisha with handcuffs and placed them in the back of his patrol car while he searched the automobile. He also called Officer Avery for assistance. During the automobile search, Officer Roberts found an open container of beer but did not find any other marijuana.

When Officer Roberts finished the search, he walked back to his patrol car and issued citations to defendant and Tisha for possession of marijuana. After handing them the citations, Officer Roberts told them they were free to leave. As defendant and Tisha walked back to the automobile, Officer Roberts performed a routine check of the backseat of his patrol car and found a "large bag of an off white substance." He believed the substance could be either cocaine or methamphetamine. After finding the white substance, the officers restrained defendant and Tisha with handcuffs, and transported them to the Gaston County Sheriff's Department. At the Sheriff's Department, Deputy Kevin Lail ("Deputy Lail") instructed defendant to take off his shoes and socks. As defendant removed his left shoe, Deputy Lail noticed a bag containing a green leafy substance that appeared to be marijuana.

Officer Roberts sent the white substance he found in the backseat of his patrol car and the other substance he discovered in the front passenger seat of defendant's automobile to the SBI for chemical analysis. The material discovered in defendant's shoe was never sent to the SBI for testing or subjected to any chemical analysis.

During trial, an SBI agent, Jay Pintacuda ("Agent Pintacuda"), testified the substance found in defendant's automobile was marijuana and the substance found in the backseat of Officer Roberts' patrol car was cocaine. Agent Pintacuda also testified about the substance in defendant's shoe. Over defendant's objection, the trial court allowed Agent Pintacuda to testify that in his opinion, the substance found in defendant's shoe was marijuana.

Following his trial in Gaston County Superior Court, the jury returned a verdict finding defendant guilty of two misdemeanor counts of possession of up to one-half ounce of marijuana, one count of possession of drug paraphernalia, and one count of possession of a controlled substance on the premises of a local confinement facility. Defendant pled guilty to attaining habitual felon status. Pursuant to the plea agreement, Judge James Hardin, Jr. sentenced defendant to a minimum term of 70 months to a maximum of 93 months in the North Carolina Department of Correction. From that judgment, defendant appeals.

I. Discovery Violation

[1] On appeal, defendant first argues the trial court erred by allowing the State to introduce expert testimony in violation of discovery requirements pursuant to N.C. Gen. Stat. § 15A-903(a)(2) (2006). We agree that the State violated the discovery statutes and the trial court erred in admitting the testimony. However, we find the error harmless.

> N.C. Gen. Stat. § 15A-903 states in pertinent part:
>
> (a) Upon motion of the defendant, the court must order the State to:
>
> . . . .
>
> (2) Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2).

"Also, once a party, or the State has provided discovery there is a continuing duty to provide discovery and disclosure." *State v. Blankenship*, 178 N.C. App. 351, 354, 631 S.E.2d 208, 210 (2006) (citing N.C. Gen. Stat. § 15A-907 (2004)).

In the instant case, prior to trial, the State notified defendant of its intention to introduce any SBI lab reports prepared in the case. At trial, Agent Pintacuda, an SBI agent testified that in his opinion the substance found in defendant's left shoe was marijuana although the substance was never sent to the SBI lab and no test results existed regarding its chemical composition. Defendant objected to Agent Pintacuda's testimony regarding the substance found in defendant's shoe. Defendant argued the State failed to notify defendant, as required pursuant to N.C. Gen. Stat. § 15A-903(a)(2), that expert testimony would be offered as to the identity of the substance found in defendant's shoe.

The trial court determined the State had complied with discovery requirements because Agent Pintacuda would not be testifying as an expert concerning the substance found in defendant's shoe. In making this determination, the trial court said there was case law allowing "a lay witness to testify and render an opinion regarding the nature of [a] substance." The trial court reasoned that marijuana has unique characteristics and Agent Pintacuda would testify to the substance found in defendant's shoe as a lay witness and not an expert witness.

This Court has held "that in order to qualify as an expert witness, the witness need only be better qualified than the jury as to the subject at hand, such that the witness' testimony would be helpful to the jury." *Blankenship*, 178 N.C. App. at 354, 631 S.E.2d at 211. Here, upon calling Agent Pintacuda to the stand, the State immediately questioned him regarding his education, training, and experience. Agent Pintacuda testified regarding his experience in forensic analysis, his employment at various sheriff's departments, and his extensive training in analyzing physical evidence. Clearly, Agent Pintacuda was "better qualified than the jury" in determining if marijuana was the substance found in defendant's shoe. However, Agent Pintacuda's extensive education and training in forensic analysis makes it difficult to imagine how he was able to separate his education, training, and experience while working for the SBI to determine the substance found in defendant's shoe was marijuana based solely on his lay opinion. Therefore, Agent Pintacuda testified as an expert witness con-

cerning the substance found in defendant's shoe and the State did not properly comply with the discovery requirements pursuant to N.C. Gen. Stat. § 15A-902(a)(2).

Although the trial court erred in admitting the testimony, we find defendant was not prejudiced. "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence *he cannot anticipate*." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (emphasis supplied). In *State v. Patterson*, 335 N.C. 437, 454, 439 S.E.2d 578, 588 (1994), our Supreme Court held the State failed to comply with the discovery statutes by not disclosing some of the statements defendant made while responding to police questioning that were later introduced as evidence at trial. However, the trial court's error in admitting the testimony was harmless error. The Court pointed out that defendant could not have been unfairly surprised by the same testimony defendant had elicited himself from another witness. *Id.*, 335 N.C. at 455-56, 439 S.E.2d at 589.

In the instant case, both Officer Roberts and Deputy Lail testified that based upon their training and experience, they believed marijuana was the substance found in defendant's shoe. Moreover, Deputy Lail testifed, "[w]hen I had taken it out of [defendant's] shoe he had asked me if I would just throw it away and not to charge him with it." Additionally, the baggie containing the substance found in defendant's shoe was passed around to the jury, and they had the opportunity to see the substance first hand. Because defendant was charged with one count of possession of a controlled substance on the premises of a local confinement facility, defendant knew both Officer Roberts and Deputy Lail would testify about the substance found in defendant's shoe at the Gaston County Sheriff's Department. Therefore, defendant should have anticipated this evidence and should not have been unfairly surprised by Agent Pintacuda's testimony regarding the substance found in defendant's shoe. We overrule this assignment of error.

Although we determine defendant was not prejudiced, we note the State should comply with statutory discovery requirements. District attorneys are elected public officials, and therefore North Carolina citizens trust the people who serve as district attorneys. Failure of district attorneys to follow statutory discovery requirements erodes the public's trust not only in district attorneys, but in any public official.

II. Possession of a controlled substance on the premises of a local confinement facility

[2] Defendant next contends the trial court erred by denying his motion to dismiss the charge of possession of a controlled substance on the premises of a local confinement facility because the State failed to prove defendant was on the premises of a local confinement facility. We disagree.

N.C. Gen. Stat. § 90-95(e)(9) (2006) provides that "[a]ny person who [possesses a controlled substance] on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 153A-217 (2006) defines "local confinement facility" as including "a county or city jail, a local lockup, a regional or district jail, a juvenile detention facility, a detention facility for adults operated by a local government, and any other facility operated by a local government for confinement of persons awaiting trial or serving sentences[.]"

Defendant contends there is an additional element the State must prove in order for defendant to be found guilty of possession of a controlled substance on the premises of a local confinement facility. Defendant argues the State did not meet its burden of proving that defendant was in a secured area accessible only to officers and their detainees and therefore, "on the premises of a local confinement facility." Defendant relies on this Court's holding in *State v. Dent*, 174 N.C. App. 459, 621 S.E.2d 274 (2005). However, defendant's reliance on *State v. Dent* is misplaced.

In *Dent*, defendant was found to be in possession of marijuana in a search room near the lobby of the magistrate's office at the Forsyth County Law Enforcement and Detention Center. *Id.*, 174 N.C. App. at 461, 621 S.E.2d at 276. The issue in *Dent* was whether defendant was on the premises of a "local confinement facility." This Court determined "[t]he legislative intent in making possession of a controlled substance on the premises of a local confinement facility felonious is clear: to deter and prevent drug possession among those individuals present at local confinement facilities." *Id.*, 174 N.C. App. at 467, 621 S.E.2d at 280. In concluding a search room near the lobby of a magistrate's office is a "local confinement facility," this Court looked at numerous factors. *Id.* One of the factors was "law enforcement officers must first proceed through a locked vehicle gate and then check their weapons and identify themselves via an intercom system." *Id.* Other factors were only law enforcement officers were allowed to

enter the area and the room in which defendant was searched was a "secured room where law enforcement officers detain and search those individuals who are to be taken before the magistrate." *Id.* While the *Dent* Court analyzed these factors to determine whether the search room was a "local confinement facility," the Court never said the State must prove that the offense occurred in an area accessible only to officers and their detainees in order for the area to be determined a "local confinement facility" pursuant to N.C. Gen. Stat. § 90-95(e)(9).

Furthermore, the *Dent* Court stated:

> By including the term 'on the premises of' in its description of the restricted area, the legislature plainly intended that N.C. Gen. Stat. § 90-95(e)(9) should extend beyond the bounds of the 'lockup' area of a local confinement facility, including to those secured areas in which arrestees are temporarily detained for *search*, *booking*, *and other purposes*.

Id., 174 N.C. App. at 467-68, 621 S.E.2d at 280 (emphasis supplied). In the instant case, defendant was taken to the Gaston County Sheriff's Department. Deputy Lail testified, "Officer Roberts with the county police had brought him in on some charges. He had been taken in front of the magistrate and then brought to us as standard procedure for us to book him in to process him because he was given a secured bond." Thus, defendant was "on the premises of a local confinement facility" within the plain meaning of N.C. Gen. Stat. § 90-95(e)(9). We find no error and this assignment of error is overruled.

III. Three counts of possession of marijuana

[3] Defendant next argues the trial court erred by denying defendant's motions to dismiss and entering judgment against him for three counts of possession of marijuana. We agree.

Defendant was charged with and convicted of three counts of possession of marijuana. He was convicted of one count of misdemeanor possession of up to one-half ounce of marijuana for the marijuana Officer Roberts found in his automobile, one count of misdemeanor possession of up to one-half ounce of marijuana found in his shoe, and one count of felony possession of marijuana on the premises of a local confinement facility in violation of N.C. Gen. Stat. § 90-95(e)(9).

Defendant argues the trial court erred by denying defendant's motions to dismiss and entering judgment against him for three

counts of possession of marijuana when the State's evidence demonstrated that all three counts arose from one continuous act of possession. However, the State concedes defendant's conviction for the lesser of the two offenses of simple possession of marijuana found on the premises of the Gaston County Sheriff's Department should be arrested.

We first note that defendant did not properly preserve this argument for appellate review pursuant to N.C.R. App. P. 10(b)(1). At the close of the State's evidence, defendant made motions to dismiss the charges of maintaining a vehicle that was used for keeping a controlled substance, possession with intent to sell or deliver a controlled substance, and possession of a controlled substance on the premises of a local confinement facility. However, defense counsel told the trial court, "Your Honor, the other charges, misdemeanor possession and drug paraphernalia, I don't care to be heard on those." After the trial court denied defendant's motions, defendant renewed these motions at the close of all the evidence. At the close of all the evidence, defense counsel told the trial court, "Your Honor, I would renew my motions on motions to dismiss, especially on maintaining a vehicle to keep a controlled substance." Thus, defendant did not properly preserve this issue for appellate review. Notwithstanding this fact, this Court addressed this same issue *ex mero motu* in *State v. Alston*, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

In *Alston*, the defendant was charged in separate indictments for the sale of cocaine on school property, felonious possession of cocaine, possession of cocaine with intent to sell and deliver, and sale of cocaine. *Id.*, 111 N.C. App. at 421, 432 S.E.2d at 388. The trial court submitted separate verdicts for sale of cocaine and sale of cocaine within 300 feet of school property, and this Court, *ex mero moto*, said this was error and arrested defendant's conviction for the sale of cocaine. *Id.* In determining the separate verdicts were error, this Court held, "[t]he sale on school property constituted an aggravated sale pursuant to G.S. § 90-95(e)(8). Since that was the only sale made, defendant could be punished for but one sale." *Id.*

In the instant case, the trial court submitted separate verdicts for one count of misdemeanor possession of marijuana found in defendant's shoe at the sheriff's department and one count of felony possession of marijuana on the premises of a local confinement facility. This was error. As in *Alston*, defendant's conviction for the lesser of the two offenses should be arrested.

Therefore, the next issue is whether defendant should have been charged with one count of misdemeanor possession of up to one-half ounce of marijuana for the marijuana Officer Roberts found in defendant's automobile. As stated earlier, defendant did not properly preserve this issue for appellate review since he did not make a motion to dismiss at the close of all the evidence pertaining to the marijuana found in defendant's automobile. However, because we agree with defendant that two of the three marijuana charges should be vacated, we address this issue pursuant to N.C.R. App. P. 2.

In order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space. *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984). In *Rozier*, this Court upheld the defendants' conviction for felonious possession of cocaine and misdemeanor possession of small amounts of cocaine. *Id.*, 69 N.C. App. at 55, 316 S.E.2d at 904. In affirming both possession convictions for possession of the same controlled substance, this Court reasoned defendants possessed the different cocaine quantities for two distinct purposes. *Id.*

However, in *State v. Smith*, 99 N.C. App. 67, 392 S.E.2d 642 (1990), this Court determined defendants' possession of separate caches of cocaine discovered on the same day in different locations within defendants' residence would support only one possession conviction. In *Smith*, officers searched defendants' residence and found .22 grams of cocaine in a plastic bottle on top of a dresser and 2.1 grams of cocaine in seventeen baggies hidden nearby between the bed and wall. *Id.*, 99 N.C. App. at 74, 392 S.E.2d at 646-47. Defendants were convicted of one count of felony possession of cocaine. *Id.*, 99 N.C. App. at 69, 392 S.E.2d at 644. On appeal, defendants argued that the trial court erred by failing to instruct the jury on the lesser-included offense of misdemeanor possession of cocaine. *Id.*, 99 N.C. App. at 74, 392 S.E.2d at 646. Although defendants failed to properly preserve the issue for appellate review, this Court noted that if the issue had been preserved, it would have overruled defendants' arguments. *Id.* The Court agreed with the State's argument that if possession of multiple caches of the same drug must be considered separate possessions, then "drug dealers could simply divide cocaine into packages containing less than one gram each to avoid being prosecuted for a felony." *Id.*, 99 N.C. App. at 74, 392 S.E.2d at 647.

In the instant case, officers found two amounts of the same drug on the same day in different places. First, Officer Roberts found mar-

ijuana in defendant's automobile. Second, after defendant was arrested and taken to the Gaston County Sheriff's Department, Deputy Lail found marijuana in defendant's shoe. Furthermore, unlike *Rozier*, there was no evidence that defendant possessed the marijuana "for two distinct purposes." *Rozier*, 69 N.C. App. at 55, 316 S.E.2d at 904.

Moreover, defendant possessed both the marijuana in the automobile and the marijuana in his shoe simultaneously. The State presented no evidence showing defendant came into possession of the marijuana in his shoe after he was arrested. Furthermore, Officer Roberts testified that both amounts of marijuana would have been discovered at the scene had an adequate search of defendant been conducted. "Obviously, if all the cocaine had been found on defendants' persons at the same time, only one offense could be charged." *Id*. Therefore, because defendant possessed both amounts of marijuana simultaneously and for the same purpose, we hold that defendant should have been charged with only the one count of felony possession of marijuana. Therefore, defendant's conviction for two counts of misdemeanor possession of marijuana should be vacated.

IV. Habitual felon status

[4] Defendant next argues that the trial court erred by accepting and entering defendant's plea to attaining habitual felon status because the court lacked subject matter jurisdiction as the indictment alleging defendant's habitual felon status was facially defective. Defendant contends his prior New Jersey conviction was not a felony within the meaning of the North Carolina Habitual Felons Act and that the State did not show defendant's New Jersey conviction was a felony under the law of New Jersey. We agree and remand for resentencing.

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time." *State v. McGee*, 175 N.C. App. 586, 587-88, 623 S.E.2d 782, 784 (2006) (citation omitted), *disc. review denied and appeal dismissed*, 360 N.C. 542, 634 S.E.2d 891 (2006). "Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense." *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003) (citation omitted). In the instant case, defendant argues the indictment failed to allege the essential elements for attaining habitual felon status; therefore, the issue is properly before this Court.

Pursuant to N.C. Gen. Stat. § 14-7.1, an habitual felon is defined as, "[a]ny person who has been convicted of or pled guilty to *three felony offenses* in any federal court or state court in the United States or combination thereof . . . ." N.C. Gen. Stat. § 14-7.1 (2006) (emphasis supplied). The statute defines a felony offense as "an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed." *Id.*

N.C. Gen. Stat. § 14-7.3 specifies what an habitual felon indictment must allege:

> An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2006).

In the instant case, the indictment lists three predicate felony offenses, one of which occurred in New Jersey. However, under the laws of New Jersey, defendant's conviction in New Jersey was considered a high misdemeanor, not a felony. Thus, the habitual felon indictment did not set forth three predicate felony offenses as required pursuant to N.C. Gen. Stat. § 14-7.1, and defendant did not attain habitual felon status. Because defendant did not attain habitual felon status, the indictment did not set forth the necessary requirements specified in N.C. Gen. Stat. § 14-7.3, and the indictment failed to confer jurisdiction upon the trial court.

The State's reliance on *State v. McGee*, 175 N.C. App. at 586, 623 S.E.2d at 782, is misplaced. In *McGee*, defendant argued his habitual felon indictment lacked sufficient information regarding the court and case file number for one of the predicate felonies. *Id.*, 175 N.C. App. at 587, 623 S.E.2d at 784. This Court held because defendant did "not dispute that the indictment included each of the elements specified in the [habitual felon] statute, defendant did not raise the issue at trial, and thus waived his right to appeal this issue." *Id.*, 175 N.C. App. at 588, 623 S.E.2d at 784. However, in the instant case, defendant argues the indictment failed to allege the essential elements of habitual felon status as required under N.C. Gen. Stat. § 14-7.3. Because defendant argues the indictment failed to include each of the

elements specified in N.C. Gen. Stat. § 14-7.3, the issue is jurisdictional and may be raised at any time. *McGee*, 175 N.C. App. at 587-88, 623 S.E.2d at 784. Unlike the defendant in *McGee*, defendant here did not waive his right to appeal this jurisdictional issue by not raising this issue at trial.

Lastly, we note that defense counsel stipulated to the three convictions set out in the habitual felon indictment. The State argues that because defense counsel stipulated to the three convictions set out in the indictment, the defendant effectively waived his right to appeal this issue. In making this argument, the State relies on *McGee* where this Court noted that "defendant's counsel stipulated to the convictions set out in the indictment, resulting in no fatal variance." *Id.*, 175 N.C. App. at 588, 623 S.E.2d at 784.

However, in the instant case, defense counsel stipulated to three predicate felonies, one of which was not a felony under the laws of New Jersey. Thus, as a matter of law, defendant's habitual felon indictment did not set forth three predicate felonies as required under N.C. Gen. Stat. § 14-7.1. "Generally parties . . . may not stipulate as to what the law is." *Baxley v. Nationwide Mutual Ins. Co.*, 104 N.C. App. 419, 422, 410 S.E.2d 12, 14 (1991) (citing 83 C.J.S. *Stipulations* § 10 (1953)). Therefore, the fact that defendant stipulated to three predicate felonies set out in the indictment has no bearing on whether the indictment is valid. For the future, we urge defense counsel to carefully scrutinize all three convictions in the habitual felon indictment before advising their clients to plead guilty to having attained the status of an habitual felon for sentencing purposes.

In conclusion, we remand for resentencing on this issue.

Defendant does not present arguments in his brief for his remaining assignments of error; thus, these assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error in part, vacated in part and remanded for resentencing.

Judges McCULLOUGH and STEPHENS concur.

ZORAIDA WILLIAMS, PLAINTIFF v. LAW COMPANIES GROUP, INC., EMPLOYER, ZURICH, CARRIER, DEFENDANTS

No. COA06-1586

(Filed 15 January 2008)

Workers' Compensation— causation—guess or mere speculation

The Industrial Commission erred in a workers' compensation case by finding and concluding plaintiff's disability was ongoing after 7 March 2002, and the opinion and award is vacated and remanded, because: (1) the medical evidence failed to support the requisite causal connection between the accident and plaintiff's physical impairment since it did not rise above the level of a guess or mere speculation; and (2) the Commission's conclusions are not supported by its findings of fact regarding the causal connection between the accident and plaintiff's alleged pain and disability.

Judge GEER dissenting.

Appeal by defendants from opinion and award entered 19 July 2006 by the Full Commission. Heard in the Court of Appeals 20 September 2007.

Scudder and Hedrick, by Samuel A. Scudder, and Exum Law Group, by Annette Exum, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and Paul C. McCoy, for defendant-appellants.

BRYANT, Judge.

Law Companies Group, Inc. and Zurich (defendants) appeal from an opinion and award entered 19 July 2006 by the Full Commission awarding Zoraida Williams (plaintiff) ongoing temporary total disability from 21 September 2000, all medical expenses and attorney's fees. For the reasons stated herein, we reverse the Full Commission's opinion and award and remand.

In 1988 and prior to working for defendants, plaintiff sustained double femur fracture injuries as a result of a motor vehicle accident. Plaintiff received medical treatment at Bellevue Hospital for approximately two years for her bilateral femur fractures which included rod placement and physical therapy.

In June 1999, plaintiff was employed by defendant Law Companies Group as a soil technician. Plaintiff's job required bending, walking and lifting in order to test five-pound soil samples and twenty-five pound concrete samples for load bearing capabilities.

On 21 September 2000, plaintiff sustained a back injury as a result of a motor vehicle accident which occurred during her employment. Following her injury, plaintiff initially received medical treatment at Johnston Memorial Hospital where Physician's Assistant David Baker provided her treatment for complaints of cervical and lumbar spine pain and chest pain. On 26 September 2000, plaintiff presented to Rex Hospital with complaints of neck, back, and chest pain. On physical examination, Robert J. Denton, M.D. noted that plaintiff exhibited: (1) diffuse paralumbar tenderness to palpation with no palpable muscle spasm; and (2) no extremity swelling or deformities with full range of motion of all joints. On 29 September 2000, plaintiff began her treatment for back pain with Dr. Sarah E. DeWitt of Raleigh Orthopaedic Clinic. After taking plaintiff's history, Dr. DeWitt noted plaintiff suffered, "bilateral femur fractures at 18 years old and has rods on both sides, but has no symptoms from this."

On 9 October 2000, defendants accepted plaintiff's workers' compensation claim pursuant to Industrial Commission Form 63. On 25 October and 29 December 2001, 10 and 11 January and 10 May 2002, Regional Investigative Services Company performed surveillance of plaintiff's daily activities. On 25 October 2001, plaintiff was observed sweeping without a limp and without assistance. At the hearing, plaintiff was questioned regarding the video from 25 October 2001, as well as still photographs taken that day which accompanied the surveillance reports. Plaintiff testified that she was the person shown in the 25 October 2001 surveillance photo sweeping the porch. On 29 December 2001, plaintiff was also observed entering and exiting her sister's car and several places of business without assistance, which plaintiff admitted during the hearing.

On 13 November 2001, plaintiff began her treatment with Catherine O. Lawrence, D.O. of the Carolina Back Institute. Subsequent to Dr. Lawrence's examination and evaluation of plaintiff, Dr. Lawrence recommended plaintiff enroll in the Pain Management Program. After plaintiff's completion of the Pain Management Program, Dr. Lawrence initially assigned plaintiff a five percent permanency rating to the left and right legs. However, on 7 March 2002, Dr. Lawrence retracted her assignment of five percent permanency

ratings to plaintiff's left and right legs and assigned plaintiff a five percent rating to the back.

On 13 August 2003, plaintiff began her treatment with Steven A. Olson, M.D., an orthopaedic surgeon at Duke University Medical Center. Dr. Olson took plaintiff's history and performed an examination. On 3 November 2003, Dr. Olson corresponded with plaintiff's counsel and stated, "[w]ith regard to your question as to whether the September 21, 2000 automobile accident aggravated substantially her current problems, my answer is no." He also stated that, "in my opinion, there is no reason I can identify as to why this accident should have precipitated this pain."

Following a hearing on 27 February 2003, Deputy Commissioner Deluca filed an opinion on 26 July 2004 concluding that on and after 7 March 2002, plaintiff (1) was neither disabled due to her 21 September 2000 injury, nor entitled to any temporary total disability compensation after that date; (2) plaintiff had no permanent impairment to the back or legs and was not entitled to any permanent partial disability compensation; and (3) defendants were entitled to a credit on all temporary total disability compensation paid to plaintiff from 7 March 2002 until defendants terminated benefits. Plaintiff appealed to the Full Commission.

By Opinion and Award filed 19 July 2006, the Full Commission reversed the Deputy Commissioner and awarded plaintiff (1) temporary total disability compensation from 21 September 2000 and continuing, (2) all past and future medical expenses, (3) attorney's fees of twenty-five percent of the compensation paid, and (4) defendants to pay costs. The dissenting opinion stated that based on lack of sufficient medical evidence "plaintiff has failed to prove that she is currently disabled due to her compensable work injury, and plaintiff needs no further medical treatment for her compensable injuries." From the Full Commission's Opinion and Award, defendants appeal.

On appeal, defendants argue the Full Commission erred in finding and concluding plaintiff's disability was ongoing after 7 March 2002. Defendants contend the medical evidence failed to support the requisite causal connection between the accident and plaintiff's physical impairment. We agree. For the reasons stated herein we vacate the Full Commission's Opinion and Award and remand.

Our review is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether

the conclusions of law are supported by the findings. *Moore v. Federal Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004). Although the Industrial Commission's findings of fact are conclusive where supported by competent evidence, "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Flynn v. EPSG Mgmt. Serv.*, 171 N.C. App. 353, 357, 614 S.E.2d 460, 463 (2005). Our review of the Industrial Commission's conclusions of law is *de novo*. *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

Plaintiff bears the burden of proof by the greater weight of the evidence that she is disabled and the extent of her disability within the meaning of the Act. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 542 S.E.2d 277 (2001). Plaintiff must prove "each element of compensability, including causation, by a preponderance of the evidence." *Everett v. Well Care & Nursing Serv.*, 180 N.C. App. 314, 318, 636 S.E.2d 824, 827 (2006). Our Supreme Court has stated medical experts must provide, "sufficient competent evidence tending to show proximate causal relationship," between the alleged injury and the plaintiff's subsequent medical condition. *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation omitted). Expert medical testimony indicating that an incident "possibly" or "could or might" have caused an injury "does not rise above a guess or mere speculation and therefore was not competent evidence to show causation." *Edmonds v. Fresenius Medical Care*, 165 N.C. App. 811, 819, 600 S.E.2d 501, 506 (2004) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005).

The Commission made several findings which are not supported by competent evidence in the medical record. For example, in finding of fact number four, the Commission found that "on September 21, 2000, plaintiff sustained injuries to her back, chest and *legs*" as a result of the accident at issue. (Emphasis added.) Similarly, in finding of fact number six, the Commission found that "on September 29, 2000, plaintiff began treatment for back and *leg* pain with Dr. Sarah Dewitt, an orthopaedic specialist." (Emphasis added.) However, these findings regarding plaintiff's alleged leg injuries and treatment for the same are not supported by the medical evidence. The hearing evidence established that immediately following the 21 September 2000 accident, plaintiff was treated by the Johnston County Memorial Hospital emergency department where she was

diagnosed with a lumbar strain and chest contusion. At that time, plaintiff neither complained of, nor was diagnosed as having any leg injuries or leg pain. Moreover, Dr. Olson, who treated plaintiff for injuries alleged to be related to the 21 September 2000 accident, stated in response to plaintiff's counsel's 3 November 2003 letter and during his deposition, that the accident did not cause plaintiff's leg injuries or associated pain. When questioned regarding whether it was possible that plaintiff's leg pain was caused by the broken rod in plaintiff's leg, Dr. Olson testified:

> I think it is possible, not probable that her thigh pain is caused by this nail (rod). It's within the realm of possibility, but I'm not more than 50 percent sure that it is.

Dr. Olson stated he did not know the cause of plaintiff's pain and that the accident did not cause plaintiff's pain. Notwithstanding plaintiff's complaints of chronic leg pain, Dr. Olson testified he could not find a basis to restrict plaintiff's work activities on the basis of any consequences of the 21 September 2000 accident. Similarly, Dr. Lawrence's testimony and medical records establish plaintiff has a 0% disability rating, no impairment, and no work restrictions as result of the accident. However, in finding number thirty-one, the Commission found that both Drs. Lawrence and Olson testified that the 21 September 2000 accident *could* have caused the rod to break in plaintiff's right leg. The Commission's findings do not support its conclusions that plaintiff's pain and ongoing disability were caused by the accident. *See Edmonds* (medical testimony indicating that an incident "possibly" or "could or might" have caused an injury was not competent evidence to show causation). Accordingly, based on the absence of any record reference to leg injuries or pain connected with the 21 September 2000 accident, and given Dr. Olson's unequivocal statement that any pain plaintiff experienced was not causally related to, or even aggravated by, the accident, the Commission's finding that plaintiff sustained injuries to her legs as a result of the accident is without evidentiary support. *See Flynn*, 171 N.C. App. at 357, 614 S.E.2d at 463.

Ultimately, the Commission's conclusions are not supported by its findings of fact regarding the causal connection between the accident and plaintiff's alleged pain and disability. The challenged conclusions of law are:

1. Plaintiff sustained an admittedly compensable injury by accident to her back, chest and *legs* on September 21, 2000, and

suffers from *chronic leg pain as a result of the accident*. N.C. Gen. Stat. § 97-2(6).

2. Plaintiff is *currently disabled* as a result of her compensable injuries. The medical evidence reveals that as a result of her compensable injury, (a) Plaintiff is medically unable to return to her pre-injury employment; (b) Plaintiff has work restrictions of no lifting and restrictions on pulling, pushing, walking, standing, squatting, kneeling, bending and use of her lower extremities; (c) Plaintiff needs vocational assistance to help her locate suitable employment due to her physical limitations related to her compensable injury; and (d) Plaintiff takes prescribed medications for her chronic leg pain. Although Plaintiff may be able to do some work, she must have vocational assistance to help her locate suitable employment considering her severe physical limitations due to her compensable injury and her limited education and training. Plaintiff has not refused vocational assistance offered by Defendants.

. . .

4. As a result of her *chronic leg pain caused by her injury by accident of September 21, 2000*, Plaintiff has been temporarily totally disabled from September 21, 2000 through the date of hearing before Deputy Commissioner and continuing and is entitled to temporary total disability compensation during said period. N.C. Gen. Stat. §§ 92-2(9); 97-29.

5. Defendants are obligated to pay for all of Plaintiff's reasonably required medical treatment resulting from her back and chronic leg pain of September 21, 2000, including past and future treatment, and vocational rehabilitation assistance for so long as such treatment is reasonably required to effect a cure, provide relief and/or lessen her disability. N.C. Gen. Stat. §§ 97-2(19); 97-25.

(Emphasis added). Although the Commission's legal conclusions state the accident caused plaintiff's pain and disability, the medical evidence presented establishes plaintiff's alleged ongoing disability is not causally related to the accident. In summary, the medical evidence related to any causal link between the accident and plaintiff's alleged pain and disability establishes: (1) the 21 September 2000 accident did not cause plaintiff to suffer leg injuries; (2) the accident did not cause the rod to break; (3) the accident did not aggravate

plaintiff's leg condition; (4) Dr. Olson had "no idea what is causing plaintiff's pain"; (5) that any restrictions plaintiff may have regarding her ability to work were not caused by the accident; and (6) plaintiff has "0% disability." As stated in the dissenting opinion, "the greater weight of the expert medical evidence . . . is insufficient to prove causation of plaintiff's condition, as all of these physicians' opinions do not rise above the level of a guess or mere speculation [and] is undoubtedly insufficient to prove that plaintiff's current symptoms are related to her compensable injuries." Plaintiff has failed to meet her burden of proving causation by a preponderance of the evidence. *See Everett*, 180 N.C. App. at 317, 636 S.E.2d at 827. Accordingly, the Commission's conclusions of law are in error as causation must be established by the evidence "such as to take the case out of the realm of conjecture and remote possibility." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753. The Commission's opinion and award is reversed. *See Gutierrez v. GDX Automotive*, 169 N.C. App. 173, 179, 609 S.E.2d 445, 450 (2005) (reversal of award in conjunction with Commission's conclusions of law that plaintiff was disabled where medical evidence was insufficient to support such conclusion). We reverse and remand to the Full Commission for disposition consistent with this opinion.

Reversed and remanded.

Judge STEELMAN concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

In contrast to the majority opinion, I would remand to the Full Commission for further findings of fact. I, therefore, respectfully dissent.

The Full Commission found that "[t]he primary issue before the Commission is whether Plaintiff's temporary total disability benefits should be terminated effective December 2001, on the ground that Plaintiff did not have any continuing disability *due to her workplace injury* after that date." (Emphasis added.) While plaintiff argues that the presumption set forth in *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006), and *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), should apply in this case, the Commission did not address that issue, and plaintiff has

failed to assign error to the omission. As a result, applicability of the presumption is not properly before this Court. *See* N.C.R. App. P. 10(d) ("Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."); *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an *alternative* basis for upholding the trial court's determination that the premarital agreement is invalid and unenforceable. However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds.").

On the causation issue addressed by the Commission, the Commission's critical findings of fact state:

> 31. The Full Commission finds that Plaintiff's chronic pain syndrome and the pain in her legs were caused by Plaintiff's motor vehicle accident on September 21, 2000. Specifically, both Dr. Lawrence and Dr. Olson noted that Plaintiff's onset of leg pain began approximately September 21, 2000, and both testified that a motor vehicle accident could have caused the rod to break in Plaintiff's right leg; even though Dr. Olson was of the opinion that it is unlikely the accident caused the rod to break without fracturing the bone itself.
>
> 32. The Full Commission gives greater weight to the opinions of Dr. Lawrence versus the opinions of Dr. Olson . . . .
>
> 33. On September 21, 2000, Plaintiff sustained compensable injuries to her back, chest and legs, and suffers from chronic leg pain as a result of her compensable injury. . . .

I fully agree with the majority that the finding that the 21 September 2000 accident "could have caused" the rod in plaintiff's right leg to break is insufficient to support a conclusion that the accident caused the broken rod.

If the Commission intended to find that plaintiff's chronic leg pain was the result of the broken rod, then there would be no basis for its determination that the compensable accident caused plaintiff's current disability. The Commission's findings of fact are not, how-

ever, that clear. In finding of fact 31, the Commission references plaintiff's chronic pain syndrome and pain in *both* legs, as well as the broken rod in the right leg, while finding of fact 33 finds that the compensable accident caused compensable injuries to plaintiff's back, chest, and legs, as well as the chronic leg pain. In finding of fact 19, describing Dr. Lawrence's deposition testimony, the Commission differentiated between the doctor's opinions regarding chronic pain syndrome and the broken rod.

It may be, given the Commission's extensive focus on the broken rod, that the Commission was basing its finding of causation solely on the broken rod.[1] On the other hand, the Commission may also have been relying both on the broken rod and the chronic pain syndrome. There is no clear finding one way or the other whether the leg pain was related to the chronic pain syndrome. The record does contain evidence arguably supporting a finding that the chronic pain syndrome was caused by the accident. Dr. Lawrence, whom the Commission found credible, wrote that the pain syndrome "likely occurred as a result of [plaintiff's] back injury" and ultimately assigned plaintiff a five percent rating to the back. The record also contains evidence supporting defendants' position.

Because I cannot determine what the Commission intended to find or whether its conclusions would change with the omission of the broken rod, I would apply the principle that when the Commission's findings of fact " 'are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings.' " *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). I would, therefore, remand to the Commission to make findings of fact regarding whether plaintiff's current disability was caused by the 21 September 2000 accident without consideration of the broken rod in plaintiff's femur.

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1. I do not agree with plaintiff that the broken femur rod "is the proverbial red herring." The broken rod is a primary focus of the Commission's opinion and was also the primary subject addressed during the two medical depositions taken in this case.

KATELYN ANDREWS, A MINOR, THROUGH HER GUARDIAN AD LITEM, DAVID ANDREWS AND DAVID ANDREWS AND ANDREA ANDREWS, INDIVIDUALLY, PLAINTIFFS v. VANESSA P. HAYGOOD, M.D., INDIVIDUALLY, AND CENTRAL CAROLINA OBSTETRICS AND GYNECOLOGY, P.A., A NORTH CAROLINA CORPORATION, THE WOMEN'S HOSPITAL OF GREENSBORO, A NORTH CAROLINA NOT FOR PROFIT CORPORATION AND KIM RICKEY, RN, INDIVIDUALLY, AND JENNIFER DALEY, INDIVIDUALLY, DEFENDANTS v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, INTERVENOR

No. COA06-1670

(Filed 15 January 2008)

1. Public Assistance— Medicaid reimbursement from settlement account—immaterial settlement might be attributed to something other than medical damages

The trial court did not err in a medical malpractice case by granting the North Carolina Division of Medical Assistance's (DMA) motion for reimbursement from the pertinent settlement account, resulting from injuries of a Medicaid recipient received at birth, and by ordering the trustee pay the requested amount of $1,046,681.94 for medical services subject to the one-third statutory limitation under N.C.G.S. § 108A-57(a) if applicable, because: (1) it was immaterial that some of plaintiffs' settlement funds might have been attributed to something other than medical damages such as pain and suffering; and (2) our Supreme Court's decision in *Ezell*, 360 N.C. 529 (2006), is controlling instead of the United States Supreme Court's decision in *Ahlborn*, 547 U.S. 268 (2006), since the U.S. Supreme Court was interpreting an Arkansas statute; the *Ezell* opinion was handed down after the *Ahlborn* opinion; our Supreme Court denied a petition for rehearing filed in *Ezell* which set out arguments based on *Ahlborn*; the construction of the statutes of a state by its highest courts is to be regarded as determining their meaning; and the Court of Appeals has no authority to overrule decisions of our Supreme Court.

2. Public Assistance— Medicaid reimbursement—characterization of state and/or county's interest in settlement account as lien instead of claim

The trial court did not err in a medical malpractice and negligent infliction of emotional distress case by characterizing the North Carolina Division of Medical Assistance's (DMA) interest in the settlement account as a lien as opposed to a claim, because:

(1) several of our Court of Appeals' decisions have referred to the state's and or county's interest under N.C.G.S. § 108-57 in a settlement or judgment as a lien; and (2) the statute itself uses the phrase "medical lien" as an alternative way of describing third parties' medical subrogation rights.

3. Public Assistance— medicaid reimbursement—settlement account—DMA as beneficary rather than claimant—absence of prejudice

Although the trial court erred in a medical malpractice and negligent infliction of emotional distress case by determining the North Carolina Division of Medical Assistance (DMA) is a beneficiary of the settlement account as opposed to a claimant, the trustee failed to establish how such a technical error would require a remand.

Judge WYNN dissenting.

Appeal by trustee from an order entered 27 July 2006 by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 9 October 2007.

Craig, Brawley, Liipfert & Walker, LLP, by Brent Stephens, for plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Timothy P. Lehan; Patterson, Dilthey, Clay, Bryson & Anderson, LLP, by Robert M. Clay and Charles George, for defendant-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Susannah P. Holloway, for intervenor-appellee.

Wishart Norris Henninger & Pittman, P.A., by Pamela S. Duffy and Molly A. Orndorff, for trustee-appellant Charlie D. Brown.

HUNTER, Judge.

Katelyn Andrews ("Katelyn") was injured at birth. Katelyn, through her Guardian ad Litem, brought suit against her doctors and the hospital at which she was delivered for medical malpractice. Katelyn's parents also brought suit against the same parties and on the same allegations in their individual capacities, with an additional claim of negligent infliction of emotional distress. Katelyn and her parents ("plaintiffs") eventually entered into settlement agreements

with the parties. After the trial court approved the agreements and established a settlement account, Charlie D. Brown ("trustee") was named trustee and the agreements were made confidential upon the trial court's order.

Katelyn is a North Carolina Medicaid recipient due to the injuries she sustained at birth. The North Carolina Division of Medical Assistance ("DMA") therefore moved to intervene. North Carolina, through the DMA, had paid $1,046,681.94 for her medical services through 10 October 2005. Under N.C. Gen. Stat. § 108A-57 (2005), the DMA moved for reimbursement from the settlement account. The trial court granted DMA's motion and ordered that trustee pay the amount requested by DMA. Trustee now appeals to this Court. After careful consideration, we affirm the ruling of the trial court.

Trustee presents the following issues for this Court's review: (1) whether the trial court erred in concluding that our Supreme Court's decision in *Ezell v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 529, 631 S.E.2d 131 (2006), is controlling and the United States Supreme Court's decision in *Arkansas Dep't of HHS v. Ahlborn*, 547 U.S. 268, 164 L. Ed. 2d 459 (2006), is not;[1] (2) whether the trial court erred in finding that the DMA has a "lien" on the settlement account as opposed to a "claim" on it; and (3) whether the trial court erred in finding that the DMA is a "beneficiary" of the settlement account as opposed to a "claimant" of the account.

Because all of trustee's assignments of error relate to the trial court's conclusions of law, we review those decisions *de novo*.[2] *Medina v. Division of Soc. Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004). We now turn to trustee's arguments.

I.

[1] This case involves the application of N.C. Gen. Stat. §§ 108A-57 and 59(a) (2005). Under section 59(a), Medicaid recipients, by accepting medical assistance, are "deemed to have made an assignment to

1. Trustee also raises the issue of whether the trial court erred in finding that no further hearing or evidence would be necessary to determine the amount to be paid to DMA and, another claimant, United Health Care. Addressing those issues, however, is dependent upon this Court finding in favor of trustee on issue one.

2. Some of the challenged conclusions by the trial court are labeled as "findings of fact" but are actually legal conclusions. Accordingly, we treat them as conclusions of law. *See Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 131, 560 S.E.2d 374, 380 (2002) (conclusions of law are reviewed *de novo* regardless of how they are labeled).

the State of the right to third party benefits[.]" In other words, the state and county providing the medical benefits are "subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance[.]" N.C. Gen. Stat. § 108A-57(a). The state is entitled to receive funds from third party benefits up to the amount of the Medicaid payments so long as the payment does not exceed "one-third of the gross amount obtained[.]" N.C. Gen. Stat. § 108A-57(a). Trustee argues that the DMA is only entitled to the settlement funds that Katelyn received as compensation for medical expenses and not, for example, any settlement funds paid by the third parties due to her pain and suffering. We disagree.

Our Supreme Court definitively addressed this issue in *Ezell*, which is binding on this Court. *Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996) ("it is elementary that we are bound by the rulings of our Supreme Court").

Judge Steelman's dissent in *Ezell* was adopted *per curiam* by our Supreme Court. *Ezell*, 360 N.C. 529, 631 S.E.2d 131. In that case, Judge Steelman stated that "[o]ur cases have consistently rejected attempts by plaintiffs to characterize portions of settlements as being for medical bills or for pain and suffering in order to circumvent DMA's statutory lien." *Ezell v. Grace Hosp., Inc.*, 175 N.C. App. 56, 65, 623 S.E.2d 79, 85 (2005) (Steelman, J., dissenting), *dissent adopted per curiam*, 360 N.C. 529, 631 S.E.2d 131. Moreover, the "DMA's right of subrogation under N.C. Gen. Stat. § 108A-57(a) is broad rather than narrow." *Id.* at 66, 623 S.E.2d at 85. In the *Ezell* dissent, which was adopted by the Supreme Court, Judge Steelman concluded that the DMA was subrogated to the entire amount of the settlement, subject only to the one-third limitation found in N.C. Gen. Stat. § 108A-57(a), irrespective of whether some of the settlement amount was intended to account for pain and suffering and not medical damages. *Id.* Such being the case here, it is immaterial that some of plaintiffs' settlement funds might have been attributed to something other than medical damages. Accordingly, the trial court did not err in subrogating the settlements, subject to the one-third statutory limitation, if applicable, to the DMA.

Trustee asks this Court to apply a recent United States Supreme Court decision to interpret our state statutes. In that case, the United States Supreme Court determined that a state's ability to recover its Medicaid lien was limited to that pro-rata portion of the settlement representing compensation for past medical expenses only, not the

entire settlement. *Ahlborn*, 547 U.S. at ––, 164 L. Ed. 2d at 474. The Court, however, was interpreting an Arkansas statute, not a North Carolina statute. The North Carolina Supreme Court opinion in *Ezell* was handed down on 30 June 2006, which was after the United States Supreme Court's opinion in *Ahlborn*, decided on 1 May 2006. Thereafter, a petition for rehearing was filed with our Supreme Court in *Ezell* on 4 August 2006. Our Supreme Court denied the petition, which set out arguments based on *Ahlborn*, on 14 December 2006. *Ezell*, 361 N.C. 180, 641 S.E.2d 4 (2006) (unpublished). Although we recognize that the Arkansas statute discussed in *Ahlborn* is similar to the one at issue here, it is well settled that " 'the construction of the statutes of a state by its highest courts is to be regarded as determining their meaning[.]' " *Fibre Co. v. Cozad*, 183 N.C. 601, 607, 112 S.E. 810, 813 (1922) (quoting *Carroll Co. v. U. S.*, 85 U.S. 71, 21 L. Ed. 771 (1873)). "Moreover, this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by . . . [our] Supreme Court.' " *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992) (citation omitted), *reversed on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993). That not being present here, trustee's arguments as to this issue are rejected.[3]

II.

[2] Trustee next argues that the trial court erred in characterizing the DMA's interest in the settlement account as a "lien" as opposed to a "claim." We disagree.

Several of this Court's decisions have referred to the state's and/or county's interest under N.C. Gen. Stat. § 108A-57 in a settlement or judgment as a "lien." *See Campbell v. N.C. Dep't of Human Res.*, 153 N.C. App. 305, 569 S.E.2d 670 (2002); *Payne v. N.C. Dept. of Human Resources*, 126 N.C. App. 672, 486 S.E.2d 469 (1997); *N.C. Dept. of Human Resources v. Weaver*, 121 N.C. App. 517, 466 S.E.2d 717 (1996). Moreover, the statute itself uses the phrase "medical lien" as an alternative way of describing third parties' "medical subrogation rights[.]" N.C. Gen. Stat. § 108A-57(a). Accordingly, trustee's assignments of error as to this issue are rejected.

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3. Also rejected is trustee's argument that the trial court erred in denying his motion for further hearing as the trial court was under no obligation to make an accounting of those funds in the settlement account attributable to medical expenses. For the same reason, we also reject trustee's arguments that the trial court erred by not addressing any potential claims that United Healthcare could have against the settlement account.

III.

[3] Trustee next argues that the trial court erred in determining that the DMA is a "beneficiary" of the settlement account as opposed to a "claimant." We agree that the trial court improperly characterized the DMA as a beneficiary but do not find the error to warrant a remand.

"A beneficiary is 'a person who receives benefits[;]' while the definition of benefit includes 'payment made under insurance, social security, welfare, etc.' " *Campbell*, 153 N.C. App. at 307, 569 S.E.2d at 672 (quoting Oxford Encyclopedic English Dictionary 132 (Judy Pearsall and Bill Trumble, eds., 1995)). Accordingly, the "beneficiary" under N.C. Gen. Stat. § 108A-57(a) is the person receiving the Medicaid benefits, be it actual funds or the medical services that have been paid by DMA on behalf of the recipient. *Id.* In the instant case, the DMA was paying plaintiffs, the beneficiaries. Thus the DMA is not the beneficiary, but a claimant.

It is well settled, however, that "verdicts and judgments will not be set aside for harmless error, or for mere error and no more." *In re Ross*, 182 N.C. 477, 478, 109 S.E. 365, 365 (1921). Instead, trustee must show "not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right." *Id.* The rationale being that "appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way." *Id.* Trustee has failed to establish how such a technical error would require a remand. Accordingly, trustee's arguments as to this issue are rejected.

IV.

In summary, we hold that the trial court did not err in subrogating the settlements, subject to the one-third statutory limitation, if applicable, to the DMA. We also hold that the trial court did not err in characterizing the DMA's claim on the settlement account as a "lien." Finally, we conclude that a remand would not be appropriate in this case even though the trial court incorrectly labeled the DMA as a "beneficiary" of the settlement accounts.

Affirmed.

Judge WYNN dissents in a separate opinion.

Judge JACKSON concurs.

WYNN, Judge, dissenting.

Because I find that our Supreme Court has not yet squarely answered the question presented to us by this case, I certify by dissent for a decision on the issue of whether the amount of the State Division of Medical Assistance's subrogation claim on a Medicaid recipient's settlement is controlled by the United States Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 164 L. Ed. 2d 459 (2006).

Preliminarily, I observe that our state Supreme Court's reversal of this Court's decision in *Ezell v. Grace Hospital, Inc.* was explained only as "[f]or the reasons stated in the dissenting opinion."[4] At the time of this Court's dissenting opinion, the *Ahlborn* decision had not yet been handed down by the United States Supreme Court. As such, the dissenting opinion adopted by our Supreme Court neither considered nor mentioned *Ahlborn*. Moreover, immediately after the issuance of the *Ahlborn* decision, our Supreme Court declined to grant a rehearing in *Ezell* with the one-word reply, "Denied." In denying the plaintiff's petition for rehearing, the *Ahlborn* decision was again neither addressed nor mentioned. Thus, *Ezell* offers no guidance for determining the inapplicability of the *Ahlborn* holding to this case, and I cannot discern a basis for why the United States Supreme Court decision should not control the outcome.

Accordingly, because the North Carolina statute at issue in this case is materially indistinguishable from the Arkansas statutory provisions found by a unanimous United States Supreme Court in *Ahlborn* to be preempted by federal law, I respectfully dissent.

The relevant North Carolina statutes provide that, by accepting medical assistance from the State, "the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled." N.C. Gen. Stat. § 108A-59(a) (2005). In turn, "to the extent of payments under [the Medical Assistance Program], the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance . . . against any person[,]" although "the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered." *Id.* § 108A-57(a).

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4. *Ezell v. Grace Hospital, Inc.*, 175 N.C. App. 56, 623 S.E.2d 79 (2005), *rev'd per curiam*, 360 N.C. 529, 631 S.E.2d 131, *reh'g denied*, 361 N.C. 180, 641 S.E.2d 4 (2006).

Likewise, the Arkansas statute at issue in the *Ahlborn* case gave that state the "right to recover from the person the cost of benefits so provided[,]" when medical assistance benefits were provided "because of injury, disease, or disability for which another person is liable[.]" Ark. Code Ann. § 20-77-301(a) (2005). Further, "any settlement, judgment, or award obtained [by the individual] is subject to the division's claim for reimbursement of the benefits provided to the recipient under the medical assistance program." *Id.* § 20-77-302(a). After paying attorney's fees and expenses, the Arkansas Department of Human Services (ADHS) would "receive an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program[,]" with "[t]he remainder [to] be awarded to the medical assistance recipient." *Id.* § 20-77-302(b). The assignment was considered a condition of Medicaid benefits and an automatic statutory lien on any settlement with a third party. *Id.* § 20-77-307.

The principal difference between the North Carolina and Arkansas statutes is that the latter provides no ceiling or limit on the amount of recovery allowed to the ADHS; rather, the statute explicitly stated that ADHS was entitled to recover the full amount of the benefits paid to the recipient. *Id.* § 20-77-302(b). North Carolina, by contrast, allows DMA to take at most one-third of the gross amount of the settlement, regardless of whether that fully satisfies the amount paid in medical benefits. N.C. Gen. Stat. § 108A-57(a). Nevertheless, the basic thrust of the statutes is the same: under both, the State has an automatic lien on the full amount of any settlement with a third party reached by a Medicaid settlement, regardless of what expenses or damages those funds are designated to compensate.

In *Ahlborn*, the United States Supreme Court focused on that specific issue, stating, "We must decide whether ADHS can lay claim to more than the portion of [the recipient's] settlement that represents medical expenses." 547 U.S. at 280, 164 L. Ed. 2d at 471. The holding of the Court was that ADHS could not:

> The text of the federal third-party liability provisions suggests not; it focuses on recovery of payments for medical care. Medicaid recipients must, as a condition of eligibility, "assign the State any rights . . . *to payment for medical care* from any third party," 42 U.S.C. § 1396k(a)(1)(A) (emphasis added), not rights to payment for, for example, lost wages.

Id. Even more explicitly:

> [A]s explained above, under the federal statute the State's assigned rights extend only to recovery of payments for medical care. Accordingly, what § 1396k(b) requires is that the State be paid first out of any damages representing payments for medical care before the recipient can recover any of her own costs for medical care.

Id. at 281, 164 L. Ed. 2d at 472.

Moreover, the United States Supreme Court found that the Arkansas statute conflicted with the federal statute's "express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf[,]" namely, the anti-lien provisions of 42 U.S.C. §§ 1396a(a)(18) and 1396p. *Id.* at 283, 164 L. Ed. 2d at 473. According to the Supreme Court:

> There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient "assign" in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. . . . But that does not mean that the State can force an assignment of, or place a lien on, any other portion of [the recipient's] property. *As explained above, the exception carved out by §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.*

Id. at 284-85, 164 L. Ed. 2d at 474 (citation omitted and emphasis added). Thus, the Arkansas statute—and likewise, our North Carolina statute—conflicts with federal Medicaid statutes by allowing the State to recover from a recipient settlement funds that were for purposes other than medical expenses.

In the instant case, Katelyn and her parents brought suit against the hospital, doctors, and nurses charged with her birth for damages including, but not limited to, mental and physical pain and anguish, severe and permanent injury, past medical expenses paid by Medicaid, her insurance company, and her parents, future medical expenses, loss of future earnings, disfigurement and loss of normal use of her body, her parents' expenses for education and life care, and her parents' emotional distress and derivative claims. These claims

were settled among all parties, with proceeds held in a single account and no allocations made as to specific amounts for which particular claim. Although the settlement is in excess of three times the amount of medical expenses paid by DMA, such that DMA could receive full reimbursement without violating the provisions of N.C. Gen. Stat. § 108A-57(a), the holding of *Ahlborn* dictates that the trial court must hold an evidentiary hearing as to what portion of the settlement is designated for medical expenses prior to determination of the amount of repayment to be made to DMA.

Accordingly, I respectfully dissent.

DEBRA CONYERS, EMPLOYEE-PLAINTIFF v. NEW HANOVER COUNTY SCHOOLS, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA07-53

(Filed 15 January 2008)

Workers' Compensation— calculation of average weekly wage— public school employee—exceptional reasons method

The Industrial Commission erred by calculating plaintiff public school employee's average weekly wage under N.C.G.S. § 97-2(5), and the decision is reversed and remanded for entry of an award in accordance with this opinion, because: (1) the record contained uncontradicted evidence that plaintiff drove a bus for 10 months out of the year, was paid for 10 months of work, received her paycheck 10 times a year, and did not work or get paid during the summer when school was out; (2) defendant was not obligated to compensate plaintiff during the summer months nor was plaintiff obligated to work for defendant during those months, and thus her average weekly wage could not be computed under the first method set out in N.C.G.S. § 97-2(5); (3) the third method was not appropriate when the inquiry required by the statute is whether the results obtained are fair and just to both parties, and plaintiff's yearly salary would be $4,962.70 more than her actual pre-injury wages; (3) the fifth method, utilized subsequent to a finding that the previous methods are either inapplicable or were applicable but would fail to produce results fair and just to both parties, should have been used since plaintiff was

essentially a seasonal worker who only worked during the school year; and (4) the language of the fifth calculation method neither requires nor prohibits any specific mathematical formula from being applied, the compensation plaintiff collects for workers' compensation will be paid every week including the summer, and thus plaintiff's average weekly wages should be calculated by dividing the wages she earned in the 52-week period prior to her accident by 52, the number of weeks in the year, yielding an average weekly wage of $338.63.

Appeal by Defendant from Opinion and Award entered 1 September 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2007.

Brumbaugh, Mu & King, by Maggie S. Bennington, for Plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for Defendant.

STEPHENS, Judge.

The sole issue to be addressed in this appeal is what method under N.C. Gen. Stat. § 97-2(5) should be used to calculate a public school employee's "average weekly wages" for the payment of workers' compensation benefits. Defendant contends the Full Commission erred in calculating Plaintiff's average weekly wages under N.C. Gen. Stat. § 97-2(5). For the reasons stated below, we reverse the Full Commission and remand for entry of an Award in accordance with this opinion.

I. FACTS AND PROCEDURE

Plaintiff-Appellee Debra Conyers ("Plaintiff") was employed by Defendant-Appellant New Hanover County Schools ("Defendant") as a bus driver. She had held this job for approximately 12 years prior to sustaining a compensable injury on 30 October 2001. Plaintiff drove a school bus during the school year and was not employed during the summertime. She earned $10.90 per hour, approximately $436 per week. She received her paycheck monthly after each month worked, receiving no paychecks during the summer months. Plaintiff earned a total of $17,608.94 in the 52 weeks preceding the accident.

On 12 March 2004, Plaintiff filed a Form 33 Request for Hearing, claiming entitlement to workers' compensation benefits for past,

present, and future disability; medical benefits; attorneys' fees; and costs as a result of her injury. Plaintiff's claim was heard by Deputy Commissioner Phillip Holmes on 31 March 2005. In an Opinion and Award filed 13 December 2005, Deputy Commissioner Holmes found that the first method described by N.C. Gen. Stat. § 97-2(5) should be used to calculate Plaintiff's average weekly wages, and thus concluded that Plaintiff's average weekly wages were $338.63.

Plaintiff appealed to the Full Commission, and the appeal was heard on 8 June 2006. By Opinion and Award filed 1 September 2006, the Full Commission reversed the decision of Deputy Commissioner Holmes, concluding that Plaintiff's correct average weekly wages were best determined by using the third method of N.C. Gen. Stat. § 97-2(5), thereby establishing average weekly wages of $434.07.

From this Opinion and Award, Defendant appeals.

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).

In North Carolina, the calculation of an injured employee's average weekly wages is governed by N.C. Gen. Stat. § 97-2(5). The statute sets forth five methods, in order of preference, by which an injured employee's average weekly wages are to be computed. *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 251 S.E.2d 399 (1979). The statute, as it pertains to this case, provides:

> [Method 1] "Average weekly wages" shall mean earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52 . . . .
>
> . . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be fol-

> lowed; provided, results fair and just to both parties will be thereby obtained. . . .
>
> . . . .
>
> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2001).

The dominant intent of this statute is to obtain results that are fair and just to both employer and employee. *Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). Results fair and just within the meaning of the statute "consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956).

Defendant argues the Full Commission erred in calculating Plaintiff's average weekly wages using the third method defined in N.C. Gen. Stat. § 97-2(5). Specifically, Defendant contends there is insufficient evidence to support the following findings of fact:

> 9. The Form 22 reflects total wages of $17,608.94 in the fifty-two weeks preceding [P]laintiff's October 30, 2001 injury. However, as [P]laintiff did not work continuously during the fifty-two week period, methods one and two for computing average weekly wage cannot be used. Using method three, dividing the amount earned by the number of weeks actually worked, [P]laintiff's average weekly wage is $434.07, and her compensation rate is $289.40.
>
> 10. Use of the third method to calculate [P]laintiff's average weekly wage produces the most fair and just results for the parties.

As Defendant points out, Plaintiff was a full-time employee with New Hanover County Schools and had been continuously employed by the school system for 12 years before the injury. Thus, according to Defendant, the mandatory method to use in this case is the first method whereby Plaintiff's yearly earnings of $17,608.94 are divided by 52, for an average weekly wage of $338.63. Furthermore, Defendant contends there is no evidence in the record to support the

finding that the third method would produce the most fair and just results for the parties. Defendant argues that use of the third method yields an unfair and unjust result as Plaintiff's yearly salary under this method would be $22,571.64, $4,962.70 more than she had actually earned in the year before she was injured.

Plaintiff contends that, as an employee of the New Hanover County Schools, she only worked 279 days in the year prior to her accident. Since her employment did not extend over the preceding 52-week period, she argues the Full Commission properly used the third method of N.C. Gen. Stat. § 97-2(5) to determine her average weekly wages.

Our research reveals only one case in which the North Carolina appellate courts have addressed the issue of whether a public school employee's average weekly wages should be calculated with or without regard to the 10 week summer vacation period. In *McAninch v. Buncombe Cty. Sch.*, 122 N.C. App. 679, 471 S.E.2d 441 (1996), *rev'd*, 347 N.C. 126, 489 S.E.2d 375 (1997), the plaintiff-employee, a cafeteria worker whose position only existed during the school year, worked 42 weeks per year for the defendant-employer. The Full Commission determined the plaintiff's average weekly wages using the third method of N.C. Gen. Stat. § 97-2(5), by dividing her earnings during her 42-week work period by the 42 weeks she had worked. This Court reversed the Full Commission, concluding that the plaintiff's average weekly wages should have been calculated under the fifth method of N.C. Gen. Stat. § 97-2(5), by dividing the plaintiff's total wages earned in the 52 weeks prior to the accident by 52. *McAninch*, 347 N.C. 126, 489 S.E.2d 375. However, on writ of certiorari, our Supreme Court held that this Court had no authority to recalculate the plaintiff's wages, because the defendant and the plaintiff had entered into a Form 21 agreement for compensation[1] which was approved by the Commission. *Id.*[2] The Supreme Court ruled that the Form 21 agreement could not be modified or set aside on appellate review "where there [was] no finding [by the Commission] that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence[.]" *Id.* at 132, 489 S.E.2d at 379 (quotation marks and citation omitted). The Supreme Court further stated that "[w]here the employer and employee have entered into a Form 21

1. The Form 21 agreement specified average weekly wages of $163.37, reflecting the plaintiff's annual salary divided by the 42 weeks she actually worked.

2. A second issue involving the proper calculation of the plaintiff's average weekly wage is not present in the case *sub judice*.

agreement, stipulating the average weekly wages, and the Commission approves this agreement, the parties are bound to its terms absent a showing of error in the formation of the agreement." *Id.* at 132, 489 S.E.2d at 378-79. Accordingly, while *McAninch* may be instructional, it provides no precedential value as to the calculation method to be used in this case.

Other jurisdictions have addressed the issue of how to calculate workers' compensation average weekly wages for educators and other school employees.[3] However, these decisions are of limited value given the unique nature of the contracts for employment in each case as well as each state's unique workers' compensation statutory scheme. Consequently, for guidance in this case, we will examine the statutory intent and construction of N.C. Gen. Stat. § 97-2(5), the undisputed facts of this case, and factually similar cases which have interpreted N.C. Gen. Stat. § 97-2(5).

Although "[w]hen the first method of compensation *can* be used, it *must* be used[,]" *Hensley*, 296 N.C. at 533, 251 S.E.2d at 402, that method cannot be used when the injured employee has been working in that employment for fewer than 52 weeks in the year preceding the date of the accident. *Loch v. Entm't Ptnrs.*, 148 N.C. App. 106, 557 S.E.2d 182 (2001). Here, since the employment contract between Plaintiff and Defendant was not included in the Record on Appeal, the actual terms of the contract are not available to this Court. However,

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3. *See*, *generally*, *Powell v. Indus. Comm'n*, 451 P.2d 37 (Ariz. 1969) (calculating the plaintiff-school teacher's average weekly wages by dividing the annual salary specified in her contract by the nine-month period of employment specified in her contract); *Lynch v. U.S.D. No. 480*, 850 P.2d 271 (Kan. Ct. App. 1993) (determining that average weekly wages of a school teacher are calculated by dividing the money earned during the school year by the actual number of weeks worked); *Brounette v. E. Baton Rouge Parish Sch. Bd.*, 610 So. 2d 979 (La. Ct. App. 1992), *cert. denied*, 612 So. 2d 64 (La. 1993) (calculating the plaintiff-school board employee's average weekly wages by dividing her annual salary, received in nine monthly installments, by 52); *Herbst's Case*, 624 N.E.2d 564 (Mass. 1993) (calculating the plaintiff-school teacher's average weekly wages by dividing his yearly earnings by 52); *Duran v. Albuquerque Pub. Sch.*, 731 P.2d 1341 (N.M. Ct. App. 1986), *cert. denied*, 731 P.2d 1334 (N.M. 1987) (calculating the plaintiff's maximum weekly workers' compensation benefits based on a 52-week work year rather than on the basis of the 40-week work year which she actually worked under the terms of her contract with the public school system); *Jones v. Worker's Comp. Appeal Bd.*, 786 A.2d 1026 (Pa. Commw. Ct. 2001) (holding that because the plaintiff-school teacher's contract called for an annual salary, the average wage should be determined by dividing her salary by 52 weeks rather than time actually worked); *Stofa v. Workers' Comp. Appeal Bd.*, 702 A.2d 381 (Pa. Commw. Ct. 1997) (holding the public school district properly divided the petitioner-school teacher's salary by 52 weeks to calculate the wages to deduct from petitioner's pre-injury average weekly wage to determine petitioner's partial disability benefits).

the record contains uncontradicted evidence that Plaintiff's employment by New Hanover County Schools extended for a period of less than 52 weeks prior to the accident. Plaintiff drove a bus for 10 months out of the year, was paid for 10 months of work, received her paycheck 10 times a year, and did not work or get paid during the summer when school was out. Defendant was not obligated to compensate Plaintiff during the summer months, nor was Plaintiff obligated to work for Defendant during those months. As a result, her average weekly wages cannot be computed under the first method set out in N.C. Gen. Stat. § 97-2(5).

Accordingly, we next examine whether Plaintiff's average weekly wages should be calculated pursuant to the third statutory method.[4] Using this method, the Full Commission determined Plaintiff's average weekly wages to be $434.07. Based on this calculation, the next inquiry required by the statute is whether the results obtained are "fair and just to both parties." N.C. Gen. Stat. § 97-2(5). Here, using the third method, Plaintiff's yearly salary would become $22,571.64, which is $4,962.70 more than her actual pre-injury wages. This result is not fair and just as Defendant would be unduly burdened while Plaintiff would receive a windfall. The purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury. Thus, the third method is not appropriate in this case.

Therefore, we must evaluate the propriety of using the fifth method of calculation.[5] This method may only be utilized subsequent to a finding that the previous methods were either inapplicable, or were applicable but would fail to produce results fair and just to both parties. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971). Such is the case here.

In *Joyner*, 266 N.C. 519, 146 S.E.2d 447, our Supreme Court considered a workers' compensation case where the employee was a relief truck driver who worked only on an as-needed basis during the 52 weeks prior to his injury. The Court described the driver's employment as "inherently part-time and intermittent" and held it was "un-

4. The second statutory method is not applicable here as it only applies where the employee worked in the employment in which he or she was injured for 52 weeks in the year preceding the accident and lost more than seven consecutive calendar days during that 52-week period.

5. The fourth statutory method is not applicable here as it only applies where the injured employee was employed for a very short period of time or where the terms of employment were casual in nature.

fair[] to the employer . . . [not to] take into consideration both peak and slack periods[,]" *id.* at 522, 146 S.E.2d at 450, in calculating average weekly wages because otherwise "it gives [the] plaintiff the advantage of wages earned in the 'peak' [] season without taking into account the slack periods" during which he did not work. *Id.* at 521, 146 S.E.2d at 449. As a result, the Court held that the employee's average weekly wages were to be calculated under the "exceptional reasons" method set forth in N.C. Gen. Stat. § 97-2(5)[6] by taking the total wages earned during the 52-week period prior to injury[7] and dividing that amount by 52, representing the number of weeks in a year. *Id.* at 522, 146 S.E.2d at 450.

In *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999), the plaintiff was injured while working as a driver for his employer, a provider of long-haul transportation services specializing in produce shipment. The Full Commission found that the plaintiff had been continuously employed with the employer since 1994, and that the plaintiff's employment was not seasonal. This Court reversed, noting that the plaintiff did not work during February, March, August, September, or November of 1995, and worked only 11 days in April, six days in July, and seven days in December of that year. As a result of this fluctuating work schedule, which was dependent upon the produce season, the plaintiff's job more properly qualified as "seasonal" rather than continuous employment. *Id.* at 436, 517 S.E.2d at 921. As in *Joyner*, the Court held that the employee's weekly wages should be computed under the "exceptional reasons" method of N.C. Gen. Stat. § 97-2(5) by dividing his total earnings in the 52-week period preceding the injury by 52. *Id.* at 437, 517 S.E.2d at 921.

In this case, as in *Joyner*, Plaintiff's employment had "peak times" where she worked full-time, and "slack periods" where she did not work at all. Calculating Plaintiff's average weekly wages using method three inflates her earnings by basing them solely on income earned during "peak times," a result contrary to the Court's reasoning in *Joyner*, and causes a windfall for Plaintiff, contrary to statutory

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6. *Joyner* was decided under a previous version of N.C. Gen. Stat. § 97-2(5) where the "exceptional reasons" method was the fourth method instead of the fifth method, as it currently is.

7. The plaintiff and another employee did the same work for the same employer for the same wage but at different times during the year at issue. The Court treated their employment as one continuous employment for the purpose of calculating the plaintiff's average weekly wages during the 52-week period prior to the plaintiff's accident.

intent. Furthermore, similar to *Barber*, Plaintiff is essentially a "seasonal" worker who only works during the school year. Although she was considered a full-time employee, by virtue of the school calendar, she was not required to work during the summer and never anticipated doing so. Thus, as in *Joyner* and *Barber*, the fifth, or "exceptional reasons" method identified in N.C. Gen. Stat. § 97-2(5), should be used to calculate Plaintiff's average weekly wages.

The language of the fifth calculation method neither requires nor prohibits any specific mathematical formula from being applied; instead, it directs that the average weekly wages calculated must "most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). Plaintiff earned $17,608.94 in the 52 weeks preceding the accident. Although she only worked approximately 40 of those weeks and was paid in 10 monthly paychecks, the compensation she collects for workers' compensation will be paid every week, including the weeks of her summer vacation. Consequently, as in *Joyner* and *Barber*, Plaintiff's average weekly wages should be calculated by dividing the wages she earned in the 52-week period prior to her accident by 52, the number of weeks in the year. This calculation yields average weekly wages of $338.63, which most nearly approximates the amount Plaintiff would be earning were it not for her injury.[8]

We therefore reverse the decision of the Full Commission and remand for entry of an Award in accordance with this opinion.

REVERSED AND REMANDED.

Judges McGEE and SMITH concur.

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8. Although this Court suggested in *Loch v. Entm't Ptnrs.*, 148 N.C. App. 106, 557 S.E.2d 182, that calculating an employee's average weekly wages under the fifth method of the statute, using the formula set out in the first method, might be an impermissible way "to circumvent the statute when calculation under the first method was otherwise inappropriate[,]" *id.* at 112, 557 S.E.2d at 186, our Supreme Court in *Joyner*, 266 N.C. 519, 146 S.E.2d 447, in making the precise calculation which *Loch* suggests is impermissible, stressed that the dominant intent of N.C. Gen. Stat. § 97-2(5) is that "*results* fair and just to both employer and employee be obtained[,]" *id.* at 522, 146 S.E.2d at 449 (emphasis added), regardless of the method or formula used.

MILTON M. CROOM CHARITABLE REMAINDER UNITRUST, W. BRIAN HOWELL, TRUSTEE, PLAINTIFF v. ROBERT T. HEDRICK, DEFENDANT AND THIRD-PARTY PLAINTIFF v. P.D. WILLIAMS, INDIVIDUALLY AND AS CO-TRUSTEE OF THE CROOM TRUST, THIRD-PARTY DEFENDANT

No. COA05-1586

(Filed 15 January 2008)

1. Civil Procedure— Rule 60(b)(1) motion—excusable neglect—notice of hearing

The trial court did not abuse its discretion in an action regarding the liability on a promissory note by denying third-party defendant Williams's N.C.G.S. § 1A-1, Rule 60(b)(1) motion for relief from judgment entered 18 July 2005 based on alleged excusable neglect of no notice of the hearing, because: (1) although Williams contends her attorney Wood had not been sent a calendar for the trial date by the Wake County Clerk of Court as of the date she began representing herself pro se, there was no evidence in the record to support her assertion; (2) Williams's only justification for not obtaining representation after Wood withdrew was that nothing was happening, she assumed the opposing party would keep her abreast of any developments, and the failure to obtain an attorney does not constitute excusable neglect nor does professing ignorance of the judicial process; and (3) the Court of Appeals has upheld the denial of a Rule 60(b) motion when the moving party was under the impression that he would be informed of a hearing time by the opposing party and did not contact an attorney until after a default judgment was entered.

2. Civil Procedure— Rule 60(b)(3) motion—fraud, misrepresentation, or other misconduct

The trial court did not abuse its discretion in an action regarding the liability on a promissory note by denying third-party defendant Williams's N.C.G.S. § 1A-1, Rule 60(b)(3) motion for relief from judgment entered 18 July 2005 based on alleged fraud, misrepresentation, or other misconduct, even though Williams contends third-party plaintiff Hedrick had actual knowledge of her address but never attempted to contact Williams after attorney Wood withdrew as her counsel in order to inform Williams that the matter was scheduled for any trial or hearing, because: (1) Williams concedes there is no duty under the law for the opposing party to do so; (2) Williams did not point to any false

statement made by Hedrick to the trial court during the 18 July 2005 proceeding, and the record revealed no egregious scheme of directly subverting the judicial process; and (3) Williams failed to demonstrate the judgment was procured by any fraud, misconduct, or misrepresentation.

3. Civil Procedure— Rule 60(b)(6) motion—any other reason justifying relief from operation of judgment

The trial court did not abuse its discretion in an action regarding the liability on a promissory note by denying third-party defendant Williams's N.C.G.S. § 1A-1, Rule 60(b)(6) motion for relief from judgment entered 18 July 2005 based on any other reason justifying relief from the operation of the judgment, because: (1) third-party plaintiff Hedrick stated in an affidavit that the six-month calendar had been published in April 2005, Williams did not deny this information, and it was uncontroverted that Williams was represented by counsel until 28 April 2005; (2) it was reasonable for the trial court to believe Williams's counsel had received notice of the hearing date, and knowledge of an attorney is imputed to the attorney's client; (3) Williams failed to show that extraordinary circumstances exist and that justice demands such relief; and (4) Williams's arguments with respect to her purported meritorious defense need not be addressed when she failed to satisfy her burden of demonstrating the existence of a reason justifying relief under Rule 60(b)(1)-(6).

4. Appeal and Error— appealability—defective notice of appeal

Although third-party defendant Williams contends the trial court erred in its 18 July 2005 judgment finding her liable for unfair and deceptive trade practices, the Court of Appeals did not have jurisdiction to review the underlying judgment entered 18 July 2005 because: (1) Williams only filed notice of appeal from the denial of her Rule 60(b) motion for relief; (2) the appellate court obtains jurisdiction only over the ruling specifically designated in the notice of appeal; and (3) notice of appeal from the denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review.

Appeal by third-party defendant from an order entered 20 September 2005 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 19 September 2007.

Robert T. Hedrick, for third-party plaintiff-appellee.

Stubbs & Perdue, P.A., by Trawick H. Stubbs, Jr., Laurie B. Biggs, and Thomas Reston Wilson, for third-party defendant-appellant.

JACKSON, Judge.

P.D. Williams ("Williams") appeals from an order entered 20 September 2005 denying her Rule 60(b) motion for relief from judgment entered 18 July 2005. For the following reasons, we affirm in part and dismiss in part.

Beginning several years prior to 1998, Robert T. Hedrick ("Hedrick") performed legal services for Williams and various corporations in which Williams had an interest as an officer or stockholder, including Cal-Tone Paints, Inc., Southeastern Sundries and Supplies, Inc., Tri-Coatings Company, Inc., Nathaniel Macon, Inc., and Slim & None, Inc. After becoming president of Cal-Tone Paints, Inc., Williams assured Hedrick that he would be paid for the services he had performed. Based upon this representation, Hedrick continued to perform legal services for Williams and the various corporations.

Williams also was appointed co-trustee of the Milton M. Croom Charitable Remainder Unitrust ("the Croom Trust"), and among the Croom Trust's assets was a sailboat ("the boat"). Since the inception of the Croom Trust, there had been no funds available with which to pay the expenses associated with maintaining the boat. In September 1999, the boat washed onto a marshy bank as a result of Hurricane Floyd and needed to be moved because it was blocking a commercial fishing trawler. Williams informed Hedrick that the Croom Trust did not have the funds to pay for moving the boat and asked Hedrick to assume ownership of the boat, with the understanding that Williams would pay the purchase price. Williams further asked Hedrick to prepare a promissory note for $50,000.00 for him to sign payable in two years, which would provide her sufficient time to acquire the funds to pay for the boat. Williams indicated that she would mark the promissory note paid and satisfied in full in order to assure that Hedrick would not be responsible for payment on the note.

On 22 September 1999, Hedrick executed a promissory note ("the note") in the amount of $50,000.00 payable to the Croom Trust, which Williams, as trustee, signed as being satisfied. Williams also instructed Hedrick to date the satisfaction at a time beyond the payment due date. Thereafter, Williams assured Hedrick on numerous

occasions that she intended to pay the Croom Trust for the boat as soon as she was in a financial position to do so. In the summer of 2001, Williams requested that Hedrick prepare an extension of the note since she had been unable to obtain the funds as anticipated. Hedrick prepared the extension with the understanding that Williams remained responsible for payment for the boat to the Croom Trust.

In October 2002, Williams indicated that she would pay $50,000.00 for the boat, but refused to pay the interest that had accumulated. Thereafter, Brent E. Wood ("Wood"), attorney for Williams, indicated that Williams would attempt to obtain financing on property that she had agreed to purchase and that if she could obtain such financing, she would put $50,000.00 into an escrow account. Hedrick responded to Wood and informed him that such a proposal was unacceptable.

On 13 October 2003, the Croom Trust filed a complaint against Hedrick alleging that Hedrick was liable on the note. On 12 December 2003, Hedrick filed an answer and counterclaim as well as a third-party complaint alleging cross-claims against Williams. On 8 April 2004, the Croom Trust filed a motion for summary judgment against Hedrick, which the trial court granted by order entered 27 May 2004. On 4 June 2004, Williams filed a motion to dismiss Hedrick's third-party complaint, and on 17 February 2005, Williams filed an answer to the third-party complaint. On 16 March 2005, Hedrick filed a more definite statement, and on 21 April 2005, Wood filed a motion to withdraw as Williams' counsel. By order entered 22 April 2005, the trial court denied Williams' motion to dismiss, and by order entered 28 April 2005, the trial court ordered Wood withdrawn as Williams' counsel.

At a hearing held on 18 July 2005 and unattended by Williams, the trial court found Williams liable on Hedrick's cross-claims and awarded Hedrick $150,000.00 in treble damages for unfair and deceptive trade practices, along with interest on the note and the costs of the action. On 19 July 2005, Hedrick dismissed his counterclaims against the Croom Trust. On 1 August 2005, Williams filed a Rule 60(b) motion for relief from the 18 July 2005 judgment, which the trial court denied by order entered 20 September 2005. Thereafter, Williams filed timely notice of appeal.

As this Court recently explained,

> Rule 60(b) of the North Carolina Rules of Civil Procedure provides that a court may relieve a party from a judgment or order

> because: (1) of mistake, surprise, or excusable neglect; (2) of newly discovered evidence that could not have been timely discovered by due diligence; (3) of fraud, misrepresentation, or other misconduct; (4) the judgment or order is void; (5) the judgment or order has been satisfied or discharged, or a prior judgment or order upon which it is based has been reversed or vacated; or (6) any other equitable justification for relief from the judgment or order.

Williams v. Walker, 185 N.C. App. 393, 397-98, 648 S.E.2d 536, 540 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005)). In the instant case, Williams based her motion for relief upon Rule 60(b)(1), (2), (3), and (6). Williams, however, has offered no argument on appeal with respect to Rule 60(b)(2). Accordingly, we confine our review to her motion for relief with respect to Rule 60(b)(1), (3), and (6). *See* N.C. R. App. P. 28(b)(6) (2006).

The standard of review for the denial of a Rule 60(b) motion is abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). "A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party." *Creasman v. Creasman*, 152 N.C. App. 119, 124, 566 S.E.2d 725, 729 (2002); *accord Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642, *disc. rev. denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). *But see Trent v. River Place, LLC*, 179 N.C. App. 72, 79, 632 S.E.2d 529, 534 (2006) ("Upon hearing such a [Rule 60(b)] motion, it is the 'duty of the judge presiding . . . to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment or order.' " (alteration in original) (quoting *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978))). When, as in the instant case, "the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is 'whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion.' " *Grant v. Cox*, 106 N.C. App. 122, 125, 415 S.E.2d 378, 380 (1992) (alteration omitted) (quoting *Tex. W. Fin. Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978)).

[1] First, with respect to Rule 60(b)(1), "[t]he issue of 'what constitutes "excusable neglect" is a question of law which is fully reviewable on appeal.' " *McIntosh v. McIntosh*, 184 N.C. App. 697, 704-05,

646 S.E.2d 820, 825 (2007) (quoting *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. rev. denied*, 322 N.C. 835, 371 S.E.2d 277 (1988)). "While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986).

In the case *sub judice*, Williams contended in her Rule 60(b) motion that after Wood withdrew from representation,

> Williams never received any calendar or other written notice indicating that the above-captioned civil action was proceeding to any hearing or trial. To the contrary, the only communication received by Williams from Hedrick after Mr. Wood withdrew as counsel . . . was a letter and audiotape from Hedrick, with which Hedrick attempted to blackmail Williams.[1]

The record demonstrates that the instant case was placed on the six-month trial calendar published in April, and Williams was represented by Wood until the trial court granted his motion to withdraw on 28 April 2005. Williams was present at the hearing when the court ordered Wood withdrawn as counsel. Although Williams contends that her attorney had not been sent a calendar for the trial date by the Wake County Clerk of Court as of the date she began representing herself *pro se*, there is no evidence in the record to support her assertion. Williams did not present an affidavit from Wood to the trial court, and Wood did not testify at the hearing on Williams' Rule 60(b) motion.

Additionally, Williams' only justification for not obtaining representation after Wood withdrew was that "[n]othing was happening." She acknowledged that at the time Wood withdrew, she had three other lawsuits pending—in one of those lawsuits, Wood continued to represent her, and in another, Williams hired an attorney in May, after Wood had withdrawn from representation in the instant matter. Williams further acknowledged that she had been represented by counsel in eight different lawsuits concerning the companies in which she had an interest. Williams nevertheless "did nothing" with respect to the instant lawsuit because she expected Hedrick—the

1. Neither the letter nor the audiotape allegedly sent by Hedrick are included in the record on appeal.

opposing party—to keep her abreast of any developments. Williams explained, "I didn't know what I was supposed to do."

It is well-settled that litigants are expected to pay "that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable." *Jones v. Statesville Ice & Fuel Co., Inc.*, 259 N.C. 206, 209, 130 S.E.2d 324, 326 (1963) (quotation marks and citation omitted). "[T]he failure of a party to obtain an attorney does not constitute excusable neglect," *Scoggins v. Jacobs*, 169 N.C. App. 411, 416, 610 S.E.2d 428, 432 (2005), and a party generally cannot demonstrate excusable neglect by professing ignorance of the judicial process. *See Hall*, 89 N.C. App. at 688, 366 S.E.2d at 885; *see also Lerch Bros. v. McKinne Bros.*, 187 N.C. 419, 420, 122 S.E. 9, 10 (1924) ("*Ignorantia facti excusat, ignorantia juris non excusat.* Ignorance of a material fact may excuse a party, but ignorance of the law does not excuse him from the legal consequences of his conduct."). Furthermore, this Court has upheld the denial of a Rule 60(b) motion when the moving party "was under the impression that he would be informed of a hearing time by [the opposing party] and did not contact an attorney until after the default judgment was entered." *JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., Inc.*, 169 N.C. App. 199, 202-03, 609 S.E.2d 487, 490 (2005). Here, the record fails to demonstrate excusable neglect, and accordingly, the trial court properly denied Williams' Rule 60(b) motion.

[2] Williams also sought relief from the judgment on the basis of fraud, misrepresentation, or other misconduct. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2005). "To obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation or misconduct by the adverse party." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 60-8, at 60-22 (3d ed. 2007).

In support of her Rule 60(b)(3) argument, Williams argued that Hedrick had actual knowledge of Williams' address, but "[d]espite all of this knowledge, Hedrick never attempted to contact Williams after Mr. Wood withdrew as counsel to inform Williams that this matter was scheduled for any trial or hearing, even though Hedrick knew that Williams vigorously denied the allegations made by Hedrick." In her brief to this Court, Williams contends that Hedrick could have and should have called her at one of her four phone numbers and informed her of the trial date. Williams, however, concedes that "there is no duty to do this under [the] law." Williams does not point to any false statement made by Hedrick to the trial court during the

18 July 2005 proceeding, and the record reveals no "egregious scheme of directly subverting the judicial process." *Henderson v. Wachovia Bank of N.C., N.A.*, 145 N.C. App. 621, 628, 551 S.E.2d 464, 469 (quotation marks and citation omitted), *disc. rev. denied*, 354 N.C. 572, 558 S.E.2d 869 (2001). Williams has failed to demonstrate that the judgment was procured by any fraud, misconduct, or misrepresentation, and accordingly, this assignment of error is overruled.

[3] Finally, Williams based her Rule 60(b) motion in part on subsection (6)—"[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2005). Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case," *McGinnis v. Robinson*, 43 N.C. App. 1, 10, 258 S.E.2d 84, 89 (1979) (quotation marks and citation omitted), and "[t]he broad language of Rule 60(b)(6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Flinn v. Laughinghouse*, 68 N.C. App. 476, 478, 315 S.E.2d 72, 73 (1984). However, "Rule 60(b)(6) is not a catch-all rule . . . [and] [i]n order to be entitled to relief under Rule 60(b)(6) the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief." *Goodwin v. Cashwell*, 102 N.C. App. 275, 278, 401 S.E.2d 840, 842 (1991) (internal quotation marks and citations omitted).

This Court previously has found a movant entitled to Rule 60(b)(6) relief when the movant had no notice that the case had been calendared. *See Windley v. Dockery*, 95 N.C. App. 771, 383 S.E.2d 682 (1989). In *Windley*, "the critical question . . . was whether [the movants] had notice, constructive or actual," that the proceeding had been calendared, *id.* at 772-73, 383 S.E.2d at 683, and this Court noted that the only evidence before the trial court was that the movants had not received notice. *See id.* at 773, 383 S.E.2d at 683. In the instant case, Williams denied, both in her Rule 60(b) motion and at the hearing on her motion, that she had notice of the 18 July 2005 hearing. However, this was not the only evidence before the trial court. Instead, the trial court also had before it an affidavit from Hedrick stating that the six-month calendar had been published in April 2005, and at no point did Williams deny this. It also was uncontroverted that Williams was represented by counsel until 28 April 2005. Therefore, it was reasonable for the trial court to believe that Williams' counsel had received notice of the hearing date, and "knowledge of an attorney is imputed to [the attorney's] client." *In re T.M.*, 182 N.C. App. 566, 572-73, 643 S.E.2d 471, 475-76 (2007).

Therefore, Williams has failed to "show that (1) extraordinary circumstances exist and that (2) justice demands such relief." *Goodwin*, 102 N.C. App. at 278, 401 S.E.2d at 842 (internal quotation marks and citation omitted); *see also Thacker v. Thacker*, 107 N.C. App. 479, 482, 420 S.E.2d 479, 481 ("[A] lack of counsel and/or an ignorance of the law does not amount to 'extraordinary circumstances' without some showing that the lack of counsel or ignorance *was due to reasons beyond control of the party seeking relief*." (emphasis added)), *disc. rev. denied*, 332 N.C. 672, 424 S.E.2d 407 (1992). The record demonstrates that the trial court's denial of Williams' motion was not "manifestly unsupported by reason," *Clark*, 301 N.C. at 129, 271 S.E.2d at 63, and accordingly, Williams' assignment of error is overruled.

When a Rule 60(b) movant has failed to satisfy his or her burden of demonstrating the existence of a reason justifying relief from a judgment, *see* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1)-(6) (2005), " 'the question of meritorious defense becomes immaterial.' " *Scoggins*, 169 N.C. App. at 413, 610 S.E.2d at 431 (quoting *Howard v. Williams*, 40 N.C. App. 575, 580, 253 S.E.2d 571, 574 (1979)). Therefore, we need not address Williams' arguments with respect to her purported meritorious defense. *See Estate of Teel by Naddeo v. Darby*, 129 N.C. App. 604, 611, 500 S.E.2d 759, 764 (1998).

[4] In her final argument, Williams contends that the trial court erred in its 18 July 2005 judgment finding her liable for unfair and deceptive trade practices. However, Williams only filed notice of appeal from the denial of her motion for relief, and therefore, we do not have jurisdiction to review the underlying judgment entered 18 July 2005.

"As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). As this Court has held, "[n]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990).

In the case sub *judice*, Williams filed notice of appeal only from the trial court's order denying her Rule 60(b) motion:

> Third-Party Defendant P.D. Williams, Individually and as Co-Trustee of the Croom Trust, hereby gives notice of appeal to the

Court of Appeals of North Carolina from the Order entered by the Honorable J.B. Allen, Superior Court Judge, on 19 September 2005 in the Superior Court, Wake County, which denied Third-Party Defendant's Motion for Relief from Judgment of the judgment entered July 18, 2005 on the claim for Unfair Business and Trade Practices and for treble damages under N.C.G.S. 75-16.

Accordingly, we do not reach Williams' arguments concerning the 18 July 2005 judgment, and these assignments of error are dismissed.

Affirmed in part; Dismissed in part.

Judges CALABRIA and STEPHENS concur.

TAWANNA APPLEWHITE, PETITIONER-APPELLANT, v. ALLIANCE ONE INTERNATIONAL, INC. F/K/A STANDARD COMMERCIAL TOBACCO CO., INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. COA07-123

(Filed 15 January 2008)

Unemployment Compensation— breach of attendance policy— illness—not substantial fault

Petitioner was not discharged from her employment for substantial fault and was thus not partially disqualified for unemployment compensation under N.C.G.S. § 96-14(2a) where petitioner received her third and final infraction which caused her discharge when she was fifteen minutes late returning to her work area after lunch, but the Employment Security Commission found that she was late solely "due to illness" in that petitioner had become sick and needed to go to the bathroom before returning to her work area, and petitioner thus did not have reasonable control over this failure to conform to respondent employer's attendance policy.

Judge TYSON dissenting.

Appeal by Petitioner from order entered 20 October 2006 by Judge W. Russell Duke, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 12 September 2007.

Legal Aid of North Carolina, Inc., by Richard Trottier and John R. Keller, for Petitioner-Appellant.

Camilla F. McClain for Respondent-Appellee Employment Security Commission of North Carolina.

No brief filed for Respondent-Appellee Alliance One International, Inc. f/k/a Standard Commercial Tobacco.

McGEE, Judge.

Tawanna R. Applewhite (Petitioner) was employed by Alliance One International, Inc. f/k/a Standard Commercial Tobacco Co., Inc. (Respondent-Employer) beginning on 22 August 2003. Petitioner last worked for Respondent-Employer as a general laborer on 21 September 2005, when Petitioner was discharged for having three attendance infractions within a twelve-month period.

Petitioner filed a claim for unemployment benefits with the Employment Security Commission (the Commission). The adjudicator determined that Petitioner had been discharged for misconduct and was therefore disqualified from receiving unemployment benefits. Petitioner appealed, and the appeals referee concluded that Petitioner had been discharged for substantial fault and was disqualified from receiving unemployment benefits for nine weeks. Petitioner appealed to the Commission, which affirmed.

Petitioner does not challenge the Commission's findings of fact. Pursuant to the Commission's findings, Petitioner was notified of Respondent-Employer's plant rules and regulations, which subjected employees to the following progressive disciplinary action: "First offense—written warning, second offense—written warning, third offense—dismissal. Three infractions in a twelve-month period will result in termination." Respondent-Employer's policy specifically provided that employees were subject to discipline for "excessive absenteeism, tardiness or excessive breaks[.]"

Petitioner received her first written warning on 21 February 2005 for taking excessive break time. Petitioner received her second written warning on 5 April 2005 for excessive tardiness. Specifically, Petitioner was tardy by 30 minutes on 18 March 2005; by 2-1/2 hours on 29 March 2005; by 1-1/2 hours on 4 April 2005; and by 1-1/2 hours on 5 April 2005. In finding of fact nine, the Commission found:

> [Petitioner's] final infraction occurred on September 21, 2005. She was issued a third written warning and discharged for taking

> an excessive break on that day. [Petitioner] took an excessive break by returning from lunch late. [Petitioner] was fifteen minutes late returning to her work area. [Petitioner] was late on that occasion due to illness. [Petitioner] had become sick, and needed to go to the bathroom before returning to her work area.

The Commission concluded that Petitioner was discharged for substantial fault and that Petitioner was disqualified from receiving unemployment benefits for nine weeks.

Petitioner appealed the Commission's decision to Superior Court, Wilson County, which found that "the Commission correctly interpreted and applied the proper provisions of the law to [the] facts[.]" The superior court entered an order affirming the Commission's decision. Petitioner appeals.

Petitioner argues the superior court erred by finding that "the Commission correctly interpreted and applied the proper provisions of the law to [the] facts[.]" Petitioner argues that finding of fact nine supports the conclusion that Petitioner was discharged through no fault of her own. We agree.

"The scope of our review is to determine whether the facts as found by the [Commission] are supported by competent evidence and if so, whether the findings of fact support the conclusions of law." *Fair v. St. Joseph's Hospital, Inc.*, 113 N.C. App. 159, 161, 437 S.E.2d 875, 876 (1993), *disc. review denied*, 336 N.C. 315, 445 S.E.2d 394 (1994). "If the findings of fact made by the [Commission] are supported by competent evidence then they are conclusive on appeal. However, even if the findings of fact are not supported by the evidence, they are presumed to be correct if the petitioner fails to except." *Id.* (citations omitted). In the present case, because Petitioner does not challenge the findings of fact, those findings are conclusive. *See id.* Accordingly, the sole question is whether those findings of fact support the Commission's conclusion that Petitioner was disqualified from receiving unemployment compensation.

Petitioner was disqualified for benefits pursuant to N.C. Gen. Stat. § 96-14(2a). This statute provides that an employee shall be disqualified for benefits for a period of between four and thirteen weeks if the employee is unemployed because the employee was discharged "for substantial fault on his part connected with his work not rising to the level of misconduct." N.C. Gen. Stat. § 96-14(2a) (2005). This statute further defines "substantial fault" as follows:

> Substantial fault is defined to include those acts or omissions of employees *over which they exercised reasonable control* and which violate *reasonable requirements of the job* but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

Id. (emphases added). An employee is generally presumed to be entitled to unemployment compensation, and the employer bears the burden of establishing that an employee is disqualified. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982). "The essence of [N.C.]G.S. § 96-14[2a] is that if an employer establishes a reasonable job policy to which an employee can conform, her failure to do so constitutes substantial fault." *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 590, 406 S.E.2d 609, 612, *disc. review denied*, 330 N.C. 196, 412 S.E.2d 57 (1991). As to whether an employee has the ability to conform to a particular policy, "[a]n employee has 'reasonable control' when [the employee] has the physical and mental ability to conform [the employee's] conduct to [the] employer's job requirements." *Id.*

In the present case, even assuming, *arguendo*, that Respondent-Employer's policy was reasonable, we hold that Petitioner did not have reasonable control over the action that violated the policy. Petitioner received her third and final infraction, which caused her discharge, on 21 September 2005 when she was fifteen minutes late returning to her work area after lunch. The Commission found that she was late solely "due to illness." As our Court recently reiterated in *James v. Lemmons*, 177 N.C. App. 509, 629 S.E.2d 324 (2006), "an employee does not have reasonable control over failing to attend work because of serious physical or mental illness." *Id.* at 520, 629 S.E.2d at 332 (citing *Lindsey*, 103 N.C. App. at 590, 406 S.E.2d at 612). In *James*, the claimant violated her employer's attendance policy because of illness, and our Court held that the claimant did not have reasonable control over her actions. *Id.* at 519-20, 629 S.E.2d at 332.

In the present case, Petitioner violated Respondent-Employer's policy "due to illness. [Petitioner] had become sick, and needed to go to the bathroom before returning to her work area." Because Petitioner did not have reasonable control over this failure to conform to Respondent-Employer's policy, Petitioner's behavior "cannot rise to the level of substantial fault." *James*, 177 N.C. App. at 520, 629 S.E.2d at 332. As such, the Commission's findings of fact do not

support its conclusion of law that Petitioner was discharged for substantial fault. Petitioner's partial disqualification for unemployment compensation was not appropriate.

We reverse the superior court's order and remand. On remand, the superior court shall enter an order reversing the Commission's decision, and remand this case to the Commission for entry of a decision consistent with this opinion.

Reversed and remanded.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

Petitioner argues and the majority's opinion holds the Employment Security Commission's ("the Commission") findings of fact do not support its conclusion of law that petitioner was discharged for "substantial fault" and is disqualified from receiving unemployment benefits. I disagree and vote to affirm the superior court's order upholding the Commission's decision in favor of respondent-employer. I respectfully dissent.

I. Standard of Review

"[F]indings of fact in an appeal from a decision of the . . . Commission are conclusive on both the superior court and this Court if supported by *any* competent evidence." *James v. Lemmons*, 177 N.C. App. 509, 513, 629 S.E.2d 324, 328 (2006) (emphasis supplied) (citing *Celis v. N.C. Employment Sec. Comm'n*, 97 N.C. App. 636, 389 S.E.2d 434 (1990)). This Court determines "whether the facts as found by the [Commission] are supported by competent evidence and if so, whether the findings of fact support the conclusions of law." *Fair v. St. Joseph's Hospital, Inc.*, 113 N.C. App. 159, 161, 437 S.E.2d 875, 876 (1993), *disc. rev. denied*, 336 N.C. 315, 445 S.E.2d 394 (1994).

II. Substantial Fault

Petitioner argues the Commission's finding of fact number nine supports the conclusion that she was discharged through no fault of her own and that she is entitled to unemployment benefits. I disagree.

The Commission found that petitioner was disqualified from receiving unemployment benefits pursuant to N.C. Gen. Stat. § 96-14(2a), which provides in relevant part:

> For a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits *if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part* connected with his work not rising to the level of misconduct. *Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job* but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

(Emphasis supplied).

The majority's opinion holds that petitioner's behavior cannot rise to the level of "substantial fault" because petitioner did not have "reasonable control" over the ability to conform to respondent-employer's plant rules and regulations due to petitioner's undescribed and undiagnosed "personal illness." The majority's opinion cites *James v. Lemmons* as the basis of its holding. 177 N.C. App. 509, 629 S.E.2d 324 (2006). In *James*, petitioner was terminated from her employment due to excessive absenteeism and a history of poor working relationships with co-workers. *Id.* at 511-12, 629 S.E.2d at 327. The petitioner in *James* would frequently miss work due to previously diagnosed mental illness and occasionally left to attend medical appointments. *Id.*

After reviewing petitioner's claim for unemployment benefits, the Commission decided she was not disqualified and found that her "absences from work were due to her medical condition [i.e., bipolar disorder] and that, while she did not give Employer intimate details about her medical condition, she did provide doctor's excuses for the time she missed from work." *Id.* at 519, 629 S.E.2d at 331. The Commission concluded that petitioner "was not absent from work due to misconduct." *Id.*

This Court affirmed the Commission's decision and held "an employee does not have reasonable control over failing to attend work

because of *serious physical or mental illness*." *Id.* at 520, 629 S.E.2d at 332 (emphasis supplied). This Court further stated, "there is no evidence that [petitioner] was medically capable of compliance." *Id.*

The majority's reliance on *James* is misplaced. The facts presented in this case are clearly distinguishable from the facts presented in *James*. *Id.* at 511-13, 629 S.E.2d at 327-28. Here, the only evidence petitioner presented regarding her "illness" was: (1) petitioner's testimony that "this illness can make anything happen. Your head could start hurting. You can get sick, vomit, it's just anything. It can trigger anything of your body[]" and (2) two vague letters dated after petitioner's date of termination on 21 September 2005.

The first letter entered into evidence, dated 30 January 2006, is written by petitioner's case manager, and states, "[petitioner] is living with an illness that may cause her to become sick at any time." The second letter merely states that petitioner visits "for a regular checkup every 2-3 month [sic], *every time she is seen by one of our doctors*, *we will give her a letter stating that she was here and has been seen by a physician*." Petitioner failed to produce the physician notes or letter referred to in her second exhibit.

Further, no evidence was presented regarding the circumstances surrounding petitioner's late arrival on 21 September 2005, other than petitioner's statement that "[she] left [to take her lunch break] at twelve thirty-five . . . [and she] got back at . . . one-o-five" but "[she] didn't come on the floor until fifteen minutes late [sic], and the reason why [she] was late because [sic] . . . [she] was in the bathroom . . . because [she] had got [sic] sick that day." The record shows petitioner had exhausted her entire lunch break prior to returning to her workplace, and then used an additional fifteen minutes without informing her employer that she was "sick."

The facts before us do not indicate that petitioner was an employee who did not have "reasonable control over failing to attend work because of *serious physical or mental illness*." *Id.* at 520, 629 S.E.2d at 332 (emphasis supplied). No competent evidence shows that petitioner was medically incapable of compliance with respondent-employer's plant rules and regulations or that she had previously informed her employer of her unspecified "illness."

Additionally, respondent-employer presented evidence of three prior written warnings and four oral warnings relating to excessive breaks, tardiness, or poor work performance during the twelve

months prior to termination. The third written warning is the only warning petitioner claims is linked to her "illness." Despite the repeated written and oral warnings and petitioner's awareness of respondent-employer's policy regarding termination, petitioner failed to give respondent-employer any notice of her "illness" to excuse her actions or provide any medical excuse for her repeated absenteeism while employed.

The Commission's findings of fact clearly support its conclusion that petitioner was discharged for "substantial fault." To hold otherwise would subject the Commission and our Courts to a number of claims and appeals asserting unsubstantiated claims of "illness" with no medical evidence or excuse as a pretext to excuse employees noncompliance with employers' rules and regulations in order to receive unemployment benefits.

III. Conclusion

No competent evidence shows petitioner's repeated pattern of tardiness is due to "a serious physical or mental illness." *Id*. The facts and holding in *James* are inapplicable to the facts before us. The Commission's findings of fact support its conclusion that petitioner is disqualified from receiving unemployment benefits pursuant to N.C. Gen. Stat. § 96-14(2a). I vote to affirm the superior court's order. I respectfully dissent.

PAM AND DAN McDONALD; ALEX PORTER, JR., PATRICIA ANN HYDE; H. EDWARD EUBANKS; JR. RICHARD THOMASON; FORREST AND TRACY BALLARD; PATRICK C. QUINN; AND KIP AND FAITH LYON, PETITIONERS v. CITY OF CONCORD, RESPONDENT

No. COA07-113

(Filed 15 January 2008)

1. Cities and Towns— conditional use permit—construction of correctional facility—whole record test

The trial court did not err by affirming the City of Concord's grant of a conditional use permit (CUP) to Cabarrus County for the construction of a Law Enforcement Center (LEC), including a jail, adjacent to downtown Concord based on its determination that the City had presented competent, material, and substantial

evidence that the planned LEC met the City's ordinance standard relating to its conforming with the surrounding residential homes, because: (1) the LEC will conform in use inasmuch as many of the buildings in the neighborhood involve governmental activities; (2) witnesses testified that the jail and the sheriff's office is and has historically been located in downtown Concord adjacent to the courthouse and has always been a member of the neighborhood; (3) the portion of the LEC that is zoned as residential compact, immediately adjacent to some of petitioners' homes, will not be developed; (4) testimony was presented that the historical use, size, and style of the proposed buildings match the existing buildings in the city center zoning district; and (5) the whole record test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views even though the court could justifiably have reached a different result had the matter been before it de novo.

2. Cities and Towns— conditional use permit—construction of correctional facility—arbitrary and capricious standard

The City Council's decision granting a conditional use permit to Cabarrus County for the construction of a Law Enforcement Center, including a correctional facility, adjacent to downtown Concord was not arbitrary or capricious because: (1) there was no evidence the Council's decision was whimsical or taken in bad faith; (2) the Council held a hearing on the issue where it received sworn testimony and evidence; and (3) the fact that the evidence could have supported a different outcome does not lend support to petitioners' argument that the Council acted in an arbitrary and capricious manner.

Appeal by petitioners from an order entered 30 October 2006 by Judge Robert C. Ervin in Cabarrus County Superior Court. Heard in the Court of Appeals 9 October 2007.

Smith Moore, L.L.P., by Thomas E. Terrell Jr. and Travis W. Martin, for petitioner-appellants.

The Brough Law Firm, by Michael B. Brough; Concord City Attorney Albert Benshoff, for respondent-appellee.

HUNTER, Judge.

Pam and Dan McDonald, Alex Porter, Jr., Patricia Ann Hyde, H. Edward Eubanks, Jr., Richard Thomason, Forrest and Tracey

Ballard, Patrick C. Quinn, and Kip and Faith Lyon ("petitioners") appeal the superior court's decision affirming the City of Concord's ("the City") grant of a conditional use permit ("CUP") to Cabarrus County ("the County") for the construction of a correctional facility adjacent to downtown Concord. After careful consideration, we affirm.

On 25 October 2005, the County submitted to the City's Development Service Department an application for a CUP and site plan approval authorizing the County to construct a Sheriff's Department and Detention Facility on slightly more than ten (10) acres in the City. The facility is referred to as a "Law Enforcement Center" ("LEC"), and we refer to it as such in this opinion as well. The LEC would include three buildings: A sheriff's Operations/Administration Building, an Annex, and a Jail House and Support Building. The LEC would go in across from the existing jail and would be located within the portion of the site zoned central city. The remainder of the site, which is not being developed, is zoned residential compact.

Under the City's Unified Development Ordinance ("the ordinance"), the request to issue the CUP was first sent to the Planning and Zoning Commission. That commission approved the CUP on 22 February 2006. The decision was appealed to the City Council ("the Council"). Under the ordinance, the Council heard the matter *de novo* to determine if six criteria set forth in § 6.2.7 of the ordinance were satisfied. In this appeal, however, only one criterion, set out below, is challenged: "The proposed conditional use conforms to the character of the neighborhood, considering the location, type, and height of buildings or structures and the type and extent of landscaping and screening on the site."

The Council held a public hearing on the application on 9 May 2006. The hearing was conducted as a quasi-judicial procedure. The Council concluded that each of the six criteria had been met and granted the permit, subject to certain conditions. The Council's written order was entered on 12 May 2006. Petitioners appealed the Council's order by *certiorari* to the superior court. That court affirmed the Council's decision, and petitioners appeal from that order.

Petitioners present the following issues for this Court's review: (1) whether the superior court erred in affirming the Council's decision; and (2) whether the superior court erred in determining that the Council's decision was not arbitrary and capricious.

I.

[1] Petitioners first argue that the superior court erred in concluding that the City had competent, material, and substantial evidence that the LEC met the City's ordinance standard relating to its conformity with the surrounding residential homes. We disagree.

When a city council issues a CUP, its action constitutes a quasi-judicial decision that is subject to review by a superior court via *certiorari*. *Sun Suites Holdings, LLC v. Board of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000). The superior court then sits as an appellate court and not a trier of fact. *Id.* The task of the superior court includes: (1) reviewing the record for errors of law, (2) ensuring that procedures specified by law in both the statute and ordinance are followed, (3) ensuring that appropriate due process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) ensuring that decisions of town boards are supported by competent, material, and substantial evidence in the whole record, and (5) ensuring that decisions are not arbitrary and capricious. *Id.* at 272, 533 S.E.2d at 527.

The applicable standard of review for the superior court depends upon the type of error assigned. *Id.* at 272, 533 S.E.2d at 527-28. In the instant case, petitioners asserted that the Council's decision was not supported by the evidence or was arbitrary and capricious. Under such circumstances, the superior court must apply the " 'whole record' test." *Id.* Under this test, the superior court examines the entire record to determine whether it contains substantial evidence to support the locality's decision. *Id.* at 273, 533 S.E.2d at 528. " 'The "whole record" test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17-18 (2002) (citation omitted).

In turn, this Court reviews the superior court's order to: " '(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Id.* at 14, 565 S.E.2d at 18 (citations omitted). In this case, there is no dispute that the superior court utilized the appropriate standard of review. Thus, this Court must determine whether the superior court erred in finding substantial evidence in the record to

support the Council's decision. *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796 (2005). We review the superior court's finding of substantial evidence *de novo*. *Id.*

> " ' "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [I]t "must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." ' "

Id. (citations omitted).

Petitioners only challenge the Council's finding that the LEC meets the following standard: "The proposed conditional use conforms to the character of the neighborhood, considering the location, type, and height of buildings or structures and the type and extent of landscaping and screening on the site."

In determining whether this standard was met, if we find that the Council had before it " 'two reasonably conflicting views, even though the [superior] court could justifiably have reached a different result had the matter been before it *de novo*[,]' " the order of the superior court will be affirmed. *Mann Media, Inc.*, 356 N.C. at 14, 565 S.E.2d at 17-18 (citation omitted).

The central dispute between the parties is over whether the LEC will "conform" with the surrounding "neighborhood." Under the ordinance, the Council is required to use Webster's Third New International Dictionary (unabridged) (1993) (hereafter "Webster's") to define those terms. Therefore, we do the same.[1]

There are several definitions given for the term "neighborhood" within Webster's. We find the second and fourth definitions to appropriately define "neighborhood" in the context of this case.[2] In rele-

1. Because we are required to use Webster's Dictionary to define the term "neighborhood," we note that this case is of limited precedential value in defining that term.

2. In our view, the first definition of "neighborhood" contained in Webster's is not useful in determining the outcome of this case. It states that a neighborhood is a "friendly association with another that is a neighbor[.]" Webster's Third New International Dictionary (unabridged) (1993). Because this definition does not pertain to geographical areas, we do not find it applicable in the case at bar. We also reject the third definition, which defines a neighborhood as "the approximate area or point of the location or position of something" or as an approximate amount, as it is too vague. *Id.*

vant part, the fourth definition describes the features associated with a neighborhood. Webster's Third New International Dictionary (unabridged) (1993). Specifically, a neighborhood is "a number of people forming a loosely cohesive community within a larger unit (as a city, town)[.]" *Id.* The definition goes on to state that a neighborhood is a "particular section or district[,]" which includes similar homes and public establishments. The second definition, which defines the term as "the quality or state of being immediately adjacent or relatively near to something[,]" describes the geographical boundaries of a neighborhood. *Id.* As the second and fourth definitions combine to describe both features and geography of a neighborhood, we utilize them in conjunction to define the term.

As stated above, the Council was required to find that the LEC would "conform" with the "neighborhood." Webster's defines "conform" as something having "the same shape, outline, or contour" as something else or "in agreement or harmony" with something else. *Id.* The ordinance itself provides that consideration should be given to "the location, type, and height of buildings or structures and the type and extent of landscaping and screening on the site." With these definitions in mind, we now address whether the Council was presented with substantial evidence that the LEC would conform to the surrounding neighborhood.

The City argues that they have produced substantial evidence that the LEC conforms with the surrounding neighborhood. We agree.

The LEC would be located on the southeastern tip of the zone that includes City Hall, the old courthouse, the new courthouse, the current jail, the Sheriff's office, the Board of Elections building, the county office building, and the main post office. Accordingly, the LEC will conform in use inasmuch as many of the buildings in the neighborhood involve governmental activities. Additionally, the Council heard testimony from Jonathan Marshall, Cabarrus County Commerce Director, that "[t]he jail and the sheriff's office is and has historically been located in downtown Concord adjacent to the courthouse and has always been a member of the neighborhood." Judge William Hamby made a similar point when he testified that "a jail . . . has been on a downtown Concord site for nearly two centuries, almost the entire time that Concord has been here." Finally, the portion of the LEC that is zoned as residential compact, immediately adjacent to some of petitioners' homes, will not be developed.

As to the architecture of the proposed LEC, the original design called for precast concrete. However, the plans were altered to use "red brick, basically about the same color brick as you find on the Hotel Concord." Moreover, an architect explained that the hotel "was one of the buildings that we looked at locally to try to match materials and colors." The building would be designed with large windows, decorative brick panels, and other features such that "you can compare it to the old Concord High School, something like that, a civic building along that character."

As to the size, or "footprint," of the LEC, the annex building would be between 23,000 and 24,000 square feet, the Sheriff's Office and Administration Building would be between 73,000 and 75,000 square feet, and the main Jail House and Support Building would be approximately 188,000 square feet. By comparison, the existing courthouse is an estimated 75,000 square feet. In summation, the architect on the project testified that the size of the LEC would be "consistent with the relative sizes of these buildings, some bigger, some smaller but consistent[.]"

With respect to the height of the buildings, they are approximately the same height as the existing buildings in the city center zoning district. The Sheriff's Office and Administration building would be only seven or eight feet taller than the existing courthouse. The Annex would be shorter than the Tribune Building which stands between the Annex and Union Street. Finally, the Jail House, although it would be the tallest building in the area, is situated on a downhill slope so that the top of the building will actually be sixteen feet lower than the existing courthouse.

As to screening, the Council added a condition on the CUP that a "buffer yard at or near the perimeter of the property wherever the County's property abuts contiguous residential property" must be implemented. The buffer "would be a minimum starting at 50 feet in width and would have a requirement of different shade trees and ornamental trees with a complete visual separation . . . within a three-year period." Additionally, the entire portion of the property that adjoins residentially used properties will remain subject to a conservation easement that will prohibit it from being developed.

The petitioners, however, do not focus on the center city zoning district but instead focus on the adjacent residential areas. The footprint of the LEC would be twenty-eight times the size of the average home within 500 feet of it. Additionally, the LEC would be sur-

rounded on three sides by residential areas. Obviously, the use of the jail is inconsistent with residential use. That said, there was testimony before the Council that the area surrounding the LEC has maintained a jail for nearly two centuries, and that both the jail and the sheriff's office have historically been located in downtown Concord "and ha[ve] always been a member of the neighborhood." Moreover, as stated above, the area adjoining the residential areas will remain undeveloped.

In summation, the City has presented substantial evidence that the LEC would conform to the surrounding neighborhood. We find especially relevant that the historical use, size, and style of the buildings proposed match the historical use, size, and style of the existing buildings in the city center zoning district, which has always abutted residential areas. The fact that petitioners have presented contrary evidence does not alter our analysis. As we stated above, " '[t]he "whole record" test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.' " *Mann Media, Inc.*, 356 N.C. at 14, 565 S.E.2d at 17-18. Petitioners' assignment of error as to this issue is therefore rejected.

II.

[2] Petitioners' final argument is that the Council's decision granting the conditional use permit was arbitrary and capricious. We disagree.

Decisions will " ' "be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate []any course of reasoning and the exercise of judgment.[]' " ' " *Id.* at 16, 565 S.E.2d at 19 (citations omitted). In the instant case, there is simply no evidence that the Council's decision was whimsical or taken in bad faith. Instead, the Council held a hearing on the issue, where it received sworn testimony and evidence. The fact that evidence could have supported a different outcome does not lend support to petitioners' argument that the Council acted in an arbitrary and capricious manner. Accordingly, petitioners' assignment of error as to this issue is rejected.

III.

In summary, this Court affirms the ruling of the superior court as there was substantial evidence that the planned LEC would conform to the surrounding neighborhood. Additionally, petitioners have not

shown that the Council acted in an arbitrary or capricious manner in granting the CUP.

Affirmed.

Judges WYNN and JACKSON concur.

STATE OF NORTH CAROLINA v. MARK DANIEL STEPHENS

No. COA06-1594

(Filed 15 January 2008)

Indictment and Information— amendment—prior stalking conviction—separate count—not substantial alteration

The State's amendment of a stalking indictment by striking the allegation of a prior stalking conviction from the existing single count and adding the allegation of a prior conviction of a stalking offense as a second count did not amount to a substantial alteration of the charge against defendant in violation of N.C.G.S. § 15A-923(e) because: (1) the original indictment sufficiently charged defendant with a Class F felony offense of stalking, and the amendment thus did not elevate the charge from a misdemeanor to a felony; (2) an allegation of the prior conviction in a separate count was permitted by N.C.G.S. § 15A-928(b); (3) none of the specific allegations against defendant were changed, and defendant was on notice of the charge against him and that the State intended to prove that he had previously been convicted of misdemeanor stalking; and (4) the trial court complied with the requirements of N.C.G.S. § 15A-928(c) in that defendant was given the opportunity to admit the prior conviction outside the presence of the jury, thereby preventing the jury from hearing evidence regarding the prior conviction.

Appeal by defendant from judgments entered 15 May 2006 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

JACKSON, Judge.

On 10 February 2003, Mark Daniel Stephens ("defendant") was indicted on one count of felony stalking of Melanie Shekita ("Shekita"). Defendant's indictment stated that

> on or about the 2nd day of October, 2002, in Wake County, the defendant named above unlawfully, willfully and feloniously did on more than one occasion follow or is [sic] in the presence of, or otherwise harass, Melanie Shekita, without legal purpose and with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury and who has committed this offense of stalking after having been previously convicted of a stalking offense on March 19, 2002. This act was done in violation of G.S. 14-277.3.

In a superceding indictment filed 4 November 2003, defendant was charged with one count of felony stalking of Shekita with language almost identical to the 10 February 2003 indictment, except that the date of the offense was amended to read "on or about October 2, 2002 to October 24, 2002" and the case number of defendant's prior stalking conviction, 02 CR 11460, was added. On 18 November 2003, defendant was indicted for attaining the status of an habitual felon. A second superceding indictment for stalking was filed 6 January 2004, stating that

> on or about May 28, 2002 to October 24, 2002, in Wake County, the defendant named above, unlawfully, willfully, and feloniously did on more than one occasion follow or was in the presence of, or otherwise harass, Melanie Shekita, without legal purpose and with either the intent to place Melanie Shekita in reasonable fear either for her safety or the safety of her immediate family or close personal associates, or with the intent to caused [sic] Melanie Shekita to suffer substantial emotional distress by placing her in fear of death, bodily injury, or continued harassment, and that in fact caused Melanie Shekita substantial emotional distress. At the time of this offense, the defendant had been previously convicted of a stalking offense on March 19, 2002 in Wake County District Court (02cr 11460). This act was done in violation of N.C. Gen. Stat. §14-277.3.

On 28 January 2004, defendant was tried before a jury and convicted of felony stalking and of attaining the status of an habitual felon. Defendant appealed, and this Court granted him a new trial

after holding that the trial court failed to conduct the statutorily required inquiry prior to allowing him to proceed *pro se*. *State v. Stephens*, 173 N.C. App. 758 (unpublished) (2005) (providing the facts of this case in greater detail).

On 1 May 2006, defendant signed a written waiver of counsel, declaring his intention to proceed *pro se*. On 9 May 2006, the State filed a motion to amend defendant's 6 January 2004 indictment by (1) striking the allegation of a prior offense from the existing single count; and (2) adding the allegation of the prior offense as a second count, which would allege the elements required for the Class F felony offense of stalking. Apart from the division of the wording into two separate counts, the language of the amended indictment was identical to the 6 January 2004 superceding indictment. The trial court allowed the amendment, and by order filed 10 May 2006, the trial court amended defendant's indictment, finding that the amendment did not prejudice defendant or substantially change the language of the indictment.

On 12 May 2006, defendant was found guilty by a jury of felony stalking, and on 15 May 2006, he was found guilty of attaining the status of an habitual felon. The trial court sentenced defendant to a term of 120 to 153 months imprisonment, and defendant gave oral notice of appeal.

Defendant's sole argument on appeal is that the trial court erred in granting the State's motion to amend the 6 January 2004 indictment by separating the existing allegation into two separate counts. Defendant contends the amendment amounted to a substantial alteration of the charge; specifically, he argues that the indictment, in its original format, was sufficient only to allege misdemeanor stalking, whereas the indictment as amended elevated the charge to felony stalking. We disagree.

North Carolina General Statutes, section 15A-923(e) provides 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) (citing *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). "In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being 'to enable the accused to prepare for trial.' " *Id.* (quoting *State v. Hunt*, 357 N.C. 257, 267, 582

S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). An amendment to an indictment "which result[s] in a misdemeanor charge being elevated to a felony, substantially alter[s] the charge in the original indictment." *State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002).

North Carolina General Statutes, section 14-277.3 sets forth the offense of stalking, and provides in pertinent part:

> (a) Offense.—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.
>
> (b) Classification.—A violation of this section is a Class A1 misdemeanor. A person convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior by that person is guilty of a Class H felony. A person who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony.

N.C. Gen. Stat. § 14-277.3(a), (b) (2005). In the instant case, defendant was charged with the offense of felony stalking, in part due to his prior conviction on 19 March 2002 for misdemeanor stalking.

North Carolina General Statutes, section 15A-928 provides in pertinent part:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name

or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) below, the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

(c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:

(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

. . . .

N.C. Gen. Stat. § 15A-928(a)-(c) (2005).

At the start of defendant's trial, and before the State made its motion to amend the superceding indictment, the trial court explained to defendant how evidence of his prior conviction for misdemeanor stalking could be introduced and admitted. The trial court explained that defendant would have the option of admitting the prior conviction so that the jury would not hear any evidence regarding it. Following the State's motion and the trial court's allowing the amendment, the trial court explained to defendant, in detail, the process for how his prior conviction could be addressed at trial. The court explained that at some point before the close of the State's evidence,

the jury would be sent out, and that outside the presence of the jury, defendant would be asked if he admitted to having the prior misdemeanor stalking conviction. Defendant stated to the court that he understood the process, and his trial began. Following a portion of the victim's testimony, and outside the presence of the jury, the trial court asked defendant if he was going to admit to the prior misdemeanor stalking conviction, to which he responded in the affirmative. Defendant then admitted that he was convicted of misdemeanor stalking on 19 March 2002, and the trial court found that defendant's admission was done freely, voluntarily, and understandingly.

Defendant contends that the amendment to the 6 January 2004 indictment added a second theory of the offense, in addition to extending the date of the offense. He contends, that pursuant to section 15A-928(a), the allegation of the prior offense should have been stricken, thus leaving the indictment sufficient only to charge the lesser misdemeanor offense that exists without the allegation of the prior offense. He argues that the indictment also violated section 15A-928(b) in that it (1) was not accompanied by a special indictment or information; and (2) did not contain a second count charging that defendant previously was convicted of a stalking offense. At trial, the State acknowledged that the 6 January 2004 indictment did not comply with the requirements of section 15A-928. However, by way of its motion, the State sought to bring the indictment into compliance with section 15A-928 by (1) striking the allegation of the prior offense from the existing single count; and (2) adding the second count which alleged defendant's prior conviction for misdemeanor stalking.

Before the jury was impaneled, the State made the motion to amend defendant's indictment. The motion sought to separate the allegations into two counts in order to comply with section 15A-928. The specific wording of the indictment was not changed at all. Section 15A-928(b) provides that "[a]t the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count." N.C. Gen. Stat. § 15A-928(b) (2005). As this Court has held,

> [t]he purpose of [section 15A-928], which is for the benefit of defendants charged with prior convictions, is not to require that the procedures referred to therein be accomplished at a certain time and no other, which would be pointless. Its purpose is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit

> or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted.

State v. Ford, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984).

In the case *sub judice*, defendant originally was tried and convicted on a felony charge, and following this Court's opinion vacating his original conviction, defendant once again was tried and convicted on a felony charge. None of the specific allegations against defendant were changed—the last two sentences of the 6 January 2004 indictment were simply put into a separate count, as permitted by section 15A-928(b).

> "Ordinarily, an indictment which charges two separate offenses in a single count is bad for duplicity." Provided that the charges were originally set out in the defective indictment, the prosecutor may upon motion and leave of court amend the indictment and state the charges upon which he desires to proceed at trial in separate counts.

State v. Rogers, 68 N.C. App. 358, 379, 315 S.E.2d 492, 507 (1984) (quoting *State v. Beaver*, 14 N.C. App. 459, 461, 188 S.E.2d 576, 578 (1972)).

Defendant likens his case to the situation in *State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223, in which this Court held that an amendment to an indictment which elevated a misdemeanor charge to a felony substantially altered the charge in the original indictment, and thus was unlawful. Defendant also relies upon this Court's holding in *State v. Sullivan*, 111 N.C. App. 441, 432 S.E.2d 376 (1993), in which we vacated the defendant's conviction when the State failed to comply with the provisions of section 15A-928. In *Sullivan*, the trial court granted the defendant's motion to strike the allegations in his indictment that alleged prior convictions that would serve to elevate the subject offense to a felony rather than a misdemeanor. Therefore, defendant contends, his case should be remanded to the trial court for entry of a judgment as to misdemeanor stalking.

Defendant's reliance upon *Sullivan* and *Moses* is misplaced. Unlike the defendant in *Sullivan*, defendant made no motion to strike the allegation of the prior conviction from the felony stalking indictment. Moreover, in the instant case, the State moved to separate the

allegation of defendant's prior conviction into a separate count. Unlike in *Sullivan*, defendant ultimately was tried on an indictment that properly alleged the prior conviction in a separate count. Unlike in *Moses*, the allegation of defendant's prior conviction was included in the original 6 January 2004 indictment, albeit in the same count as the allegation regarding the stalking offense. Therefore, defendant was on notice of the charge against him and the fact that the State intended to prove that he previously had been convicted of misdemeanor stalking. Defendant had ample notice of the charge against him, and had an opportunity to prepare his defense.

From the record, it is clear that defendant was aware of the charge against him, including the fact that his prior conviction for misdemeanor stalking was to be used as an element of the instant charge. Defendant understood his rights and the effect of his admission of the prior conviction, and we decline to interpret section 15A-928 as requiring the quashing of defendant's indictment under the circumstances of the instant case. Therefore, we hold the trial court's allowing of the amendment to the indictment, by separating the existing allegation into two, separate counts, did not constitute a substantial alteration of the charge against defendant. The amendment merely was a change in form. Defendant had ample notice that he was being tried for felony stalking and which prior conviction was being alleged. Further, the trial court complied with the requirements of section 15A-928(c), in that defendant was given the opportunity to admit to the prior conviction outside of the jury, thereby preventing the jury from hearing evidence regarding the conviction. Accordingly, defendant's assignment of error is overruled.

Defendant's remaining assignments of error not argued on appeal are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

No Error.

Judges CALABRIA and GEER concur.

BILLY BOLICK, EMPLOYEE, PLAINTIFF v. ABF FREIGHT SYSTEMS, INC., EMPLOYER, (SELF-INSURED), DEFENDANT

No. COA07-198

(Filed 15 January 2008)

1. Workers' Compensation— asbestosis—failure to apportion award

The Industrial Commission did not err in a workers' compensation case by failing to apportion plaintiff's award of compensation based upon the portion of the disability caused by the occupational-related asbestosis, because: (1) where there is no evidence attributing a percentage of plaintiff's total incapacity to her compensable injury and to the noncompensable condition, or where the evidence before the Commission is such that any attempted apportionment of the disability between work-related and non-work-related causes would be merely speculative, apportionment is not proper; (2) the Commission was entitled to give greater weight to the testimony of Dr. Hayes, which supported the Commission's finding that plaintiff's disability could not be reasonably apportioned; and (3) the Commission's findings of fact support its conclusion that defendant is liable to compensate plaintiff for the entire disability.

2. Workers' Compensation— prescription medical expenses—treatment for both work-related and non-work-related conditions

The Industrial Commission did not err in a workers' compensation case by ordering defendant to pay for prescription expenses that treat both work-related and non-work-related conditions because: (1) a doctor testified that the FDA has not approved medication specifically designed to treat asbestosis and that plaintiff is treated with medication approved to treat the symptoms of obstructive lung disease and to improve his overall lung functioning; and (2) there was competent evidence in the record from this testimony to support the Commission's findings that plaintiff's prescription medications provided some relief to plaintiff by improving his overall lung functioning.

3. Workers' Compensation— failure of Commission to expressly rule on reimbursement—past out-of-pocket medical expenses

The Industrial Commission erred in a workers' compensation case by failing to expressly rule on whether defendant was required to reimburse plaintiff for past out-of-pocket medical expenses, and the decision is remanded for an explicit ruling on this issue, because while it appeared from the emphasis in the Commission's opinion and award which ordered defendant "to pay medical expenses, **when timely submitted**," as well as from its decision not to hold defendant in civil contempt, that the Commission implicitly ruled that plaintiff did not timely submit his request for reimbursement of $1,965.13, the better approach is to expressly respond to the issues raised by plaintiff's appeal.

4. Workers' Compensation— failure to hold in civil contempt—discretionary ruling

The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to hold defendant in contempt for its failure to comply with the 4 June 2002 order and for not making adequate findings of fact to support its conclusion that defendant should not be held in civil contempt, because: (1) contrary to plaintiff's assertion, the Commission would not be required to sanction defendant even if it made explicit findings that all the conditions outlined in N.C.G.S. § 5A-21(a) were satisfied since civil contempt is a discretionary sanction; (2) due to the age of plaintiff's medical bills, the Commission appeared to have implicitly rejected the 4 June 2002 order with respect to past medical bills; and (3) the Commission found that the prosecution of the claim was reasonable and was not based on unfounded litigiousness, which provided a rational basis to deny the motion for sanctions.

Appeal by plaintiff and defendant from an Opinion and Award filed 27 September 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2007.

Huffman Law Firm, P.A., by Richard L. Huffman, for plaintiff appellant-appellee.

Hedrick Eatman Gardner & Kincheloe, LLP, by Neil P. Andrews and M. Duane Jones, for defendant appellant-appellee.

McCULLOUGH, Judge.

Defendant appeals an Opinion and Award of the North Carolina Industrial Commission ("the Commission"), finding plaintiff, Billy Bolick, permanently and totally disabled and awarding him compensation pursuant to N.C. Gen. Stat. § 97-29 (2005).

The evidence before the Commission tended to show that plaintiff, who is now 73 years of age with a ninth grade education, was employed for roughly 30 years by defendant, ABF Freight Systems, Inc. Plaintiff worked as a general laborer and local route driver for defendant's Charlotte terminal; his final day of work was 30 September 1987. Five of defendant's regular customers included businesses that produced asbestos products. As part of his duties, plaintiff loaded and unloaded freight and swept out trailers, which routinely contained boxes and bags that became unsealed and released asbestos dust into the air.

The evidence also showed that plaintiff smoked cigarettes for approximately forty-two years and has a history of asthma. On 30 September 1987, plaintiff retired from employment due to shortness of breath and respiratory problems, which became worse with time. On 7 June 1993, plaintiff's family doctor, Dr. Cutchin, found that plaintiff had multiple pleural nodules and plaques on his lungs, consistent with asbestos exposure. On or about 14 March 1994, after further testing, Dr. Edward Landis diagnosed plaintiff with asbestosis and a Class II impairment.

The Commission first heard plaintiff's claim for compensation on 14 May 1996, following which an Opinion and Award was issued on 14 May 1997. Plaintiff was found to have asbestosis and was awarded 104 weeks of compensation at the rate of $308.00 per week. Pursuant to that order, plaintiff has undergone three follow-up medical examinations.

On 4 April 2002, plaintiff filed a Motion for Immediate Payment of Out-of-Pocket Expenses for Medications Prescribed for Asbestos-Related Illness, which was granted by a 4 June 2002 order from Special Deputy Commissioner Elizabeth Maddox. Defendant did not comply with this order nor did he seek to have the order stayed.

In its most recent Opinion and Award, filed 27 September 2006, the Commission found:

> 9. . . . Dr. Hayes felt plaintiff had an obstructive condition that was classic in nature and that would require a disability rat-

> ing. Dr. Hayes stated that, by definition, asbestosis is a restrictive condition, not an obstructive condition; however it can, in some limited cases, appear obstructive on pulmonology testing. . . . Dr. Hayes stated that [he] could not separate plaintiff's asthmatic conditions and asbestos-related lung disease to determine the cause of plaintiff's impairment, although if plaintiff had no other lung conditions other than the asbestosis related lung disease, Dr. Hayes believed he could be capable of gainful employment. . . .
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> 13. . . . [A]lthough [plaintiff's] medicines were prescribed in the late 1960s and early 1970s for asthma as opposed to asbestosis there is medical evidence to support finding that these medications do provide some relief for plaintiff's work-related condition.

The Commission concluded that: (1) plaintiff has been totally and permanently impaired since 14 March 1996 due to his age, education, work experience, as well as asbestosis and a pre-existing lung condition; (2) plaintiff's impairment cannot be apportioned between occupational and non-occupational causes; (3) plaintiff is entitled to continued compensation, pursuant to N.C. Gen. Stat. § 97-29, at a rate of $308.00 per week for the remainder of his life; and (4) plaintiff is entitled, pursuant to § 97-59, to have defendant pay for "medical expenses incurred, **when timely submitted**, or to be incurred, as a result of plaintiff's asbestos-related disease and asbestosis, as may be required to monitor, provide relief, effect a cure or lessen plaintiff's period of disability." (Emphasis in original.)

Defendant appeals, contending that the Commission erred by: (1) not apportioning the extent of plaintiff's disability between non-occupational factors and occupational factors; and (2) requiring defendant to pay for prescription expenses related to a non-occupational condition.

Plaintiff cross-appeals, contending that the Commission erred by: (1) failing to expressly rule on whether defendant is required to reimburse plaintiff for past out-of-pocket medical expenses; and (2) not holding defendant in contempt for its failure to comply with the 4 June 2002 order.

Appellate review of an Opinion and Award of the Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the

findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission is the sole judge of the credibility of the witnesses and of the weight of the evidence. *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). As long as there is some competent evidence to support the Commission's determination, it is binding on appeal even though the evidence might also support contrary findings. *Id.*

Defendant's Assignments of Error

A. Apportionment of Award

[1] Defendant first contends that the Commission should have apportioned plaintiff's award of compensation based upon the portion of the disability caused by the occupational-related asbestosis. We disagree.

It is well settled that apportionment of compensation is appropriate where the occupational disease in question "causes a worker to be partially physically disabled, and other infirmities, acting independently of and not aggravated by [the occupational disease], also cause the worker to be partially disabled[.]" *Rutledge v. Tultex Corp.*, 308 N.C. 85, 100, 301 S.E.2d 359, 369 (1983). However, where there is no evidence attributing a percentage of the plaintiff's total incapacity to her compensable injury and to the non-compensable condition, *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119-20, 415 S.E.2d 583, 586 (1992); or where the evidence before the Commission is such that any attempted apportionment of the disability between work-related and non-work-related causes would be merely speculative, apportionment is not proper. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985).

Here, the Commission noted that they afforded greater weight to the testimony of Dr. Allen Hayes than to Dr. Boehlecke and Dr. Dew regarding apportionment. While Dr. Hayes testified that plaintiff primarily suffered from an obstructive lung disease, classically associated with asthma and cigarette smoking, he testified that plaintiff's chest CT scan showed evidence of pleural plaques as well as parenchymal fibrosis, which are consistent with asbestosis, and stated that there is "no generally accepted way" to apportion the causes of the reduced lung functioning. Further, in his report of

his evaluation of plaintiff, Dr. Hayes stated that "it is impossible to apportion the relative contribution of" plaintiff's work-related asbestosis and non-work-related obstructive lung disease to his overall impairment.

Since the Commission was entitled to give greater weight to the testimony of Dr. Hayes, there is competent evidence in the record to support the Commission's finding that plaintiff's disability could not reasonably be apportioned between the work-related asbestosis and the other non-work-related lung disease. In turn, the Commission's findings of fact support its conclusion that defendant is liable to compensate plaintiff for the entire disability. This assignment of error is overruled.

B. Prescription expenses

[2] Defendant next contends that the Commission erred in ordering defendant to pay for prescription expenses that treat both work-related and non-work-related conditions. We disagree.

N.C. Gen. Stat. § 97-2 defines medical compensation to include any medicines "as may reasonably be required to effect a cure or 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). In interpreting provisions of the Workers' Compensation Act, we note that the legislature intends "for the Workers' Compensation Act to be construed liberally in favor of the injured worker to the end that its benefits not be denied upon technical, narrow or strict interpretation." *Harrell*, 314 N.C. at 566, 578, 336 S.E.2d at 54. Even if the medical treatment will not lessen the period of disability, the statute requires employers to pay for medical expenses, as long as they are reasonably required to (1) effect a cure or (2) give relief. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986).

Dr. Hayes testified that the FDA has not approved medication specifically designed to treat asbestosis and that plaintiff is treated with medication approved to treat the symptoms of obstructive lung disease and to improve his "overall lung functioning." Based on this testimony, there is competent evidence in the record to support the Commission's finding that plaintiff's prescription medications provide some relief to plaintiff by improving his overall lung functioning. Thus, it was proper for the Commission to order defendant to pay for these medications. This assignment of error is overruled.

Plaintiff's Assignments of Error

A. Past Medical Expenses

[3] Plaintiff first contends that the Commission erred by failing to expressly rule on whether defendant is required to reimburse plaintiff for past out-of-pocket medical expenses. We agree.

The Full Commission is charged with a duty "to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). In *Vieregge v. N.C. State University*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 774 (1992), we stated that pursuant to N.C. Gen. Stat. § 97-85 (2005), a party requesting review before the Full Commission and filing a Form 44 "is entitled to have the full Commission respond to the questions directly raised by his appeal."

While it appears from the emphasis in the Commission's Opinion and Award, which orders defendant to "pay medical expenses, **when timely submitted,**" as well as from its decision not to hold defendant in civil contempt, that the Commission implicitly ruled that plaintiff did not timely submit his request for reimbursement of $1,965.13 in past out-of-pocket medical expenses, we find that the better approach is to expressly respond to the issues raised by plaintiff's appeal. Therefore, we remand for an explicit ruling as to whether defendant must reimburse plaintiff for past out-of-pocket medical expenses.

B. Sanctions

[4] Finally, plaintiff contends that the Commission erred by: (1) not holding defendant in contempt for its failure to comply with the 4 June 2002 order; and (2) not making adequate findings of fact to support its conclusion that defendant should not be held in civil contempt.

Where a party fails to comply with the Workers' Compensation Rules of North Carolina, the Industrial Commission has discretionary authority to "subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure," which includes finding the violator in contempt of court. N.C. Admin. Code tit. 4 r. 10A.0802 (June 2006); N.C. Gen. Stat. § 1A-1, Rule 37 (2005). We review discretionary decisions under an abuse of discretion standard and will not disturb such decisions unless they are "mani-

festly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Plaintiff contends that in order for the Commission to refuse to hold defendant in civil contempt, the Commission was required by N.C. Gen. Stat. § 5A-21(a), which outlines the guidelines for determining when an individual is in civil contempt, to make specific findings as to whether defendant was able to comply with the order or if the violation was willful. N.C. Gen. Stat. § 5A-21(a) (2005). We disagree. Because civil contempt is a discretionary sanction, even if the Commission made explicit findings that all of the conditions outlined in § 5A-21(a) were satisfied, the Commission would not be required to sanction defendant.

As previously discussed, due to the age of plaintiff's medical bills, the Commission appears to have implicitly rejected the 4 June 2002 order with respect to past medical expenses. Furthermore, the Commission also found that the prosecution of the claim was reasonable and was not based on unfounded litigiousness. While we agree with plaintiff that § 5A-21(a) does not require the Commission to find defendant's claim to be based on unfounded litigiousness in order to hold defendant in contempt, this finding is nonetheless a rational basis for the Commission, in its discretion, to deny plaintiff's motion for sanctions pursuant to Rule 802. This assignment of error is overruled.

Accordingly, the Opinion and Award of the Commission is affirmed in part and remanded for additional findings.

Affirmed in part; remanded for additional findings.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA v. RIDGEWAY BRANDS MANUFACTURING, LLC, A NORTH CAROLINA CORPORATION; RIDGEWAY BRANDS, INC., A KENTUCKY CORPORATION; FRED A. EDWARDS, A CITIZEN OF KENTUCKY IN HIS INDIVIDUAL CAPACITY; CARL B. WHITE, A CITIZEN OF KENTUCKY IN HIS INDIVIDUAL CAPACITY, AND TREVALLY, INC., AN ARIZONA CORPORATION

No. COA06-1711

(Filed 15 January 2008)

1. Appeal and Error— appealability—dismissal of party based on lack of personal jurisdiction—substantial right

Although plaintiff appeals from an interlocutory order that dismisses a party for lack of personal jurisdiction but does not dispose of all matters pending in the case, plaintiff is entitled to an immediate appeal because an order dismissing a party for lack of personal jurisdiction affects a substantial right.

2. Civil Procedure— motion to dismiss—standard of review

The Court of Appeals' review of a motion to dismiss for lack of personal jurisdiction was limited to the issue of whether the trial court's findings of fact support its conclusions of law that there was no personal jurisdiction over defendant Trevally on a statutory or constitutional due process basis, because appellant did not assign as error any of the trial court's findings of fact but only assigned error to the trial court's granting of defendant's motion to dismiss.

3. Jurisdiction— personal jurisdiction—out-of-state corporate defendant—failure to show availed itself of laws and privileges of state

The trial court did not err by dismissing plaintiffs' claims against defendant foreign corporation under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction, because: (1) plaintiff's conclusory allegation in the second amended complaint was insufficient to establish that defendant is the alter ego of a North Carolina corporation for purposes of determining whether North Carolina courts have jurisdiction over defendant; (2) plaintiff failed to cite authority as required by N.C. R. App. P. 28(b)(6) for its proposition that North Carolina courts have personal jurisdiction over an out-of-state corporation if it is the alter ego of a North Carolina corporation; and (3) plaintiff failed to allege that the out-of-state corporate defendant was present in

North Carolina at the time of the alleged transaction or otherwise availed itself of the laws and privileges of this State.

Appeal by plaintiff from judgment entered 27 October 2006 by Judge James C. Spencer, Jr. in Wake County Superior Court, dismissing plaintiff's claims against defendant Trevally, Inc. Heard in the Court of Appeals 20 September 2007.

Roy Cooper, Attorney General, by Melissa L. Trippe and Richard L. Harrison, Special Deputy Attorney Generals, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis, for the defendant.

STEELMAN, Judge.

Where the plaintiff failed to allege that an out-of-state corporate defendant (Trevally, Inc. or "Trevally") was present in North Carolina at the time of the alleged transaction or otherwise availed itself of the laws and privileges of this State, the trial court did not err in dismissing the plaintiff's claims against defendant Trevally pursuant to N.C. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

I. Factual and Procedural Background

This is the second time this year that this case has come before this Court. A detailed discussion of the prior procedural history of this matter is contained in our opinion in the case of *State v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 646 S.E.2d 790 (2007) (*Ridgeway I*). On 10 May 2006, the Superior Court of Wake County entered an order allowing plaintiff to amend its First Amended Complaint to add Trevally, Inc. (Trevally), an Arizona corporation, as a party defendant to this lawsuit. The amended complaint added a seventh claim against Trevally seeking to recover funds transferred from Ridgeway Brands Manufacturing, LLC (Ridgeway) to Trevally at a time when Ridgeway did not have sufficient assets to pay its liability to the State of North Carolina under N.C. Gen. Stat. § 66-291.

On 27 July 2006, Ridgeway and Trevally filed motions to dismiss pursuant to N.C.G.S. § 1A-1 Rules 12(b)(2) and 12(b)(6). These motions were heard before Judge Spencer on 15 September 2006. The State submitted a limited portion of the deposition of defendant James C. Heflin (Heflin) to the court. On 23 October 2006, the court denied the motion to dismiss pursuant to Rule 12(b)(6) but granted

Trevally's motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The order contained specific findings of fact and concluded as a matter of law that:

> The factual allegations contained in Plaintiff's Second Amended Complaint and in the deposition of James C. Heflin are not sufficient to support a determination that personal jurisdiction exits [sic] on a statutory or constitutional due process basis.

From the entry of this order, plaintiff appeals.

II. Interlocutory Appeal

[1] The order appealed from does not dispose of all matters pending in the case, and is therefore interlocutory. *See N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). However, an order dismissing a party for lack of personal jurisdiction affects a substantial right and is immediately appealable. N.C.G.S. § 1-277(a)-(b) (2005).

II. Standard of Review

[2] Motions to dismiss for lack of personal jurisdiction are heard by the trial court sitting without a jury. The trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based upon affidavits. N.C.G.S. § 1A-1, Rule 43(e). Under the provisions of N.C.G.S. § 1A-1, Rule 52(a)(2), findings of fact and conclusions of law are necessary only when requested by a party. In the absence of such a request, "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). In the event that the trial court makes findings of fact, our review is limited to whether the trial court's findings of fact are supported by competent evidence in the record and whether the conclusions of law are supported by the findings of fact. *See Robbins v. Ingham*, 179 N.C. App. 764, 768, 635 S.E.2d 610, 614 (2006).

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). In the instant case, appellant does not assign as error any of the trial court's findings of fact, but only assigns error to the trial court's granting of Trevally's motion to dismiss. Our review in this case is thus limited to the issue

of whether the trial court's findings of fact support its conclusion of law that there was no personal jurisdiction over Trevally "on a statutory or constitutional due process basis."

III. Analysis

[3] Plaintiff contends that the trial court erred in holding that it had no personal jurisdiction over Trevally, reasoning that: (1) Trevally is the "alter ego" of Ridgeway, a North Carolina corporation; (2) jurisdiction exists under N.C.G.S. § 1-75.4(3) arising out of a local act or omission; and (3) jurisdiction exists under N.C.G.S. § 1-75.4(6) because the transaction involves local property which was within this State at the time that Trevally acquired possession or control over it. We disagree.

In the Second Amended Complaint, plaintiff made the following allegations pertaining to defendants Trevally and Ridgeway:

> 7. Defendant, Trevally, Inc., . . . is upon information and belief an Arizona corporation with its principal place of business at 105 West Rose Lane, Phoeniz [sic], Arizona, 85013 which address is a personal residence of James C. Heflin, who is an owner and member manager of Defendant Ridgeway Manufacturing. Upon information and belief, Defendant Trevally is owned and operated by James C. Heflin and Suzanne C. Heflin and was the receiver of fraudulent conveyances from Defendant Ridgeway Manufacturing.
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> 12. This Court has personal jurisdiction over Defendant Trevally pursuant to N.C. Gen. Stat. § 1-75.4(6)(c), as this Defendant has assets of Defendant Ridgeway Manufacturing, which were in North Carolina at the time they were conveyed to Defendant Trevally and which must be recovered to satisfy escrow obligations and penalties herein claimed to be owed to Plaintiff by Defendant Ridgeway Manufacturing. Further this Court has personal jurisdiction over Defendant Trevally because this Defendant is one and the same with or an alter ego of Defendant Ridgeway Manufacturing.
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> 79. Defendant Trevally is the alter ego of Defendant Ridgeway Manufacturing.

The only additional evidence introduced at the hearing was the partial deposition of Heflin.

A. Alter Ego Theory

We first note that Judge Spencer's order is devoid of any findings of fact pertaining to an alter ego theory. In such a situation it is presumed that the trial court found facts sufficient to support his order. *See Thompson Co.*, 72 N.C. App. at 424, 324 S.E.2d at 912.

Plaintiff first argues that the courts of North Carolina have jurisdiction over Trevally because Trevally is the alter ego of Ridgeway, a North Carolina corporation, and the courts of North Carolina have jurisdiction over Ridgeway.

In our previous opinion in this matter, we held that plaintiff's detailed allegations concerning the relationship between Heflin and Ridgeway were sufficient to state a claim for "piercing the corporate veil." *Ridgeway I*, 184 N.C. App. at 622, 646 S.E.2d at 797. However, in the instant case, plaintiff does not allege in the Second Amended Complaint or argue in its brief that Trevally is the alter ego of Heflin, but rather contends that Trevally is the alter ego of Ridgeway. Plaintiff's support for this contention is a single allegation contained in paragraph 79 of the Second Amended Complaint, which is not further argued in its brief. Plaintiff's argument fails for two reasons.

First, in any challenge to personal jurisdiction, "plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Godwin v. Walls*, 118 N.C. App. 341, 347, 455 S.E.2d 473, 479 (1995) (internal quotations and citations omitted). We hold that plaintiff's conclusory allegation in the Second Amended Complaint is insufficient to establish that Trevally is the alter ego of Ridgeway for purposes of determining whether the courts of North Carolina have jurisdiction over Trevally.

Second, plaintiff cites no authority for its proposition that if an out-of-state corporation is the alter ego of a North Carolina corporation, then the courts of North Carolina have personal jurisdiction over the out-of-state corporation. Where a party fails to cite authority in support of its argument, it is deemed abandoned. N.C. R. App. P. 28(b)(6).

This argument is without merit.

B. Local Act or Omission

Plaintiff next contends that the courts of North Carolina have personal jurisdiction over Trevally pursuant to the provisions of N.C.G.S. § 1-75.4(3).

This statute provides that the courts of this State have jurisdiction as follows:

> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

N.C.G.S. § 1-75.4(3) (2005).

Finding of fact 5 of Judge Spencer's order states:

> There are no factual allegations in the Second Amended Complaint or in the portion of the deposition of James C. Heflin introduced by Plaintiff that Trevally was in North Carolina when it received the payments describe [sic] above or that it had any contact with North Carolina other than receiving the payments described above.

As noted above, since plaintiff failed to assign error to this finding of fact, we are bound by it on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. There being no "act or omission within this State by the defendant," we affirm the ruling of the trial court.

This argument is without merit.

C. Local Property

Plaintiff next contends that the courts of North Carolina have personal jurisdiction over Trevally pursuant to the provisions of N.C.G.S. § 1-75.4(6)c.

This statute provides that the courts of this State have jurisdiction in any action arising out of:

> c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within the State at the time of the defendant acquired possession or control over it.

N.C.G.S. § 1-75.4(6)c (2005).

Finding of fact 5, *supra*, specifically states that Trevally was not in the State of North Carolina when it received the funds from Ridgeway. We must therefore affirm the trial court.

This argument is without merit.

Because of our holdings above, it is unnecessary to address plaintiff's Constitutional arguments.

AFFIRMED.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. PAUL BRANTLEY LEWIS

No. COA07-518

(Filed 15 January 2008)

Criminal Law— motion for appropriate relief—juror misconduct—motion for new trial—conversation with third party meant to influence or prejudice jury

The trial court abused its discretion in a first-degree sexual offense, armed robbery and felony breaking and entering case by denying defendant's motion for appropriate relief based on the discovery of a previously undisclosed communication between a detective and a deputy who served as a juror on the case which informed the deputy that defendant failed a polygraph test even though the deputy already knew this information, and defendant is entitled to a new trial, because; (1) the detective was not aware that the deputy knew about the failed polygraph test and intended to influence the verdict by informing him of that fact; and (2) it was not a harmless conversation between a juror and a third person not tending to influence or prejudice the jury in their verdict.

On writ of *certiorari* from judgments entered 7 November 2006 by Judge C. Philip Ginn in Avery County Superior Court. Heard in the Court of Appeals 1 November 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

N.C. Prisoner Legal Services, Inc., by Mary E. McNeill, for defendant-appellant.

JACKSON, Judge.

Paul Brantley Lewis ("defendant") petitioned this Court for a writ of *certiorari* to review the 7 November 2006 order denying his motion for appropriate relief. This Court granted defendant's petition on 14 March 2007. For the following reasons, we reverse and remand for a new trial.

On 12 September 2003, defendant was convicted of first-degree sexual offense, robbery with a dangerous weapon, and felony breaking and entering. His conviction was reviewed by this Court on 3 November 2004 and was affirmed in an unpublished opinion filed 1 March 2005. This appeal arises from facts discovered after this Court's filing in the previous appeal.

When defendant's case came on for trial, Deputy Eddie Hughes ("Deputy Hughes") of the Avery County Sheriff's Department was among those called for jury duty. Deputy Hughes knew defendant through his work at the Avery County Jail. During the period defendant was jailed awaiting trial in the matter, Deputy Hughes had transported him to Central Prison in Raleigh on two occasions. During one of those trips, defendant disclosed that he had failed a polygraph test. Deputy Hughes also had assisted Detective Roberts—the lead investigator in the case—prepare a photo line-up including at least three photos of defendant.

During *voir dire*, the potential jurors were asked if anyone knew defendant. Deputy Hughes, who had been selected as a potential juror in defendant's case, admitted that he did and that he had discussed the case with defendant. Deputy Hughes told the court that he could be impartial, in part because he was in uniform and thought it would look bad to say otherwise—part of his job as a law enforcement officer was to be impartial. However, he did not think he should be on the jury because he knew so much about the case.

Defendant's attorney did not want a law enforcement officer on the jury. However, he did not use a peremptory challenge to dismiss Deputy Hughes because defendant insisted that he remain on the jury. Defendant's attorney moved the court to allow an individual *voir dire*

of Deputy Hughes in an effort to have him removed for cause. The motion was denied, and the court never was made aware of the extent of Deputy Hughes' knowledge of the case.[1]

During a break in proceedings, Deputy Hughes went to the Sheriff's Department where Detective Roberts said to him, "[I]f we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Deputy Hughes told no one about the comment because he believed it was irrelevant—he already knew that defendant had failed a polygraph test because defendant told him on the way to Raleigh.

Defendant filed a motion for appropriate relief ("MAR") on 14 July 2006, after discovering the previously undisclosed communication between Detective Roberts and Deputy Hughes. After an evidentiary hearing on 6 November 2006, defendant's motion was denied. Defendant appeals.

By his first assignment of error, defendant argues that the trial court erred in holding that he was not prejudiced by the inappropriate communication. We agree.

When this Court reviews an MAR, the trial court's findings of fact "are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citing *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986)). This Court must determine whether the trial court's "findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). We review the trial court's conclusions of law *de novo*. *See Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276 (citing *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

Defendant contends that because the conversation between Detective Roberts and Deputy Hughes "constituted misconduct which was sufficiently gross and likely to cause prejudice to [him,]" he is entitled to a new trial. *See State v. Johnson*, 295 N.C. 227, 235, 244 S.E.2d 391, 396 (1978). He argues that "[i]t is hard to imagine how an officer of superior rank informing a co-worker on a jury that he expects him to vote guilty could be considered harmless."

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1. The denial of the motion for individual *voir dire* was not raised in the original appeal.

Courts generally seek to ensure litigants are protected against improper influences by court officers and other third parties to the litigation; however, if it does not appear that a conversation between a juror and a stranger "was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby," a verdict will not be disturbed. *Id.* at 234, 244 S.E.2d at 395 (citations omitted).

> Generally speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person *unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.*

Id. at 234, 244 S.E.2d at 396 (emphasis in original) (citations omitted). "[I]f a trial is *clearly fair and proper*, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury." *Id.* at 234, 244 S.E.2d at 395-96 (emphasis added).

Pursuant to North Carolina General Statutes, section 15A-1240, "[u]pon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." N.C. Gen. Stat. § 15A-1240(a) (2007). However, when the testimony concerns "[b]ribery, intimidation, or attempted bribery or intimidation of a juror[,]" a juror may testify to impeach the verdict of the jury on which he served. N.C. Gen. Stat. § 15A-1240(c)(2) (2007).

Rule 606(b) of the North Carolina Rules of Evidence similarly provides:

> Upon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention *or whether any outside influence was improperly brought to bear upon any juror.*

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2007) (emphasis added).

The State argues that there was no prejudice because Deputy Hughes already was aware of the "extraneous information"—that defendant had failed a polygraph test. However, the point is not what Deputy Hughes knew, but rather what Detective Roberts intended during his conversation with Deputy Hughes. Deputy Hughes testified at the MAR hearing that Detective Roberts said, "[I]f we have . . . a deputy sheriff for a juror, he would do the right thing." Although it is possible to interpret this statement as not being intended to influence the verdict, in Deputy Hughes' affidavit—attached to the MAR petition—he recounted a different version of Detective Roberts' comment as follows: "Since we have a deputy on the jury, *he should have this information so that he can do the right thing.*" He then told Deputy Hughes that defendant had failed a polygraph test. Stated in this manner, it appears clear that Detective Roberts was not aware that Deputy Hughes knew about the failed polygraph test and intended to influence the verdict by informing him of that fact.

This was not a "harmless conversation" between a juror and a third person not tending to influence or prejudice the jury in their verdict. This was a conversation between a sheriff's deputy and a lead detective that was intended to influence the verdict. This was not a "clearly fair and proper" trial, but rather one where an "outside influence was improperly brought to bear upon a juror."

Motions for a new trial based on misconduct affecting the jury ordinarily are addressed to the discretion of the trial court, and will not be disturbed unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion. *Johnson*, 295 N.C. at 234, 244 S.E.2d at 396 (citing *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968); *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965); *Keener v. Beal*, 246 N.C. 247, 98 S.E.2d 19 (1957)). Because we hold that Detective Roberts' comments to Deputy Hughes were intended to influence the verdict in defendant's case, the trial court's ruling clearly was erroneous and amounted to a manifest abuse of discretion. Therefore, this matter must be reversed and remanded for a new trial.

As our holding on his first assignment of error is dispositive, we do not reach defendant's second assignment of error.

New trial.

Judges TYSON and STROUD concur.

STATE OF NORTH CAROLINA v. TERRENCE JEROME HAYES

No. COA07-386

(Filed 15 January 2008)

Search and Seizure— investigatory stop—reasonable suspicion of crime—drug neighborhood, aimless walking and gun in car—not sufficient

Defendant's motion to suppress evidence in a prosecution for possession of heroin and possession of a firearm by a felon should have been granted where heroin and a firearm were seized in searches after an investigatory stop of defendant, and the officer could not point to articulable facts giving rise to a reasonable suspicion that a crime was taking place. The officer became suspicious because defendant and his companion were walking back and forth on the sidewalk without going anyplace in particular in an area where drug-related arrests had been made, and the officer saw a gun under the seat of the car defendant and his companion had recently left. Defendant's later resistence and flight cannot be used as retroactive justification for the stop.

Appeal by defendant from judgments entered 18 October 2006 by Judge J. B. Allen in Wake County Superior Court. Heard in the Court of Appeals 17 October 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the State.

Jeffrey Evan Noecker for defendant-appellant.

HUNTER, Judge.

Terrence Jerome Hayes ("defendant") appeals from judgments entered on 18 October 2006 pursuant to a jury verdict finding him guilty of possession of a firearm by a convicted felon and possession of heroin. After careful review, we reverse.

I.

Officer Richard Wigger of the Raleigh Police Department was on patrol in the early afternoon of 15 June 2005 in North Raleigh in an area he testified was known by him and other officers to have been the site of several previous drug-related arrests. At 1:45 p.m., Officer Wigger passed a red car with two occupants traveling

past him in the opposite direction. The two occupants were defendant, who was driving, and another man; the officer knew neither the car nor the occupants.

Officer Wigger turned his car around, traveled back down the street for ten or fifteen seconds, and found the car parked and empty, with defendant and the other passenger walking along the sidewalk nearby. Officer Wigger remained in his car watching them and testified that the pair continued to walk up and down the sidewalk about twenty or thirty yards from the car. They did not meet or interact with anyone.

When the pair walked about 150 yards down the sidewalk, Officer Wigger exited his patrol car and approached the Oldsmobile. When he reached the car, he looked through the car window and saw the handle of a pistol sticking out from under the passenger seat. He then called for back-up, got back into his car, and drove down the street toward the two men, who were still walking on the sidewalk.

Upon reaching them, the officer exited his patrol car with his weapon drawn and ordered the two men to lie down on the ground. Officer Wigger testified that defendant was not getting onto the ground and had his hands in his pockets. Another officer, Sergeant Lynch, arrived on the scene at that time. Officer Wigger then approached defendant and began forcing him to the ground using "soft hand" techniques, which he testified meant physically moving a person without punching or striking him. At that point, defendant pulled away from Officer Wigger and led Sergeant Lynch on a short chase; after fifty to seventy-five yards, Sergeant Lynch sprayed defendant with pepper spray, which ended the chase.

When defendant pulled away from Officer Wigger, defendant's jacket came off in the officer's hands. The officer searched it and found in the pocket a small bag of heroin. Upon searching the Oldsmobile, the officers found two handguns under the front passenger seat.

Defendant filed a pre-trial motion to suppress the evidence obtained during this stop—specifically, the package of heroin and two firearms that were found during the search of the car. That motion was denied. Defendant renewed this motion at trial and the motion was again denied. He was found guilty of charges of possession of a firearm by a convicted felon and sentenced to twenty-eight to thirty-four months' imprisonment, and possession of heroin and sentenced to eight to ten months' imprisonment. Defendant now appeals.

II.

Defendant first argues that his motion to suppress the evidence obtained from the stop should have been granted. We agree.

Our review of the denial of a motion to suppress evidence "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. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

Both parties agree that an investigatory stop occurred when Officer Wigger emerged from the car with his weapon drawn and ordered defendant onto the ground. As our Supreme Court has noted many times, our courts recognize "the right of a law enforcement officer to detain a person for investigation of a crime without probable cause to arrest him if the officer can point to specific and articulable facts, which with inferences from those facts create a reasonable suspicion that the person has committed a crime[]"; however, "[a]ny investigation that results must be reasonable in light of the surrounding circumstances." *State v. Lovin*, 339 N.C. 695, 703-04, 454 S.E.2d 229, 234 (1995); *see also State v. Jackson*, 302 N.C. 101, 105, 273 S.E.2d 666, 670 (1981) (" '[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and *allow a crime to occur or a criminal to escape*' ") (emphasis added; quoting *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 616-17 (1972)); *State v. Fletcher*, 348 N.C. 292, 302, 500 S.E.2d 668, 674 (1998).

Officer Wigger testified that, while sitting in his patrol car watching defendant and his companion walk back and forth on the sidewalk, he became "suspicious of their actions at that point because they were not going anywhere in particular." The only additional facts to which the State can point to bolster this suspicion as reasonable are these: Defendant and his companion were in an area where drug-related arrests had been made in the past; the men were walking back and forth on the sidewalk of a residential neighborhood on a Sunday afternoon; the officer did not believe either man lived in the neighborhood; and the officer observed in the car defendant and his companion had recently exited a gun under the seat not of defendant, but of his companion.

These facts are very similar to those in *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), where an officer stopped and

searched the defendant and another man because they were unfamiliar to him, the area was known to the officer to be a " 'high drug area,' " it was midnight, and the two men walked away from the officer upon seeing him forty feet away. *Id.* at 168, 415 S.E.2d at 784. This Court held that "a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area" was not a reasonable suspicion that could support the seizure of a defendant. *Id.* at 171, 415 S.E.2d at 785.

In the case at hand, as in *Fleming*, it is clear that the officer could not point to articulable facts giving rise to a reasonable suspicion that a crime was taking place. Indeed, Officer Wigger testified that, even after the entire altercation took place—defendant attempting to flee and being caught—he was still only planning to arrest defendant for resisting arrest. While it turned out that defendant was a felon and thus not allowed to possess a firearm, the officer testified that he did not know either man and thus had no reason to believe that the possession of a gun in the car was a crime.

Later actions—defendant's flight in particular—would likely have independently been enough to create that reasonable suspicion were the initial confrontation legitimate. However, "[d]ecisions of this Court [have] recognize[d] the right to resist illegal conduct of an officer." *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970); *see also State v. Mobley*, 240 N.C. 476, 478, 83 S.E.2d 100, 102 (1954) ("[i]t is axiomatic that every person has the right to resist an unlawful arrest"); *State v. McGowan*, 243 N.C. 431, 434, 90 S.E.2d 703, 705 (1956) (holding that defendant had a "legal right to resist" arrest when officers were without authority to arrest him). As such, defendant's resistance and flight cannot be used as retroactive justification for the stop.

Because the officer could supply no facts to support a reasonable suspicion that crime was afoot, we reverse the trial court's motion to suppress all evidence obtained from the stop and subsequent searches, including the heroin and firearms.

Defendant also argues that the trial court committed plain error in failing to sever the possession of a firearm by a felon charge from the possession of heroin charge and allowing the prosecutor to disclose to the jury the nature of defendant's felony conviction. Because we reverse on the above argument and remand for new trial, we do not address this argument.

III.

Because defendant's motion to suppress the evidence from the stop should have been granted, we reverse the trial court's ruling on the motion.

Reversed.

Judges McGEE and BRYANT concur.

IN RE: A.V.

No. COA07-360

(Filed 15 January 2008)

1. Constitutional Law— effective assistance of counsel—failure to renew motion to dismiss

A juvenile did not receive ineffective assistance of counsel at a delinquency proceeding, regarding a charge of assault on a State employee, based on his counsel's failure to renew a motion to dismiss at the close of all evidence, because: (1) there was no dispute that the juvenile was the perpetrator or that the victim was a State employee; (2) viewing the evidence in the light most favorable to the State, the State presented substantial evidence to support the charge; and (3) the juvenile cannot show the trial court would have granted the motion even if his trial counsel's performance was deficient.

2. Appeal and Error— appealability—defective notice of appeal

Although a juvenile contends the trial court erred in a juvenile delinquency case by failing to consider the risk and needs assessment or other predisposition reports during the disposition hearing, and/or by entering the disposition order without attaching the predisposition report as required by the disposition form, this assignment of error is dismissed, because: (1) the juvenile designated error only in the adjudication order and not the disposition order in his notice of appeal; (2) N.C. R. App. P. 3(d) requires the notice of appeal to designate the judgment or order from which appeal is taken; and (3) the juvenile's violation of

N.C. R. App. P. 3(d) is a jurisdictional defect that cannot be waived, and thus, the Court of Appeals did not acquire jurisdiction to review the trial court's 19 February 2007 disposition order.

Appeal by juvenile from order entered 19 February 2007 by Judge James Bell in Robeson County District Court. Heard in the Court of Appeals 17 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Tracy J. Hayes, for the State.

Peter Wood, for juvenile-appellant.

CALABRIA, Judge.

A.V. ("the juvenile") appeals from an adjudication order of the trial court adjudicating him delinquent on the charge of assault on a State employee. We affirm.

On 13 September 2006, Trina Bullard ("Ms. Bullard"), a physical education teacher at Pembroke Middle School, observed a commotion among a group of students. Specifically, the juvenile was instigating a fight with another student. Since Ms. Bullard was assigned to monitoring duty, she approached the crowd of students to prevent the fight and saw the juvenile reach out to hit a younger boy. Ms. Bullard reached the students in time and prevented the juvenile from hitting the other student by grabbing the juvenile. He struggled to break free of her hold and attempted to pursue the other student. Although Ms. Bullard told the juvenile to stop struggling, the juvenile continued to struggle and both of them fell to the ground.

The juvenile dragged Ms. Bullard about four feet. As a result of the altercation, Ms. Bullard was struck on her jaw, suffered bruises on her arms and legs, and sustained a scratch on her ankle. The juvenile continually tried to break free of Ms. Bullard's hold. Two other teachers helped to hold the juvenile until the school resource officer arrived to restrain him in handcuffs.

The juvenile was charged with a Class A1 misdemeanor of assault on a State employee pursuant to N.C. Gen. Stat. § 14-33(c)(4) (2006). At the close of the evidence, the trial court adjudicated the juvenile as delinquent for assault on a State employee. Since the juvenile had been placed on twelve months probation for a prior offense, the trial court, *inter alia*, extended his probation for an additional six months. Juvenile appeals.

I. Ineffective Assistance of Counsel

[1] Juvenile first contends he received ineffective assistance of counsel. We disagree. A juvenile has a right to counsel at a delinquency proceeding. *See In re Garcia*, 9 N.C. App. 691, 692, 177 S.E.2d 461, 462 (1970). "When defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Pursuant to *Braswell*, the juvenile must establish both (1) that his attorney's performance was deficient, and (2) that he suffered prejudice from his counsel's deficient performance. *Id.* "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted).

In the instant case, at the close of the State's evidence, juvenile's trial counsel made a motion to dismiss the action. However, juvenile's trial counsel failed to renew the motion to dismiss at the close of all the evidence, and according to the juvenile, his counsel's failure to act equates to ineffective assistance of counsel. If juvenile's counsel had renewed the motion, the trial court would have had the opportunity to dismiss the action. Therefore, the juvenile claims he was prejudiced.

"[T]o withstand a motion to dismiss the charges . . . 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) (citation omitted). "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. 720, 724, 407 S.E.2d 873, 875 (1991) (citation omitted). For the charge of assault on a State employee, the State must present evidence of all the common elements of assault and that the victim was "an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]" N.C. Gen. Stat. § 14-33(c)(4) (2007).

At trial, there was no dispute that the juvenile was the perpetrator or that Ms. Bullard was a State employee. The State presented testimony from Ms. Bullard, the victim, that she ordered the juvenile to

stop, but when he continued to resist and struggle, she grabbed him. Ms. Bullard testified:

> Q: Okay. What happened after you grabbed him?
>
> A: The other boy walked away and it took me with everything I had just to keep him from getting away from me. Eventually we fell down on the ground. He drug me probably about four feet before help got there. The other teachers came and I was sitting on top of him and they held me—helped me hold him down.
>
> Q: Did you say anything to him?
>
> A: Told him to stop.

Furthermore, on cross-examination, Ms. Bullard stated, "[The juvenile] was moving forward and I kept telling him to stop. I said, you know, stop. He was trying to break me, swinging his arms, and that's how I got hit in the jaw because he was throwing his arms and stuff trying to get away from me." The State also presented evidence from the school resource officer, Amy Dial, that the juvenile continued to struggle and "pull away a little bit" after she restrained the juvenile with handcuffs and led him to the school office.

Thus, in reviewing the evidence "in the light most favorable to the State," we conclude the State presented substantial evidence to support the juvenile's charge of assault on a State employee to withstand a motion to dismiss the charge. Moreover, even if the juvenile's trial counsel's performance was deficient by failing to renew the motion to dismiss at the close of all the evidence, the juvenile cannot show that the trial court would have granted the motion. Therefore, the juvenile cannot show that he suffered prejudice from his counsel's deficient performance. This assignment of error is overruled.

II. Disposition Order

[2] Juvenile next asserts prejudicial errors in the juvenile's disposition order. First, the juvenile argues the trial court erred by not considering the risk and needs assessment or other predispositional reports during the disposition hearing. Second, he contends the trial court erred by entering the disposition order without attaching the predisposition report as required by the disposition form. At the disposition hearing on 6 February 2007, the juvenile did not object when the trial court failed to consider the risk and needs assessment. "As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*,

314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citations omitted). However, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *Id.* Juvenile argues that although he did not object to this error at trial, his right to appeal this alleged error has been properly preserved for appellate review since he alleges the error is a statutory violation. We would agree to review juvenile's alleged error, since it is a statutory violation, if he had included the alleged disposition order error in his notice of appeal. However, when the juvenile filed his notice of appeal to this Court, the juvenile designated error only in the adjudication order and not in the disposition order.

Rule 3(d) of the North Carolina Rules of Appellate Procedure states: "[t]he notice of appeal required to be filed and served by subdivision (a) of this rule . . . shall designate the *judgment or order* from which appeal is taken . . . ." N.C.R. App. P. 3(d) (2007) (emphasis supplied). In the instant case, the juvenile's notice of appeal states: "Monica [V.], mother of . . . juvenile, hereby gives notice of appeal on behalf of said juvenile in that the court found him delinquent on the charge of assault on a Government Official, February 6, 2007." In his notice of appeal, the juvenile states the court's finding of delinquency in the adjudication order, but fails to also include that he is appealing an error in the trial court's disposition order.

The juvenile's violation of the North Carolina Rules of Appellate Procedure is a jurisdictional defect and cannot be waived. *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991). Therefore, this Court has not acquired jurisdiction to review the trial court's 19 February 2007 disposition order based on the juvenile's failure to file notice of appeal from that order. Juvenile's remaining assignments of error are dismissed.

Affirmed.

Judges STEPHENS and ARROWOOD concur.

WAYNE G. SPRAKE AND WIFE, JANICE R. SPRAKE, PLAINTIFFS v. GEORGE LECHE, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA06-1690

(Filed 15 January 2008)

1. Arbitration and Mediation— award exceeding authority— remanded

The trial court did not err by vacating an arbitration award based on its decision that the arbitration panel exceeded its authority, as allowed by N.C.G.S. § 1-567.13(a)(3) (2001), and then remanding to the arbitration panel as permitted by N.C.G.S. § 1-567.13(c) (2001).

2. Arbitration and Mediation— prejudgment interest—ambiguity—interpretation against insurance company

The trial court did not err by confirming an arbitration award which contained prejudgment interest where the arbitration provision was within an automobile insurance policy, the policy language was ambiguous as to whether prejudgment interest was available, and that ambiguity was resolved against the insurance company.

Appeal by defendant insurance company from order and judgment entered 3 October 2006 by Judge Russell G. Walker, Jr., in Orange County Superior Court. Heard in the Court of Appeals 30 August 2007.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiffs.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendant.

ELMORE, Judge.

On 22 September 2001, Janice G. Sprake (plaintiff) was riding as a passenger on a motorcycle when George Leche (defendant-tortfeasor), an uninsured motorist, struck her with his vehicle. On 6 June 2003, plaintiff filed suit against the uninsured motorist carrier, North Carolina Farm Bureau Mutual Insurance Company (defendant). In her complaint, plaintiff requested that the matter be arbitrated as provided for by defendant's insurance policy. The trial court therefore stayed her action and referred the matter to arbitration.

Prior to the arbitration, plaintiff requested prejudgment interest; defendant objected, stating that the arbitration panel lacked the authority to grant such relief. The arbitration panel deferred its decision on plaintiff's request until after it determined the amount of compensatory damages to which plaintiff was entitled.

The arbitration panel held its hearing on 9 February 2006, and issued the first of two awards on 13 February 2006. In it, the arbitration panel awarded plaintiff $85,000.00. Plaintiff then renewed her request for prejudgment interest. On 16 March 2006, after receiving briefs from the parties, the arbitration panel issued a final award in which it found that it did have the authority to award prejudgment interest and that such an award was appropriate in this case. One member of the three member panel dissented on the grounds that he did not believe the panel had the authority to grant such relief.

Plaintiff filed a motion to confirm the award with the trial court, and defendant filed a motion to vacate, as well as a supplemental motion to vacate. Following a 24 April 2006 hearing, the trial court denied plaintiff's motion, granted defendant's motion, and remanded the case to the arbitration panel for further findings on 12 July 2006. In response, the arbitration panel entered an amended award, again awarding plaintiff prejudgment interest with a divided panel. Plaintiff again filed a motion to confirm and defendant filed a motion to vacate. On 3 October 2006, the trial court confirmed the order. Defendant appealed both the original order remanding the case to the arbitration panel and the subsequent order confirming the panel's amended award.

[1] In its first argument on appeal, defendant contends that the trial court's 12 July 2006 remand of the matter to the arbitration panel was in violation of then-current statute. We disagree.

As defendant argues, and plaintiff agrees, because the incident at issue took place in 2001, the previous version of the Uniform Arbitration Act applies to this case. *See* N.C. Gen. Stat. § 1-569.3 (2005) (stating that the Revised Uniform Arbitration Act applies to agreements to arbitrate entered into after 1 January 2004 or if all of the parties agree that it applies). Under the Uniform Arbitration Act as it was in 2001 (UAA), "Upon application of a party, the court shall vacate an award where: . . . (3) The arbitrators exceeded their powers . . . ." N.C. Gen. Stat. § 1-567.13(a) (2001). In such a case, the statute goes on to state that "if the award is vacated on grounds set forth in subdivisions (3) or (4) of subsection (a) the court may order

a rehearing before the arbitrators who made the award . . . ." N.C. Gen. Stat. § 1-567.13(c) (2001).

It is not clear exactly what defendant's argument is. Defendant appears to concede that the trial court vacated the award for the reasons set out in N.C. Gen. Stat. § 1-567.13(a)(3), stating in its brief, "The trial court held that the panel exceeded its powers and remanded the matter to the arbitration panel for a rehearing." Indeed, that is also how this Court understands the trial court's order, which reads, in pertinent part: "the arbitrators have not claimed or demonstrated any particular authority or power to [issue the award as written], thus they have exceeded any powers and authority they may have had to do so . . . ."

However, despite its statement that "If the award was vacated and remanded due to the panel exceeding their authority, then the trial court was correct in ordering a new hearing before the same panel," defendant goes on to claim that "it was error for the trial court to remand the matter back to the same panel without specifically setting forth the reasons the panel exceeded its authority." Defendant's vague contention is entirely unsupported by the cases to which it cites; indeed, we can find no support for it anywhere in the law. The trial court vacated the award, as allowed by N.C. Gen. Stat. § 1-567.13(a)(3), based on its decision that the arbitration panel exceeded its authority. It then remanded to the arbitration panel as permitted by N.C. Gen. Stat. § 1-567.13(c). Defendant's argument has no merit.

[2] Defendant next claims that the trial court erred in confirming the amended award, which granted plaintiff prejudgment interest. Defendant contends that neither the arbitration agreement nor North Carolina law permit an arbitration panel to award prejudgment interest in this case. We disagree.

To begin with, we note that prejudgment interest can be appropriate in the uninsured motorist context. *See, e.g.*, *Lovin v. Byrd*, 178 N.C. App. 381, 384-85, 631 S.E.2d 58, 61 (2006) (upholding an award of prejudgment interest in a case in which "both the arbitration agreement as understood between the parties and the arbitration award as drafted" allowed such relief). Accordingly, the only question properly before this Court is whether the arbitration agreement allowed the arbitration panel to consider and award prejudgment interest. We hold that the agreement did allow such an award, and that the arbitration panel properly exercised its authority in granting it.

"[P]rejudgment interest issues will be decided by our courts based upon the court's interpretation of the specific insurance policy under review in each particular case." *Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, 145 N.C. App. 278, 289, 550 S.E.2d 271, 277 (2001) (citation omitted). In this case, the arbitration agreement in question is embodied in the insurance contract that defendant issued. "Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal." *Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004) (citations omitted). In *Register*, our Supreme Court went on to state:

> The primary goal in interpreting an insurance policy is to discern the intent of the parties at the time the policy was issued. If the terms of the policy are plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.

Id. at 695, 599 S.E.2d at 553 (quotations and citations omitted).

Defendant argues that the language of the agreement did not include any specific provision allowing prejudgment interest. The contract permits an insured party to demand arbitration when the parties "do not agree: 1. Whether that insured is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle or underinsured motor vehicle; or 2. As to the amount of such damages . . . ." It is true that there is no explicit mention of prejudgment interest in this section. However, as our Supreme Court has stated,

> [a]n ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions. In interpreting the language of an insurance policy, courts must examine the policy from the point of view of a reasonable insured.

Id.

This Court has applied the rule that "prejudgment interest up to the amount of the carrier's liability limit is part of compensatory damages for which the UIM carrier is liable." *Austin v. Midgett*, 159 N.C. App. 416, 419, 583 S.E.2d 405, 408 (2003) (citing *Baxley v.*

Nationwide Mutual Ins. Co., 334 N.C. 1, 11, 430 S.E.2d 895, 901 (1993)). This Court has also noted that "unless the policy of insurance provides to the contrary, prejudgment interest constitutes a portion of a plaintiff's damage award." *Ledford v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 44, 50, 453 S.E.2d 866, 869 (1995). Given the law as it stands in this State, we hold that the provision granting the arbitration panel authority to address issues of "compensatory damages" was ambiguous as to whether prejudgment interest was available. As such, we resolve our doubt "against the insurance company and in favor of the policyholder." *Register*, 358 N.C. at 695, 599 S.E.2d at 553. The arbitration panel had the authority to address the issue and the trial court properly confirmed the amended award. Defendant's assignment of error regarding the trial court's denial of its motion to vacate the arbitration award is likewise without merit. We therefore affirm the order of the trial court.

Affirmed.

Judges STEELMAN and STROUD concur.

CATAWBA VALLEY BANK, PLAINTIFF v. GLENN D. PORTER AND SHEILA A. PORTER, D/B/A CAROLINA CARS AND BOATS, DEFENDANTS

No. COA07-737

(Filed 15 January 2008)

Civil Procedure; Unfair Trade Practices— attorney fees—Rule 60 motion improper for relief from errors of law or erroneous judgments

The trial court erred in a case arising out of breach of loan agreements by awarding $7,500 in attorney fees under N.C.G.S. § 75-16.1 to defendants in an amended order entered in response to defendant's N.C.G.S. § 1A-1, Rule 60 motion raising the issue of whether the trial court applied the correct legal standard in its ruling on defendants' motion for attorney fees, because: (1) the trial court improperly addressed an error of law raised by defendants' Rule 60 motion, and it is well-settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments; and (2) the proper remedy for errors of law committed by the court is

either appeal or a timely motion for relief under N.C.G.S. § 1A-1, Rule 59(a)(8).

Appeal by Plaintiff from judgment entered 9 April 2007 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 13 December 2007.

Young, Morphis, Bach & Taylor, L.L.P., by T. Dean Amos and Jimmy R. Summerlin, Jr., for Plaintiff-Appellant.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton and Nancy L. Huegerich, for Defendant-Appellees.

ARROWOOD, Judge.

Catawba Valley Bank (Plaintiff) appeals from an order awarding attorneys' fees to Glenn and Sheila Porter (Defendants). We vacate the court's order.

Plaintiff filed suit against Defendants on 6 July 2005. Plaintiff's complaint alleged that the parties had executed five Promissory Notes and Security Agreements, obligating Defendants to repay Plaintiff more than $200,000.00; that the loans were secured by certain motor vehicles; and that Defendants were in default on these loans. Plaintiff sought judgment in the amount owed on the notes plus interest and attorney's fees, and recovery of the collateral securing the notes. Defendants filed an answer on 6 September 2005, denying the material allegations of the complaint and asserting counterclaims for breach of contract, wrongful repossession, and unfair and deceptive trade practices. In its Reply to Defendants' counterclaims, Plaintiff admitted that they had mistakenly repossessed one item and denied the other allegations of Defendants' counterclaims.

The case was tried before a Catawba County jury in November 2006. On 17 November 2006, the jury returned a verdict finding that Defendants had breached the five loan agreements, and awarding Plaintiff the monies owed on the notes. The jury also found that Plaintiff's wrongful repossession of Defendants' trailer was an act in or affecting commerce that caused injury to Defendants, and awarded Defendants the sum of $6,000.00. Defendants moved for costs and attorneys fees, pursuant to N.C. Gen. Stat. § 75-16.1 (2005).

On 11 December 2006 the trial court entered judgment awarding Plaintiff money owed under the loan agreements, and granting

Defendants' request for trebled damages. In a separate order, the trial court denied the motions of Plaintiff and Defendants for attorney's fees. Also on 11 December 2006 Defendants filed a motion asking the trial court to "reconsider and amend judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure." On 9 April 2007 the court entered an amended order awarding Defendants' counsel $7,500.00 in attorney's fees. From this order Plaintiff has appealed.

Plaintiff argues first that the trial court erred by entering its order for attorney's fees, on the grounds that the court improperly addressed the error of law raised by Defendants' Rule 60 motion. We agree.

In its order denying Defendants' motion for attorney's fees, the trial court stated in pertinent part that:

1. The factual evidence in this case is that the Defendants prevailed on one of its claims for unfair and deceptive trade practices[.] . . .

2. There were some requests by the court for counsel and their clients to attempt to resolve the matter, however, the matter was not resolved.

3. There is nothing in the file and no evidence was presented by Defendants[] to show that there was an unwarranted refusal to fully resolve the matter . . . and no affidavits or other evidence have been introduced on that issue.

Following the entry of this order, Defendants moved the court to reconsider and amend its order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (2005). Defendants asserted in pertinent part that:

3. At the hearing on attorney's fees requested by Defendants' counsel of record, the Court's questions seemed to indicate that there was no evidence offered of an attempt to "settle the matter" after the institution of the action.

4. [B]ased upon a review of the law, Defendants' counsel urges the Court to reconsider this matter, as it is not necessary to find a failed attempt to settle the matter after institution of the action in order to qualify under N.C. Gen. Stat. § 75-16.1 as an "unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit."

> Wherefore, Defendants' attorney of record prays the court that the prior Order Denying Attorney's Fees be amended pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to grant attorney's fees to Defendants' counsel of record pursuant to N.C. Gen. Stat. § 75-16.1

In its amended order granting Defendants' counsel attorney's fees, the trial court's findings included the following:

1. That the Court applied the wrong legal standard upon Defendants' initial Motion for Attorneys' Fees and Costs and erroneously held that a failed attempt to settle the action after its institution was a necessary finding in awarding a prevailing party attorney's fees and costs . . . pursuant to N.C. Gen. Stat. § 75-16.1[.] . . . Defendants' Motion to Reconsider and Amend Judgment should be Granted and the appropriate standard applied;

2. That the actions of Plaintiff in violating N.C. Gen. Stat. § 75-1.1 *et seq.* were willful;

3. That Plaintiff refused to resolve the matter fully;

4. That the sum of $7,500.00 is a reasonable attorney's fees for Defendants' counsel[.]

We conclude that Defendants' motion raised an issue of law—whether the trial court applied the correct legal standard in its initial ruling on Defendants' motion for attorney's fees. The court's amended order clearly states that it is entered in response to Defendants' Rule 60 motion, and that the purpose of the order is to correct an error of law.

"[I]t is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments. 'The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8).' In the present case, defendants based their Rule 60(b)(6) motion for relief on alleged errors of law. Rule 60(b)(6) may not be used as an alternative to appellate review, however." *Baxley v. Jackson*, 179 N.C. App. 635, 638, 634 S.E.2d 905, 907 (quoting *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994)), *dis. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006) (internal quotation marks omitted).

Moreover, "[t]o be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect in all courts[.]" *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973). Consequently, a party who fails to appeal from an erroneous judgment may be bound by its ruling:

> Because the trial judge did make a determination that [Defendants were] not entitled to [attorney's fees] as a matter of law . . . [Defendants] may be bound by this determination despite the fact that it was erroneous. The normal method for obtaining relief from judgments flawed by error of law is through appeal to our appellate courts. [Defendants] had the opportunity to have the trial judge's erroneous determination corrected in this manner. It failed to do so. Therefore, [they] may properly be bound by the earlier judge's determination that [they were] not entitled to [attorney's fees.]

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 432, 349 S.E.2d 552, 558 (1986). We conclude that Defendants improperly sought relief from an error of law by means of a Rule 60 motion. Our resolution of this issue renders it unnecessary to reach Plaintiff's other appellate issue.

Defendants argue that the trial court had the authority to correct its own legal errors. In the instant case, however, the trial court's amended order was entered, not pursuant to its inherent authority nor under N.C. Gen. Stat. § 1A-1, Rule 59 (2005), but in an order granting Defendants' motion under Rule 60. As discussed above, Rule 60 is an improper mechanism for obtaining review of alleged legal error.

For the reasons discussed above, the trial court's order awarding attorney's fees to Plaintiff's counsel is

Vacated.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. JASON CHRISTOPHER WALKER & EMIL E. BROWNING, JR. & JAVIER A. HERNANDEZ, JR.

No. COA03-1426-2

(Filed 15 January 2008)

Sentencing— aggravating factor—*Blakely* error—harmless beyond reasonable doubt standard

The trial court erred in a robbery with a dangerous weapon case by sentencing defendant in the aggravated range without submitting the aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy under N.C.G.S. § 15A-1340.16(d)(2) to the jury as required by *Blakely v. Washington*, 542 U.S. 296 (2004), and defendant is entitled to a new sentencing proceeding when the error was not harmless beyond a reasonable doubt, because: (1) although the evidence that defendant joined with more than one other person in committing the robbery was overwhelming, it was not uncontroverted; (2) defendant's testimony constituted conflicting evidence sufficient to prevent the Court of Appeals from finding that a rational fact finder would have found this factor beyond a reasonable doubt; and (3) although the jury convicted defendant of robbery with a dangerous weapon, it was impossible to know upon which evidence the jury based its verdict.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina vacating in part and remanding in part the decision of the Court of Appeals in *State v. Walker*, 167 N.C. App. 110, 605 S.E.2d 647 (2004), for reconsideration in light of the decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007). *See State v. Walker*, 361 N.C. 160, 2006 N.C. Lexis 1428 (2006). Appeal by defendant from judgment entered 15 November 2002 by Judge Thomas D. Haigwood in Beaufort County Superior Court. Originally heard in the Court of Appeals 9 June 2004.

Roy Cooper, Attorney General, by Philip A. Lehman, Assistant Attorney General, for the State. (Jason Christopher Walker)

Roy Cooper, Attorney General, by Kristine L. Lanning, Assistant Attorney General, for the State. (Emil E. Browning, Jr.)

Roy Cooper, Attorney General, by Barbara A. Shaw, Assistant Attorney General, for the State. (Javier A. Hernandez, Jr.)

Staples Hughes, Appellate Defender, by Kelly D. Miller, Assistant Appellate Defender, for defendant-appellant Walker.

Brian Michael Aus for defendant-appellant Browning.

Geoffrey W. Hosford for defendant-appellant Hernandez.

STEELMAN, Judge.

The trial court erroneously sentenced defendant Browning in the aggravated range without submitting the aggravating factor to the jury as required by *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Under *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), this error cannot be deemed harmless because we cannot determine from the record that a rational juror would have found the disputed aggravating factor "beyond a reasonable doubt."

This appeal originated from charges of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury against three co-defendants. The cases were joined for trial pursuant to N.C. Gen. Stat. § 15A-926. The underlying facts are found in our previous decision in *State v. Walker*, 167 N.C. App. 110, 605 S.E.2d 647 (2004). Following the Supreme Court's decision in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006), this Court allowed defendant Browning's motion for appropriate relief, vacated the aggravated sentence imposed by the trial court, and remanded the case for resentencing. This opinion was vacated by our Supreme Court and remanded to this Court for reconsideration in light of *Blackwell*, 361 N.C. 41, 638 S.E.2d 452. The instant appeal deals only with the sentencing of defendant Browning.

In sentencing defendant Browning, Judge Haigwood found as a statutory aggravating factor that Browning "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2) (2001). The trial court further found that this aggravating factor outweighed the mitigating factor found and imposed a sentence from the aggravated range of 80-105 months imprisonment for the charge of robbery with a dangerous weapon. The aggravating factor was not submitted to a jury as required by *Blakely*.

Under the rationale of the Supreme Court's decision in *Blackwell*, we must determine:

> whether the trial court's failure to submit the challenged aggravating factor to the jury in the present case was harmless beyond a reasonable doubt. 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.

Blackwell, 361 N.C. at 49-50, 638 S.E.2d at 458 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)).

In his first argument, defendant Browning contends that the failure of the trial court to submit the aggravating factor to the jury was not harmless beyond a reasonable doubt. We agree.

Browning, Walker, and Aguillon together went to Desperado's in the early morning hours of 7 April 2002. Each man wore a mask and carried a weapon; Browning carried a hammer handle, Aguillon a miniature baseball bat, and Walker a pool stick. The owner was severely beaten during the robbery. Following the assault and robbery, Aguillon, Browning, Hernandez, and Walker each received a portion of the money stolen from Desperado's.

Defendant Browning gave a statement to Investigator Wayne Melton, stating that he had discussed the robbery of Desperado's with Aguillon about a week before the robbery. A third person (Walker) was recruited to assist in the robbery.

At trial, defendant Browning testified that his prior statement contained inaccuracies. He testified to talking with Walker and Aguillon about going to Desperado's to confront a man named Pablo regarding threats made against him. Aguillon handled arrangements with Hernandez and other bouncers. Browning testified that he and Walker did not plan a robbery, and to his knowledge, neither he nor Walker knew about the stolen money until after the robbery had taken place.

The jury was instructed to find defendant Browning guilty of robbery with a dangerous weapon only if it found "from the evidence and beyond a reasonable doubt that[,] on or about the alleged date[,] the defendant acting by himself or acting together with Jason Christopher Walker *and/or* Justo Aguillon" committed each element

of the crime. These instructions did not require the jury to determine whether defendant Browning acted with more than one person in committing the robbery.

We hold that the evidence that defendant Browning joined with more than one other person in committing the robbery was overwhelming but not uncontroverted. Defendant Browning's testimony constitutes conflicting evidence sufficient to prevent this Court from finding that a rational fact finder would have found beyond a reasonable doubt that defendant Browning joined with more than one other person in committing the offense. *See Blackwell*, 361 N.C. at 50, 638 S.E.2d at 458. Although the jury convicted defendant Browning of robbery with a dangerous weapon, it is impossible to know upon which evidence the jury based its verdict. *State v. Battle*, 182 N.C. App. 169, 170-71, 641 S.E.2d 352, 354 (2007). There is no dispute that defendant Browning was not charged with conspiracy. Defendant is entitled to a new sentencing hearing.

Because of our holding above, it is unnecessary to address defendant Browning's second argument.

REVERSED and REMANDED FOR A NEW SENTENCING HEARING.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. NATHAN AARON CROSS
A/K/A MICHAEL THOMAS FERGUSON

No. COA07-868

(Filed 15 January 2008)

Appeal and Error— appealability—mootness—revocation of probation—discharge from custody

Defendant's appeal from judgments revoking probation is dismissed as moot, because: (1) the Court of Appeals took judicial notice of the fact that the North Carolina Department of Correction records indicated that defendant's sentence expired and he was released from custody on 20 June 2007; and (2) the subject matter of this appeal has ceased to exist and the issue is moot by reason of the discharge of defendant from custody.

STATE v. CROSS

[188 N.C. App. 334 (2008)]

Appeal by Defendant from judgment entered 12 March 2007 by Judge Laura J. Bridges in County McDowell Superior Court. Heard in the Court of Appeals 13 December 2007.

Attorney General Roy Cooper, by Assistant Attorney General Terence D. Friedman, for the State.

Peter Wood for Defendant.

ARROWOOD, Judge.

Nathan Cross (defendant) appeals from judgments revoking probation. We dismiss his appeal as moot.

In 2003 Defendant was convicted of two charges of larceny of a motor vehicle, and one charge of felonious breaking and entering. He received suspended sentences of five to six months imprisonment in each case, and was placed on supervised probation. Probation violation reports were filed in June 2004. On 12 March 2007 the court revoked Defendant's probation and activated the five to six month sentences previously entered in each case. Defendant was given credit in each case for seventy-one (71) days already served.

The original judgments provided for consecutive sentences, but upon revocation the sentences were served concurrently. Although not made a part of the Record on Appeal, we take judicial notice of the fact that the North Carolina Department of Correction records indicate that Defendant's sentence expired and he was released from custody on 20 June 2007.

" '[A]s a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist.' By reason of the discharge of the [Defendant] from custody, the subject matter of this [appeal] has ceased to exist and the issue is moot." *In re Swindell*, 326 N.C. 473, 474-75, 390 S.E.2d 134, 135 (1990) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1967) (other citation omitted). *See also*, *e.g.*, *Wilson v. Wilson*, 134 N.C. App. 642, 518 S.E.2d 255 (1999) (appeal from expired domestic violence protective order dismissed as moot); *In re Cowles*, 108 N.C. App. 74, 422 S.E.2d 443 (1992) (juvenile's appeal from training school commitment dismissed as moot where juvenile reached age of 18 years during pendency of appeal).

"In general, 'an appeal presenting a question which has become moot will be dismissed.' " *State v. Bowes*, 159 N.C. App. 18, 21, 583

S.E.2d 294, 297 (2003), *opinion vacated and dismissed as moot*, 360 N.C. 55, 619 S.E.2d 502 (2005) (quoting *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978)).

We conclude that the subject of this appeal is moot and that Defendant's appeal must be

Dismissed.

Judges TYSON and JACKSON concur.

PENNY M. RUMPLE RICHARDSON, EMPLOYEE, PLAINTIFF-APPELLEE v. MAXIM HEALTHCARE/ALLEGIS GROUP, EMPLOYER, AND KEMPER INSURANCE COMPANY/AMERICAN PROTECTION INSURANCE C/O SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS-APPELLANTS

No. COA06-875

(Filed 5 February 2008)

1. Appeal and Error— preservation of issues—failure to include record or transcript references

Defendants' third assignment of error in the record on appeal in a workers' compensation case is dismissed based on a failure to include clear and specific record or transcript references in violation of N.C. R. App. P. 10(c), because: (1) defendants made only a blanket reference to transcript volumes I and II without making reference to a particular error, and there are 3,285 transcript pages in the transcripts; and (2) defendants failed to specify which documents should have been included in the transcripts, and failed to provide specific record or transcript references.

2. Workers' Compensation— notice of accident—timeliness—findings of fact—reasonable excuse for failing to provide written notice—prejudice based on delay in written notification

The Industrial Commission erred in a workers' compensation case by failing to address whether plaintiff employee timely reported her claim under N.C.G.S. § 97-22 and whether her case should be barred for her failure to do so because: (1) although the evidence demonstrated, and the full Commission found, that defendant had actual knowledge of plaintiff's accident, the Commission failed to make the crucial finding that plaintiff provided a reasonable excuse for her failure to timely provide written notice of her accident; and (2) N.C.G.S. § 97-22 also requires that the Commission be satisfied that the employer has not been prejudiced by the delay in written notification, and the mere existence of actual notice without more cannot satisfy the statutorily required finding with respect to prejudice. The case is remanded for specific findings with respect to whether plaintiff satisfied her burden of showing a reasonable excuse for not providing defendant employer with written notice of her accident within thirty days of its occurrence, and for adequate findings of fact with respect to the issue of prejudice to defendant employer.

3. Workers' Compensation— causation of injuries—competent evidence—headaches—hand and wrist—knee—breast implants

Although the Industrial Commission did not err in a workers' compensation case by finding there was competent evidence that causally related plaintiff's various injuries to her motor vehicle accident of 16 May 2001 including for headaches, her right hand and wrist, and her knee, it erred when it concluded plaintiff sustained compensable injuries to her bilateral breast implants. The case is remanded for a determination of the appropriate amount of compensation for the replacement of plaintiff's right breast implant, because although breast implants satisfy the statutory requirement under N.C.G.S. § 97-2(6) as compensable prosthetic devices that functions as part of the body, plaintiff's breast implant surgeon testified unequivocally that the rippling in the left breast implant most likely was due to the original implant's being underfilled and that the rippling was not caused or aggravated by the accident.

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

Although defendants contend the full Commission erred in a workers' compensation case by its finding of fact number 24, this assignment of error is dismissed, because defendants failed to make an argument in their brief relating to this assignment of error or the full Commission's findings with respect to plaintiff's teeth as required by N.C. R. App. P. 28(b)(6).

5. Workers' Compensation— disability—burden of proof

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff carried her burden of proving disability because: (1) plaintiff showed that defendant did not provide light-duty work to her other than for two days in June 2002, a doctor testified that plaintiff would have difficulty performing her regular job until at least February 2003 following her knee surgery in June 2002, and plaintiff showed she was placed on one-handed work restrictions by a doctor that was scheduled to continue until at least January 2004; (2) although plaintiff returned to work on a few occasions during the pertinent time period, such intermittent and infrequent work days did not constitute a successful trial return to work; and (3) defendants failed to carry their burden of proving that plaintiff was capable

of obtaining suitable employment and failed to rebut the ongoing presumption of disability.

6. Workers' Compensation— lien—third-party settlement

The Industrial Commission erred in a workers' compensation case by failing to award defendants a lien on all amounts accepted by plaintiff in her third-party settlement with her uninsured motorists carrier, and the case is remanded for findings consistent with this Court of Appeals opinion, because: (1) N.C.G.S. § 97-10.2(j) provides that either party may apply to the superior court for a determination of the subrogation amount, regardless of whether both parties consented to the third-party settlement, if justified by the equities of the case; (2) contrary to the full Commission's conclusion, defendants' credit does not depend upon an award by the superior court since N.C.G.S. § 97-10.2(h) clarifies that the lien is automatic, and instead plaintiff may apply to the superior court for a determination of the lien amount under N.C.G.S. § 97-10.2(j); and (3) unless and until plaintiff applies to the superior court for a determination of the subrogation amount, defendants are entitled to a lien on all corresponding uninsured motorist benefits received by plaintiff, less the portion expended for the cost of replacing plaintiff's left breast implant.

Judge WYNN dissenting.

Appeal by defendants from Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 15 March 2006. Heard in the Court of Appeals 20 February 2007.

Anne R. Harris, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock and Eleasa H. Allen, for defendants-appellants.

JACKSON, Judge.

Maxim Healthcare/Allegis Group ("defendant-employer") and its insurance carrier, Kemper Insurance Company/American Protection Insurance c/o Specialty Risk Services (collectively, "defendants"), appeal from an order of the Full Commission of the North Carolina Industrial Commission ("Full Commission") filed 15 March 2006 awarding workers' compensation benefits to Penny M. Rumple Richardson ("plaintiff"). For the reasons stated below, we affirm in

part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

In 1996, plaintiff began working for defendant-employer, a medical staffing agency with approximately 400 employees. As a certified nursing assistant, plaintiff worked either in a long-term care facility or in a client's home. Plaintiff's work duties varied with the particular assignment and "could be very strenuous to very light," with work ranging from total patient care to sitting with an elderly or disabled patient. Work assignments were made either when an employee contacted defendant-employer to see if work was available or when defendant-employer contacted an employee seeking to fill a particular assignment. Employees could turn down jobs, and many of defendant-employer's employees, including plaintiff, worked a sporadic schedule.

On 16 May 2001, plaintiff was assigned work assisting a paraplegic client with bathing, dressing, and general care. Plaintiff left the client's house to pick up food, and while traveling at approximately fifty-five miles per hour in the right-hand lane, another vehicle drifted out of the left-hand lane and struck plaintiff's vehicle. The impact caused plaintiff's vehicle to spin out of control and strike a cement median barrier. The vehicle's air bags did not deploy, and plaintiff hit her head and right knee on something in the car. The driver of the other vehicle did not stop. As a result of the accident, plaintiff immediately experienced swelling in her face and right knee. Plaintiff also sustained injuries to her chest as a result of the accident.

Emergency Medical Services ("EMS") arrived at the scene of the accident and noted that plaintiff complained of pain in the left side of her head. EMS also noted edema to the left side of plaintiff's upper lip. EMS transported plaintiff to Moses Cone Memorial Hospital, where she was treated for headache, difficulty breathing, contusions, swelling around her mouth and chin, and moderate pain and soreness around her head, face, and chest.

Additionally, plaintiff began experiencing a decrease in the size of her breast implants as well as a rippling of the breasts almost immediately after the motor vehicle accident. Plaintiff, who had obtained the implants approximately five years prior to the accident, reported her concerns to the physicians at the emergency room. The physicians performed a visual inspection but noted no asymmetry.

Within twenty to thirty minutes after the accident, plaintiff called defendant-employer and reported the accident to her supervisor. Defendant-employer acknowledged that it first learned of the injury on 16 May 2001—the date of the accident—on Industrial Commission Form 19, dated 9 August 2002. Also shortly after the accident, plaintiff filed uninsured motorists claims with Nationwide Insurance ("Nationwide")—the insurance carrier for plaintiff's motor vehicle—for the personal injuries she sustained as a result of the accident.

On 17 May 2001, plaintiff presented to her family physician at Eagle Family Medicine, complaining of significant soreness, particularly in her shoulders and upper back. The physical examination revealed tenderness and soft tissue swelling over plaintiff's left cheek as well as a contusion on the inside of her upper lip. Plaintiff was given a note that provided that she was not to return to work until 6 June 2001 due to medical reasons.

On 31 May 2001, plaintiff presented to Dr. David M. Bowers ("Dr. Bowers"), a board certified specialist in plastic surgery, and expressed concerns "that there was a decrease in the size of the implants, fairly immediately [after the accident]." Plaintiff also informed Dr. Bowers of "some rippling in the implants" and that she was "no longer filling out the bras that she . . . bought post surgery." Dr. Bowers testified that plaintiff's right breast implant had ruptured, and the left breast implant, although it did not appear to have ruptured, exhibited signs of rippling. On 7 June 2001, Dr. Bowers performed bilateral breast re-augmentation—specifically, he removed the original implants and replaced them with new implants. Nationwide paid Dr. Bowers for his work, pursuant to plaintiff's claim with Nationwide. Following the surgery on 7 June 2001, Dr. Bowers restricted plaintiff from working until 24 July 2001.

Plaintiff also sought treatment for her right knee. Prior to the accident, she had undergone two knee surgeries, after which plaintiff had been able to return to work without restrictions. Following the accident, plaintiff began experiencing pain and swelling in her right knee, and on 9 July 2001, she presented to Dr. Peter G. Dalldorf ("Dr. Dalldorf") for treatment. Dr. Dalldorf confirmed plaintiff's complaints and referred her to physical therapy. Plaintiff followed up with Dr. Dalldorf on 30 July 2001, complaining of "intense pain since her accident" in her right knee. As a result, Dr. Dalldorf injected plaintiff's right knee and restricted plaintiff from working from 9 July 2001 until 6 August 2001.

Plaintiff returned to work on a regular basis on 7 August 2001,[1] but ceased working on 6 October 2001 to have surgery on her right knee on 9 October 2001. Between October 2001 and May 2002, when plaintiff returned to Dr. Dalldorf, she was limited in her abilities to crawl, climb, or stoop as well as lift, position, and turn patients. Nevertheless, plaintiff regularly contacted defendant-employer requesting to be assigned to light-duty jobs that she was capable of performing. Plaintiff testified that defendant-employer rarely offered her modified work that she was physically capable of performing, and during this time, plaintiff worked a total of eight days, performing light-duty jobs as they became available and were offered to her. Defendant-employer used plaintiff's wages on nearly all of these days to pay her health insurance costs.

On 25 June 2002, Dr. Dalldorf performed a second post-accident surgery on plaintiff's right knee. Plaintiff has not worked since this surgery and has been under work restrictions from her physicians. On 8 October 2002, Dr. Dalldorf performed a third post-accident surgery on plaintiff's knee. Dr. Dalldorf testified that although plaintiff had chondromalacia patella prior to the motor vehicle accident, plaintiff's motor vehicle accident aggravated her pre-existing condition, and she would not have needed the three surgeries but for the motor vehicle accident. Dr. Dalldorf further noted on 5 February 2003 that plaintiff would have trouble performing her regular job duties.

Plaintiff also has experienced discomfort in her right hand since the accident. On 22 January 2003, plaintiff presented to Dr. Marshall C. Freeman ("Dr. Freeman"), complaining that she had been experiencing bilateral hand numbness and tingling, especially on her right hand, since May 2001. Plaintiff also explained her hand condition to Dr. Dalldorf on 5 February 2003. Dr. Dalldorf reviewed the nerve conduction studies performed by Dr. Freeman, noted that the studies revealed a mild carpal tunnel syndrome on her right hand, and injected plaintiff's hand with Depo-Medrol. Plaintiff returned to Dr. Dalldorf on 26 February 2003, complaining of continued discomfort in her right hand. Having already prescribed a brace and injection for plaintiff, Dr. Dalldorf decided to refer plaintiff to Dr. Gary R. Kuzma ("Dr. Kuzma").

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1. The Full Commission found that plaintiff had "worked a few days between May 20 and May 24, 2001, for which she received pay, although she had been restricted from work. . . . [P]laintiff also worked two half-days in July 2001, but was not paid for those days. Her wages were used to pay her health insurance premiums."

On 6 March 2003, plaintiff presented to Dr. Kuzma, who is board certified in orthopedics and hand surgery, complaining of numbness and tingling in her hand. Plaintiff also indicated that "[s]he felt as though it was gradually getting worse." Plaintiff indicated to Dr. Kuzma that she had been experiencing pain since her motor vehicle accident. Dr. Kuzma diagnosed plaintiff with carpal tunnel syndrome as well as arthrosis in her right thumb. Dr. Kuzma recommended immobilizing plaintiff's thumb and wrist by placing her right hand in a splint. On 4 June 2003, Dr. Kuzma performed a carpal tunnel release on plaintiff's right hand. On 5 January 2004, Dr. Kuzma testified that plaintiff remained under his care and on one-handed work restrictions. He also opined that plaintiff may require additional surgery on her thumb in the future.

Since her 16 May 2001 motor vehicle accident, plaintiff also has experienced daily and continuous headaches. Plaintiff complained of a headache at the time of the accident to EMS workers. Plaintiff first sought treatment for her headaches on 23 October 2002 when she visited Dr. Freeman. Dr. Freeman's initial examination revealed bilateral occipital nerve tenderness along with a decreased range of motion of plaintiff's cervical spine. Over the course of his care of plaintiff, Dr. Freeman diagnosed plaintiff with "cervicogenic headache as well as occipital neuralgia as well as a previous comorbid condition of fibromyalgia and migraine headache without aura." Dr. Freeman prescribed a variety of medications and performed trigger point injections and occipital nerve blocks, but plaintiff exhibited no significant improvement. Dr. Freeman testified that further options existed for treating plaintiff's headaches, including additional trigger point injections, botulinum-toxin injections, and integrative therapies. Plaintiff did not follow up on the integrative therapies, which Dr. Freeman explained typically are not covered by insurance.

Finally, plaintiff's injuries as a result of the motor vehicle accident included several dental injuries. Plaintiff initially presented to Dr. Dennis Torney ("Dr. Torney"), a board certified endodontist, on 30 April 2002. Dr. Torney has performed root canals on several teeth on the left side of plaintiff's mouth, including multiple root canals on some of those teeth. Dr. Torney also has performed dental work and crowns on the teeth that underwent root canal therapy. These teeth all are on the left side of plaintiff's mouth—the side of her face impacted during the accident. Plaintiff has received treatment for teeth numbers 12, 13, 14, 15, 19, 23, and 24, although the Full Commission found that the repair to tooth number 19 was the re-

sult of a previous inadequate root canal, as opposed to the motor vehicle accident.

After receiving her final check from Nationwide, plaintiff filed for workers' compensation benefits on 24 June 2002. Defendants denied liability on 9 September 2002. On 30 October 2003, a hearing was held before Deputy Commissioner George T. Glenn II, and on 17 June 2004, Deputy Commissioner Glenn issued an Opinion and Award in favor of plaintiff. Defendants appealed to the Full Commission, which entered an Opinion and Award on 15 March 2006 affirming Deputy Commissioner Glenn's decision with modifications. Chairman Buck Lattimore filed a dissenting opinion. On 14 April 2006, defendants filed timely notice of appeal.

On appeal, defendants contend that: (1) the Full Commission erred in failing to properly address whether plaintiff timely reported her claim pursuant to North Carolina General Statutes, section 97-22 and whether the case should be barred for her failure to do so; (2) no competent evidence causally relates plaintiff's various alleged injuries to the accident; (3) the Full Commission failed to properly place the burden of proving disability on plaintiff and that plaintiff presented insufficient evidence of disability; and (4) the Full Commission erred in failing to award defendants a lien on all amounts accepted by plaintiff in her third-party settlement in contravention of North Carolina General Statutes, section 97-10.2.

[1] As a preliminary matter, we note that defendants' third assignment of error in the record on appeal violates the North Carolina Rules of Appellate Procedure. Pursuant to Rule 10(c),

> [e]ach assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

N.C. R. App. P. 10(c)(1) (2006). In their third assignment of error, defendants contend: "The Full Commission erred in omitting relevant stipulated documents from the transcript of the evidence prepared by the Industrial Commission." The assignment of error does not indicate to which documents defendants are referring, and this Court has held that "[a]ssignments of error which are 'broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate

Procedure.' " *Hedingham Cmty. Ass'n v. GLH Builders, Inc.*, 178 N.C. App. 635, 641, 634 S.E.2d 224, 228 (quoting *In re Lane Company-Hickory Chair Div.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002)), *disc. rev. denied*, 360 N.C. 646, 636 S.E.2d 805 (2006). Additionally, assignments of error are required to include "*clear and specific* record or transcript references," N.C. R. App. P. 10(c)(1) (2006) (emphasis added), but defendants' third assignment of error makes only the blanket reference to "Transcripts Volumes I and II." *See State v. Walters*, 357 N.C. 68, 95, 588 S.E.2d 344, 360 ("Defendant identifies the 'Entire Transcript' as the basis for the assignment of error alleging ineffective assistance of counsel, as contained in the record on appeal. As there are 3,285 transcript pages in this case, a reference to the entire transcript is not a reference to a 'particular error', nor is it 'clear and specific.' "), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). In effect, defendants' third assignment of error fails to specify which documents should have been included in the transcripts and fails to provide specific record or transcript references. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Accordingly, defendants' third assignment of error is dismissed.

[2] In their first argument, defendants contend that the Full Commission erred in failing to properly address whether plaintiff timely reported her claim pursuant to North Carolina General Statutes, section 97-22 and whether the case should be barred for her failure to do so. We agree.

North Carolina General Statutes, section 97-22 provides that an injured employee must give written notice to his employer "immediately on the occurrence of an accident, or as soon thereafter as practicable . . .; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident . . . ." N.C. Gen. Stat. § 97-22 (2001). In the instant case, it is undisputed that plaintiff did not provide written notice of the accident until she filed her workers' compensation claim on 24 June 2002, over one year after her accident on 16 May 2001.

An employee is excused from the thirty-day notice requirement, however, if the employee has a "reasonable excuse . . . for not giving such notice and . . . the employer has not been prejudiced thereby." *Id.* As this Court recently noted,

> included on the list of reasonable excuses would be, for example, a belief that one's employer is already cognizant of the accident or where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows.

Chavis v. TLC Home Health Care, 172 N.C. App. 366, 377, 616 S.E.2d 403, 412 (2005) (internal quotation marks and alterations omitted) (quoting *Jones v. Lowe's Cos., Inc.*, 103 N.C. App. 73, 75, 404 S.E.2d 165, 166 (1991)), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). "The burden is on the employee to show a 'reasonable excuse.' " *Id.* (citing *Jones*, 103 N.C. App. at 75, 404 S.E.2d at 166).

Here, plaintiff telephoned her supervisor within thirty minutes after the accident and reported the motor vehicle accident to him. Indeed, defendants concede that they had actual knowledge of the accident on the day it happened. Although the evidence demonstrates and the Full Commission found that defendant had actual knowledge of plaintiff's accident, the Full Commission failed to make any finding that plaintiff provided a reasonable excuse for her failure to timely provide written notice of her accident. As this Court has noted, "[w]hile 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 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). The determination whether or not there is a "reasonable excuse" for plaintiff's failure to file in writing is crucial. Although "[a]ctual notice by the employer has been previously held by this Court to be a reasonable excuse for not giving written notice within thirty days," *Chavis*, 172 N.C. App. at 378, 616 S.E.2d at 413, we must remand this case to the Full Commission for specific findings with respect to whether plaintiff satisfied her burden of providing a reasonable excuse for not providing defendant-employer with written notice of her accident within thirty days of its occurrence.

Additionally, the inquiry pursuant to section 97-22 does not conclude with a finding of "reasonable excuse." "Section 97-22 . . . also requires that the [F]ull Commission be satisfied that the employer has not been prejudiced by the delay in written notification[,] . . . [and] [t]he burden is on the employer to show prejudice." *Id.*

Here, the Full Commission found that "[i]n light of . . . defendants' actual notice of . . . plaintiff's accident in May 2001, . . . defendants

were not prejudiced by her failure to immediately file a written notice." However, the mere existence of actual notice, without more, cannot satisfy the statutorily required finding with respect to "prejudice," as the issue of "prejudice" pursuant to section 97-22 must be evaluated in relation to the purpose of the notice requirement:

> The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury.

Booker v. Duke Med. Ctr., 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979); *see also Jones*, 103 N.C. App. at 76-77, 404 S.E.2d at 167. Accordingly, we remand this case for adequate findings of fact with respect to the issue of prejudice to defendant-employer pursuant to section 97-22. *See Westbrooks v. Bowes*, 130 N.C. App. 517, 527-29, 503 S.E.2d 409, 416-17 (1998) (remanding the case to the Full Commission for specific findings on whether the employer was prejudiced pursuant to section 97-22).

[3] Next, defendants contend that no competent evidence causally relates plaintiff's various injuries to her motor vehicle accident of 16 May 2001. We agree in part and disagree in part.

When reviewing decisions of the North Carolina Industrial Commission, this Court must determine whether there is competent evidence in the record to support the Commission's findings of fact and whether those findings, in turn, justify the Commission's conclusions of law. *See Perkins v. U.S. Airways*, 177 N.C. App. 205, 210-11, 628 S.E.2d 402, 406 (2006), *disc. rev. denied*, 361 N.C. 356, 644 S.E.2d 231 (2007). With respect to causation, it is well-established that

> [e]xpert testimony that a work-related injury 'could' or 'might' have caused further injury is insufficient to prove causation when other evidence shows the testimony to be 'a guess or mere speculation.' However, when expert testimony establishes that a work-related injury 'likely' caused further injury, competent evidence exists to support a finding of causation.

Cannon v. Goodyear Tire & Rubber Co., 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47 (citations omitted), *disc. rev. denied*, 360 N.C. 61, 621 S.E.2d 177 (2005).

In the instant case, plaintiff sought workers' compensation benefits for: (1) the replacement of her breast implants, (2) treatment for

headaches, (3) treatment for carpal tunnel syndrome and arthrosis in her right wrist and thumb, (4) treatment for and surgeries to her right knee, and (5) treatments and procedures performed on her teeth. We address each injury separately in the above listed order.

Pursuant to our Workers' Compensation Act, "[i]njury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body." N.C. Gen. Stat. § 97-2(6) (2001). Although this Court has not addressed the issue of compensability of damage to breast implants, we have affirmed workers' compensation awards for cosmetic surgery. *See*, *e.g.*, *Ray v. Pet Parlor*, 169 N.C. App. 236, 609 S.E.2d 256 (2005). We believe that the weight of authority supports a determination that breast implants satisfy the statutory requirement as a compensable prosthetic device that functions as part of the body. *See* N.C. Gen. Stat. § 97-2(6) (2001); *see*, *e.g.*, *Wal-Mart Stores*, *Inc. v. VanWagner*, 990 S.W.2d 522 (Ark. 1999) (finding that substantial evidence supported the Workers' Compensation Commission's decision that the employee suffered a compensable injury to her right breast implant in the course of her employment); *In re Smith*, 34 P.3d 696 (Or. Ct. App. 2001) (affirming an order of the Workers' Compensation Board that concluded that the employee had suffered a compensable injury when an on-the-job accident caused one of her saline breast implants to collapse); *see also Cowen v. Wal-Mart*, 93 P.3d 420, 424 (Alaska 2004) (injury to the employee's breast implant was presumptively compensable).

Following her motor vehicle accident on 16 May 2001, plaintiff noted that her right breast was smaller than it had been prior to the accident. Plaintiff also noted rippling in her left breast. On 31 May 2001, plaintiff presented to Dr. Bowers, a board certified specialist in plastic surgery, and expressed concerns that her breast implants had ruptured. Subsequently, on 7 June 2001, Dr. Bowers removed and replaced plaintiff's original breast implants.

During his deposition, Dr. Bowers was presented with a hypothetical scenario that echoed plaintiff's description of the accident and her injuries. In response, Dr. Bowers opined "that the accident more than likely caused the leak" in the right breast implant and that even if the accident did not directly cause the leak, the trauma "most definitely" could have accelerated or aggravated such a leak. Dr. Bowers, however, noted that the left breast implant had not ruptured, and he could not state with any certainty that the rippling evident in

the left breast was a result of the motor vehicle accident, as opposed to an underfilling of the implant.

> [DEFENSE COUNSEL]: And so am I also correct that we must come to the conclusion, then, that the rippling [in the left breast] was due to underinflation, or underfilling?
>
> [DR. BOWERS]: Right.
>
> [DEFENSE COUNSEL]: Okay. So as far as the left one, your—would it be your opinion that the left one was not ruptured by this accident? It wasn't ruptured at all, correct?
>
> [DR. BOWERS]: It wasn't—it did not appear to me that it was ruptured at all.
>
> [DEFENSE COUNSEL]: Okay. *And I take it that you cannot state more than 50 percent that the rippling was due to the accident as opposed to due to underfilling?*
>
> [DR. BOWERS]: *Right. That's correct.*

(Emphasis added). Notwithstanding the Full Commission's finding that "[t]he damage to plaintiff's breast *implants* were [sic] caused or aggravated by the accident" (emphasis added), Dr. Bowers consistently distinguished between the two breast implants.

> [PLAINTIFF'S COUNSEL]: Okay. And now let me go back and review your testimony regarding the left versus the right breast. And I guess what I'm trying to figure out is, are you giving two different opinions, left versus right, or is your opinion the same for both the left and right concerning whether the trauma either caused or aggravated—
>
> [DR. BOWERS]: Well, after—after the surgery I think the left—*the left implant was not affected by the—by the injury* because the left implant, I didn't see any evidence of a leak in it. The right implant, I think, is the one where I think it potentially was damaged by the—by the accident. Or there was some sort of damage to the right impact [sic] such that it had been affected in a way that the left implant had not been. And I think what I was seeing with the left implant was simply that there was just less saline than the 475 cc's.

(Emphasis added).

The Full Commission found that replacement of the left breast implant was necessary "because the replacements would have to be symmetrical and evenly matched. Replacement of one implant required replacement of both." Dr. Bowers, however, never testified to this effect. Instead, he stated unequivocally that the rippling in the left breast most likely was due to the original implant's being underfilled and that the rippling was not caused or aggravated by the accident. Accordingly, we hold that the Full Commission correctly ruled with respect to the replacement of plaintiff's right breast implant, but erred in concluding that "plaintiff sustained compensable injuries to her . . . *bilateral* breast implants." (Emphasis added). Therefore, plaintiff is entitled only to compensation for replacement of the right breast implant, and we remand to the Full Commission for a determination as to the appropriate amount of compensation for such replacement.

We next review the Full Commission's ruling that plaintiff was entitled to workers' compensation benefits for her headaches. During her motor vehicle accident, plaintiff sustained an impact to her head, as evidenced in the EMS report as well as the emergency room records. Dr. Freeman, plaintiff's treating physician for her headaches, testified as to the cause of plaintiff's headaches. Defendants assert on appeal that "Dr. Freeman's opinions changed throughout the deposition" and that "[h]is opinions are indecisive at best." We disagree.

To the extent defendants contend Dr. Freeman was not a credible witness, we decline to rule on that issue. *See Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony."). Furthermore, defendants misconstrue Dr. Freeman's testimony, which appears consistent with respect to plaintiff's headaches. During his deposition, Dr. Freeman opined:

> It would be my opinion that this person, who did not previously suffer from daily head or neck pain prior to the accident, did suffer the chronic daily head and neck pain as reported to me as a consequence of the motor vehicle accident.

Dr. Freeman clarified that plaintiff's fibromyalgia diagnosis did not alter his conclusion, stating "that without a history of documented fibromyalgia, the accident caused the pain the patient states," and "[i]f she had fibromyalgia previously, then . . . the accident exacerbated an underlying condition." Dr. Freeman explained that the only

way he would be unable to state with any certainty that the accident caused the headaches or aggravated an underlying condition would be "[i]f the patient had an extended period of pain-free, say, beginning a week or two after the initial injury." However, Dr. Freeman testified that "[f]rom the very beginning the patient has stated she's experienced a daily headache since the time of her accident." Accordingly, the Full Commission did not err in accepting Dr. Freeman's testimony and ruling that plaintiff's headaches constituted a compensable injury.

Next, plaintiff sought and obtained compensation for treatment for carpal tunnel syndrome in her right wrist and arthrosis in her right thumb. Once again, defendants effectively request this Court to reweigh the evidence presented before the Full Commission. However, "[t]his Court does not re-weigh evidence or assess credibility of witnesses." *Sharpe v. Rex Healthcare*, 179 N.C. App. 365, 370, 633 S.E.2d 702, 705 (2006).

Dr. Dalldorf testified that plaintiff's right wrist and thumb pain was not related to the motor vehicle accident. Dr. Dalldorf further explained that he was "not even convinced she had carpal tunnel syndrome." Defendants contend that the Full Commission improperly disregarded this testimony in favor of that of Dr. Kuzma. Dr. Kuzma opined that plaintiff's motor vehicle accident, as described to him in a hypothetical question during his deposition, either caused or at least aggravated or accelerated plaintiff's carpal tunnel syndrome and arthrosis. Although plaintiff did not seek treatment for carpal tunnel syndrome symptoms for more than a year after the accident, Dr. Kuzma explained that "[m]ost carpel tunnel syndromes are going to take a period of time to develop. . . . Depending, again, on the trauma, the direction of trauma, it may take a longer period of time for it to actually show up." As this Court has held, "[t]he Commission may weigh the evidence and believe all, none or some of the evidence." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272, *disc. rev. denied*, 355 N.C. 211, 558 S.E.2d 868 (2001). It is not for this Court to evaluate the comparative weight of Dr. Dalldorf's and Dr. Kuzma's testimony. Competent evidence supports the Full Commission's finding that the treatment for plaintiff's right hand and wrist was the result of her motor vehicle accident, and accordingly, this portion of defendants' assignment of error is overruled.

Defendants also contest the Full Commission's findings and conclusions with respect to plaintiff's right knee. Defendants note that plaintiff did not report complaints of knee pain in the first several

weeks following the accident. Defendants further argue that "Dr. Dalldorf's theories as to causation stemmed from his hypothesis that plaintiff's knee hit the dashboard during the accident—a fact unsubstantiated by competent evidence."

Plaintiff testified that she felt her knee "hit something because it was—it had started swelling." Plaintiff also testified that her knee began swelling within a couple of hours after the accident. Defendants cross-examined plaintiff about, *inter alia*, her knee and her failure to report it to physicians at the emergency room. As there is nothing in the record to indicate that plaintiff's deposition testimony was incompetent and defendants have presented no argument to this effect, we agree that the basis for Dr. Dalldorf's theories as to causation was supported by competent evidence, as opposed to mere speculation or conjecture. *See Hatcher v. Daniel Int'l Corp.*, 153 N.C. App. 776, 780, 571 S.E.2d 20, 23 (2002).

Dr. Dalldorf testified that although plaintiff had chondromalacia patella prior to the motor vehicle accident, plaintiff's motor vehicle accident aggravated her pre-existing condition, and she would not have needed the three surgeries but for the motor vehicle accident. Specifically, Dr. Dalldorf testified, "[M]y opinion is that if she hadn't been in the accident, she wouldn't have needed the subsequent surgeries. So I feel that the accident caused her to need these additional operations." Accordingly, we hold that the Full Commission did not err in finding plaintiff's right knee injuries and surgeries to be compensable under our Workers' Compensation Act.

[4] Defendants next contend that the Full Commission's Finding of Fact number 24—relating to the compensability of treatment performed on plaintiff's teeth—was not supported by competent evidence. Defendants list this assignment of error as one of seventeen assignments of error supporting the second question presented in their brief. However, defendants make no argument in their brief relating to this assignment of error or the Full Commission's findings with respect to plaintiff's teeth. "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) (2006).

[5] In their next argument, defendants contend that the Full Commission erred in concluding that plaintiff carried her burden of proving disability. We disagree.

" 'Disability,' within the North Carolina Workers' Compensation Act, 'means incapacity because of injury to earn the wages which the

employee was receiving at the time of injury in the same or any other employment.' " *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (quoting N.C. Gen. Stat. § 97-2(9)). The burden of proving the existence and extent of a disability lies with the employee seeking compensation. *See id.* (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). In order for a plaintiff to establish a claim for either temporary or permanent disability under the Workers' Compensation Act,

> the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). This Court has explained that

> [t]he employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

In the case *sub judice*, the Full Commission properly found that plaintiff satisfied her burden of proving her disability as a result of her work-related injuries. Plaintiff's motor vehicle accident occurred on 16 May 2001, and plaintiff's family physician wrote her out of work from 17 May 2001 to 6 June 2001. Dr. Bowers, plaintiff's breast implant surgeon, wrote plaintiff out of work from 7 June 2001 to 24 July 2001. After injecting plaintiff's right knee, Dr. Dalldorf restricted plaintiff from working from 9 July 2001 through 6 August 2001. Plaintiff attempted to return to work on 7 August 2001, but became

disabled once again after knee surgery on 9 October 2001. After this first knee surgery, plaintiff worked one day in October 2001, four days in November 2001, one day in January 2002, and two days in February 2002. Plaintiff did not earn wages from this work, however, as defendants used plaintiff's wages to pay her health insurance premiums. Plaintiff worked and earned wages on two occasions in June 2002 prior to her final period of ongoing disability, which began on 25 June 2002 with a second knee surgery and continued until the hearing on this matter in October 2003. However, plaintiff was able to work these two days only because "sitter jobs" were available and offered to her. Other than these two days, defendant-employer did not make such light-duty work available to plaintiff. Following plaintiff's June 2002 knee surgery, Dr. Dalldorf explained that plaintiff would have had difficulty performing her regular job until at least February 2003. By March 2003, however, plaintiff was placed on one-handed work restrictions by Dr. Kuzma for her carpal tunnel syndrome and arthrosis, with such restrictions scheduled to continue until Dr. Kuzma's deposition in January 2004.

Plaintiff satisfied her initial burden of proving disability under the Workers' Compensation Act. Although plaintiff returned to work on a few occasions during the time period at issue, such intermittent and infrequent work days do not constitute a successful trial return to work. Pursuant to North Carolina General Statutes, section 97-32.1,

> an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to [section] 97-30. *If the trial return to work is unsuccessful, the employee's right to continuing compensation under [section] 97-29 shall be unimpaired* unless terminated or suspended thereafter pursuant to the provisions of this Article.

N.C. Gen. Stat. § 97-32.1 (2001) (emphasis added).

As plaintiff carried her burden of proving disability, the burden then shifted to defendants to disprove her claim. Our Supreme Court has explained that

> [i]f an injured employee establishes a compensable injury, the burden shifts to the employer to rebut the employee's evidence. As to the injured employee's ability to work, this burden requires the employer to come forward with evidence to show not only

that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.

Johnson v. S. Tire Sales & Serv., 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (internal quotation marks and citations omitted).

In the instant case, the Full Commission found that between October 2001 and May 2002, plaintiff testified that she regularly contacted defendant-employer seeking light-duty work, but defendant-employer rarely offered her the modified work that she was physically capable of performing based upon her restrictions. The Full Commission also found that while the accounts manager for defendant-employer testified that plaintiff had been offered light-duty assignments, the accounts manager did not know the dates or nature of such job offers, and he admitted that defendant-employer did not keep records of such offers. Because of his lack of personal knowledge, his testimony was found not to be credible. As " 'findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence,' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)), we hold that defendants failed to carry their burden of proving that plaintiff was capable of obtaining suitable employment. Defendants, therefore, failed to rebut the ongoing presumption of disability, and accordingly, this assignment of error is overruled.

[6] In their final argument, defendants contend that the Full Commission erred in failing to award defendants a lien on all amounts accepted by plaintiff in her third-party settlement with Nationwide. We agree.

As provided in section 97-10.2(b), an injured employee has the exclusive right to enforce the liability of a third party within the first twelve months following the injury. *See* N.C. Gen. Stat. § 97-10.2(b) (2001). Pursuant to subsection (h), "[i]n any proceeding against or settlement with the third party, every party to the claim for compensation *shall have a lien* to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death." N.C. Gen. Stat. § 97-10.2(h) (2001) (emphasis added). Although this subsection provides that an "employee . . . shall [not] make any settlement with or accept any payment from the third party without the written consent of the [employer]," the statute further provides that employer consent to a third-party settlement is not required "[i]f

either party follows the provisions of subsection (j) of this section." N.C. Gen. Stat. § 97-10.2(h) (2001). Pursuant to subsection (j),

> [n]otwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

N.C. Gen. Stat. § 97-10.2(j) (2001). Therefore, either party may apply to the superior court for a determination of the subrogation amount, regardless of whether both parties consented to the third-party settlement. Although "cognizant of the potential for plaintiff to receive a double recovery via the operation of [section] 97-10.2(j)[,] . . . we [previously have] determined that the statute contemplated and allowed for such a recovery if justified by the equities of the case." *Wiggins v. Bushranger Fence Co.*, 126 N.C. App. 74, 77-78, 483 S.E.2d 450, 452, *disc. rev. denied*, 346 N.C. 556, 488 S.E.2d 825 (1997).

In the case *sub judice*, following her 16 May 2001 motor vehicle accident, plaintiff filed a claim against Nationwide, the carrier of the uninsured motorist coverage of the vehicle she had been driving. As the Full Commission properly found, "the settled claim filed by . . . plaintiff against Nationwide is, in fact, a third-party claim." The Full Commission, however, concluded that "defendants shall be entitled to a credit, if any, *as duly awarded by a superior court* pursuant to [North Carolina General Statutes, section] 97-10.2." (Emphasis added).

Contrary to the Full Commission's conclusion, defendants' credit does not depend upon an award by the superior court, since section 97-10.2(h) clarifies that the lien is automatic. *See* N.C. Gen. Stat. § 97-10.2(h) (2001) (providing that "every party to the claim for compensation *shall have a lien* to the extent of his interest . . . upon any

payment made by the third party" (emphasis added)). Instead, plaintiff may apply to the superior court for a determination of the lien amount pursuant to section 97-10.2(j), which this Court has described "as permitting the superior court to *adjust* the amount of a subrogation lien." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 353, 593 S.E.2d 453, 455 (2004) (emphasis added). Unless and until plaintiff applies to the superior court for a determination of the subrogation amount, defendants are entitled to a lien on all corresponding uninsured motorist benefits received by plaintiff, less the portion expended for the cost of replacing plaintiff's left breast implant. *See Tise v. Yates Constr. Co., Inc.*, 345 N.C. 456, 459, 480 S.E.2d 677, 679 (1997) (holding that damages awarded against a third party are to be reduced only "by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation"). Accordingly, we reverse this portion of the Full Commission's Opinion and Award and remand to the Full Commission for findings not inconsistent with this opinion.

Affirmed in part; Reversed in part; and Remanded.

Judge WYNN dissents in part and concurs in the results only in part in a separate opinion.

Judge STEELMAN concurs.

WYNN, Judge, dissenting in part and concurring in the results only in part.

Because I find that the majority reweighs the evidence in this case and improperly substitutes its judgment for that of the Full Commission, I respectfully dissent.

I note at the outset that this Court's review of an Opinion and Award of the Full Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Most significantly, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (emphasis added) (quoting *Anderson v. Lincoln Constr. Co.*, 265

N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Thus, if there is any evidence at all, taken in the light most favorable to the non-moving party, the finding of fact made by the Full Commission stands, even if there is substantial evidence supporting the opposing position. *Id.* Findings may therefore be set aside on appeal only "where there is a *complete lack* of competent evidence to support them." *Rhodes v. Price Bros.*, 175 N.C. App. 219, 221, 622 S.E.2d 710, 712 (2005) (emphasis added and quotation omitted).

I.

First, I disagree with the majority's conclusion that the Full Commission erred in failing to address whether Ms. Richardson timely reported her worker's compensation claim pursuant to North Carolina General Statute § 97-22.

The majority cites to *Booker v. Duke Medical Center* for the proposition that the Full Commission should make findings as to an employer's ability to "provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury" and to conduct "the earliest possible investigation of the circumstances surrounding the injury." 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979) (citation omitted). However, I note that the Supreme Court also held in *Booker* that the defendant-employer had waived the issue of notice by failing to raise it before the Full Commission, and that the facts indicated that the defendant-employer did have actual notice of the employee's work-related illness. *Id.* at 482, 256 S.E.2d at 204. Thus, I find the language from *Booker* cited by the majority to be dicta from the Supreme Court, offered only in the context of discussing "[t]he purpose of the notice-of-injury requirement," *id.* at 481, 256 S.E.2d at 204, and not stated as a directive to the trial court as to what specific findings must be made.

Moreover, in *Jones v. Lowe's Companies*, this Court referred to the "purpose of the statutory notice requirement" when explaining how the Industrial Commission should determine whether prejudice exists, not as a requirement as to what findings are necessary for the Full Commission to make. 103 N.C. App. 73, 76-77, 404 S.E.2d 165, 167 (1991). Indeed, we vacated and remanded the Industrial Commission's Opinion and Award in that case, finding that the record showed that the employee did have a reasonable excuse for lack of written notice so the Commission had to make a determination as to preju-

dice. *Id.* at 76, 404 S.E.2d at 167. Significantly, however, we held that "the burden is on Employer to show prejudice." *Id.*

Likewise, the Supreme Court explicitly stated in *Booker* its finding that a worker's compensation claim is barred "if the employer is not notified within 30 days of the date the claimant is informed of the diagnosis unless reasonable excuse is made *to the satisfaction of the Industrial Commission* for not giving such notice and *the Commission is satisfied that the employer has not been prejudiced thereby*." 297 N.C. at 481, 256 S.E.2d at 203 (emphasis added and quotation omitted). The holdings from these cases make clear that the statute does not require specific findings as to prejudice, only that the Commission find to its "satisfaction" that the employer failed to show prejudice.

In the instant case, the Full Commission made the explicit finding that:

> The plaintiff notified the defendant-employer about her accident on May 16, 2001, within thirty minutes. Her notice was timely. She gave written notice, by filing a Form 18 in June 2002. In light of the defendants' actual notice of the plaintiff's accident in May 2001, *the defendants were not prejudiced by her failure to immediately file a written notice.*

(Emphasis added).[2] I find this to be sufficient under the Supreme Court's language in *Booker* that a claim will not be barred if "the Commission is satisfied that the employer has not been prejudiced [by the failure to give written notice]." *Id.*

Additionally, I note that we held in *Chavis v. TLC Home Health Care* that actual knowledge was a reasonable excuse for failure to give written notice:

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2. I note, too, that this finding is corroborated by the following statement by the Deputy Commissioner who heard this case, with respect to the issue of notice:

> Here, the testimony is that [Maxim Healthcare] had actual notice. . . . Now, they did nothing. Again, we had somebody who went to the hospital. At a very minimum, they knew at that point that they had hospital bills they needed to pay. . . . Now, . . . each side is saying that neither did what they should have done. Be that as it may, there was enough notice given here that somebody on [Maxim Healthcare's] part should have done something. They didn't. So, no, [Ms. Richardson] didn't do everything she should have done, but she did enough. . . . And again, [Maxim Healthcare] knew of the injury by accident on the date of the accident. If they didn't do any investigation to determine what—and the extent of her injuries, it's a little late for them to complain now or a year or so later, after she filed an 18, . . ., when they had an opportunity, because of their notes, to investigate the claim, but they did not.

> Here, the full Commission found that [the defendant-employer] had actual notice of [the plaintiff-employee's] accident on the day it occurred. The full Commission found also that [the defendant-employer] "offered no evidence that might tend to show that they were prejudiced" by any delay in written notification. Although [the defendant-employer] now argues it was prejudiced because it was unable to direct [the plaintiff- employee's] medical treatment, it did not argue this to the full Commission. Also, [the defendant-employer] fails to assert how it was prejudiced by [the plaintiff-employee] seeking medical treatment from her own doctor. We find competent evidence to support the full Commission's finding that [the defendant-employer] had actual knowledge of [the plaintiff-employee's] injury and was not prejudiced by any delay in written notification.

172 N.C. App. 366, 378, 616 S.E.2d 403, 413 (2005) (citation omitted), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). This holding is binding on other panels of this Court and should be followed, given that the Full Commission's findings amounted to the conclusion that Ms. Richardson had offered a reasonable excuse for the delay in her written notice. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Accordingly, I would affirm the Full Commission's Opinion and Award as to the issues of notice and prejudice.

II.

I agree with the majority's conclusion to affirm the Full Commission's award of compensation for Ms. Richardson's treatment for headaches, carpal tunnel syndrome in her right wrist and thumb, treatment and surgeries on her right knee, and treatment and procedures on her teeth. However, I would likewise affirm the Full Commission's award of compensation for the replacement of both of Ms. Richardson's breast implants, rather than only the right breast implant.

As previously noted, this Court's review of a Full Commission Opinion and Award is strictly limited to determining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of

law." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We are therefore precluded from reweighing the evidence and instead review the record only to verify that it "contains any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Additionally, under our legal framework, "[t]he objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950). Put more simply, "[t]he goal is to make the plaintiff whole." *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 615, 306 S.E.2d 519, 526 (1983), *disc. review denied*, 310 N.C. 154, 311 S.E.2d 294 (1984); *see also Watson v. Dixon*, 352 N.C. 343, 347, 532 S.E.2d 175, 177-78 (2000) (citing *Bowen v. Fidelity Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936) ("The purpose of the law is to place the party as near as may be in the condition which he would have occupied had he not suffered the injury complained of."). Workers' compensation cases are a subset of these compensatory damages cases; they seek to compensate the employee for medical expenses and the loss of earning capacity while also limiting the liability of employers. *See Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986). Thus, although an employee may not recover traditional monetary compensatory damages, the Workers' Compensation Act nevertheless seeks to make an injured employee whole by providing for her medical treatment to restore her, to the extent possible, to the same condition she was in prior to a compensable accident and injury.

This is true even when the injury merely accelerated or aggravated an employee's pre-existing condition. *See Davis v. Columbus County Schs.*, 175 N.C. App. 95, 101, 622 S.E.2d 671, 676 (2005) (citing *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 267 (1951)). "In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed." *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987) (citation omitted).

In the instant case, the relevant finding by the Full Commission states:

> 10. *The damage to plaintiff's breast implants were caused or aggravated by the accident.* Dr. Bowers testified that the accident caused the leak he found in the plaintiff's right

> breast implant. He was not certain whether the accident caused the rippling in her left breast implant or whether the rippling was from normal wear and tear. However, Dr. Bowers noted that, even if there was deterioration of the implants pre-accident, the trauma to the plaintiff's chest would "most definitely" have accelerated or aggravated the process. *Dr. Bowers replaced both implants, even though only one had ruptured, because the replacements would have to be symmetrical and evenly matched. Replacement of one implant required replacement of both.*

(Emphasis added). In his deposition, Dr. Bowers stated that he did not believe the left implant had been ruptured, but "it did have that rippling around the periphery." Although Dr. Bowers did not have the medical records from Ms. Richardson's first implant surgery, he made the assumption that she had had 475 cc implants that were underfilled, which could lead to the rippling effect she had noticed—but he also stated that he was not certain as to the exact amount of fluid Ms. Richardson had in her first implants. Dr. Bowers also confirmed that the right breast implant did appear to be ruptured based on the amount of fluid it was missing, such that there was a lot less fluid in the right implant than in the left implant.

Ms. Richardson testified that she had not had any problems with her breast implants prior to the accident and had been satisfied with the result of that earlier surgery. She further stated that she believed her implants were affected by the accident because "they had decreased. You could see rippling that you could not see before." Additionally, her bra size had changed. Ms. Richardson recounted that she had her breast implants replaced with implants of the same size, because they had decreased in size after the accident and she wanted "[t]o achieve the look that [she] had before the wreck."

This testimony was corroborated by the notes Dr. Bowers took following his initial consultation with Ms. Richardson, which likewise recounted that she reported a decrease in breast size and rippling in both implants following the accident. Moreover, Dr. Bowers wrote that, "[i]f these were initially 475 cc implants, then clearly they are smaller than they were." Following the surgery, Dr. Bowers recorded "[v]ery nice symmetry" and that the procedure "seems to have corrected the deficit which she noticed post car accident."

I believe this testimony and evidence supports the Full Commission's finding that replacement of both implants was neces-

sary to ensure that they would be "symmetrical and evenly matched[,]" and that "[r]eplacement of one implant required replacement of the both." Given that the right implant was ruptured and necessitated replacement, the sole means of ensuring that both implants would be symmetrical—and in the condition they were prior to Ms. Richardson's car accident—was to replace and fill both to the same saline level. The majority's holding would force any woman who suffered this type of compensable injury, including one who had undergone reconstructive surgery following a double mastectomy, to choose between a noticeably asymmetrical appearance or out-of-pocket payment for treatment necessary due only to a compensable injury. I cannot agree with such an outcome. Accordingly, I would therefore affirm the Full Commission in this regard.

III.

Next, I find that the Full Commission's Opinion and Award recognizes that Maxim Healthcare does, in fact, have a lien on Ms. Richardson's third-party settlement with Nationwide Insurance, and that it further allows for either party to apply to the Superior Court to subsequently determine the amount of that lien. This conclusion is exactly in line with the language and directive of North Carolina General Statute § 97-10.2 (2005). Accordingly, I see no error or reason to reverse and remand on this issue and would instead affirm the Full Commission.

As noted by the majority, section 97-10.2(b) gives an employee the exclusive right to enforce the liability of a third party for an injury. N.C. Gen. Stat. § 97-10.2(b). The statute further dictates that "every party to the claim for compensation *shall have a lien to the extent of his interest* . . . upon any payment made by the third party . . . and such lien may be enforced against any person receiving such funds." *Id.* § 97-10.2(h). Although the written consent of the employer is generally required before a third-party settlement is valid and enforceable, *see id.*, the statute also allows an exception for the employee to settle with the third party and then have either the employer or the employee "apply to the resident superior court judge . . . to determine the subrogation amount[.]" *Id.* §§ 97-10.2(h)(2), (j). The statute includes factors that the trial court should consider in using its discretion to determine the amount of the lien the employer should have against the employee's third-party settlement. *Id.* § 97-10.2(j).

In the instant case, the Full Commission's conclusion states:

> 5. Plaintiff's settled claim against Nationwide Insurance is a third-party claim and, thus, N.C. Gen. Stat. § 97-10.2 applies to provide the defendants a statutory lien.
>
> N.C. Gen. Stat. § 97-10.2(j) provides in pertinent part:
>
> > [I]n the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount.
>
> Thus, the defendants may be entitled to a credit for plaintiff's third party recovery pursuant to N.C. Gen. Stat. § 97-10.2(j).

From its plain language, the Opinion and Award "provide[s] the defendants a statutory lien[]" against Ms. Richardson's third-party settlement with Nationwide Insurance. Nevertheless, by stating only that "the defendants *may be* entitled to a credit[,]" the Full Commission complied with the express statutory directive that it is the responsibility of a Superior Court judge—not that of the Full Commission—to determine the actual amount of the lien.

This conclusion of law fully comports with the applicable statute; the Full Commission recognized that Maxim Healthcare has an automatic statutory lien on Ms. Richardson's settlement but left the amount to be determined by a Superior Court judge upon application by either party. As such, the Full Commission has already done in its Opinion and Award what the majority would direct them to do on remand. I would therefore affirm the Full Commission.

IV.

Finally, I concur in the result only of the dismissal of Maxim Healthcare's third assignment of error. I, too, would dismiss the assignment of error contending that the Full Commission erred in "omitting relevant stipulated documents from the transcript of the evidence prepared by the Industrial Commission." Maxim Healthcare failed to present or discuss any actual argument as to this assignment of error in their brief to this Court; accordingly, under our Rules of Appellate Procedure, it must be dismissed. N.C. R. App. P. 28(b)(6). Because Maxim Healthcare essentially abandoned this assignment of error by failing to argue it, I would dispose of this assignment of error in the same manner the majority has treated Maxim Healthcare's

assignment of error concerning the Full Commission's Finding of Fact number 24, namely, to dismiss it as abandoned.

STATE OF NORTH CAROLINA v. HENRY HARMON MACK

No. COA07-135

(Filed 5 February 2008)

1. Criminal Law— no mistrial ex mero motu—identification of defendant

There was no abuse of discretion in the denial of a mistrial ex mero motu in a prosecution for cocaine offenses where one of the State's witnesses could not identify defendant as the person from whom he had tried to purchase crack. Another witness, an officer, testified that defendant's clothes matched that of an individual whom he saw engaging in a drug transaction.

2. Appeal and Error— preservation of issues—ground of objection not specified

To preserve a question for appellate review, a party must state the specific grounds for the desired ruling if they are not apparent from the context. Defendant could not assert that the trial court abused its discretion by not sanctioning the State for an alleged discovery violation where defendant objected to the introduction of the evidence, but did not state grounds for his objection and did not draw the trial court's attention to the alleged discovery violation.

3. Criminal Law— information revealed day of trial—outcome of trial not affected

The disclosure of a police report the State intended to introduce on the day of trial did not materially affect the trial and the assignment of error was overruled. The focus should be on the import of the undisclosed evidence at trial rather than on defendant's ability to prepare for trial.

4. Evidence— subsequent acts—drugs sales—sufficiently similar

The trial court did not err in a cocaine prosecution by admitting evidence concerning the subsequent acts of defendant. There was substantial evidence from which a reasonable jury could find

that defendant had committed a similar act; the fact that defendant played a different role in the two transactions (which involved intermediaries) was not sufficient by itself to classify the two transactions as dissimilar.

5. Sentencing— stipulation to prior record level—sufficiency

Defendant stipulated to his prior record level where the judge inquired about the correct level, suggesting level III; the prosecutor said that defendant would be a record level IV; and defense counsel said, "IV." Defendant contended that his counsel was repeating the prosecutor's assertion, but his counsel did not object or seek clarification.

6. Sentencing— consolidated sentence—additional sentencing point

The trial court erred by including an additional sentencing point on a conviction for selling cocaine in a prosecution which resulted in consolidated convictions for sale of cocaine and resisting an officer, and possession with intent to sell or deliver and delivery. The addition of a sentencing point in accord with N.C.G.S. § 15A-1340.14(b)(6) was appropriate for the conviction of delivering cocaine, but defendant had never been convicted of any offense containing all of the elements of selling cocaine.

7. Drugs— cocaine sale with intermediary—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges against defendant for possession of cocaine with intent to sell or deliver, delivery of cocaine, and sale of cocaine where there was evidence from which a reasonable jury might conclude that defendant possessed cocaine, intended to sell the cocaine, and then sold and delivered it to a witness. The dismissal of the additional charge of possession of cocaine does not demonstrate insufficient evidence.

Appeal by defendant from judgments entered 25 July 2006 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 12 September 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for the State.

Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals judgments entered after a jury verdict of guilty of possession with intent to sell or deliver cocaine, selling cocaine, delivering cocaine, and resisting a public officer.

FACTS

The State's evidence at trial tended to show the following: On 13 December 2004, Officer C. N. Kiser of the Winston-Salem Police Department was performing surveillance of 328 West 23rd Street, located near the intersection of 23rd Street and Pittsburgh Avenue in Winston-Salem, North Carolina. From his location, Officer Kiser had a clear line of sight from which he could see both the front and east sides of the house. During the course of his surveillance, Officer Kiser observed defendant walking back and forth between the porch and the sidewalk as vehicles approached the curb in front of the house. After approaching these vehicles, defendant would interact with some of the drivers. The first vehicle defendant approached was a red compact car. Once defendant reached the vehicle, Officer Kiser observed defendant lean into the car with his hand open as the driver of the car removed something with his thumb and forefinger. The driver then handed defendant money.

Officer Kiser observed a similar exchange involving defendant and a woman in a white truck. This woman exited her truck, talked with defendant, and then handed defendant money in exchange for an item small enough to be contained within defendant's thumb and forefinger. During a third exchange, a small white truck approached the front of the house in the same manner as the previous two vehicles. Defendant then approached the passenger side of the vehicle and entered the truck. After defendant entered the vehicle, the truck drove east on 23rd Street and made a left turn onto Collins Street. Officer Kiser subsequently contacted Officer McCready, who was able to follow the white truck in an unmarked vehicle. Officer Kiser observed defendant walking back to the property at 328 West 23rd Street several minutes later.

After defendant returned to the house, a four-door white car drove up and parked in front of the house. Defendant approached the vehicle, reached into his right jacket pocket, and leaned into the passenger side of the vehicle with his hand open. During this exchange, a second vehicle pulled up behind the first. A woman subsequently exited the second vehicle, walked over to defendant,

and waited behind him. When defendant finished his interaction with the first vehicle, defendant turned and exchanged small items with the woman from the second vehicle. Officer Kiser testified that one of the items appeared to be U.S. currency. Defendant then removed a baggie containing a white substance from his right front jacket pocket, and shook it. Following this exchange, a dark-colored compact truck approached the residence. Defendant opened the passenger door of the truck and sat inside the truck for a short period of time.

While defendant was sitting inside the dark-colored truck, Officer Kiser notified his arrest team. Officer Kiser described defendant as wearing "[b]lue jeans, a gray sweatshirt with red writing on the front, and a black jacket known commonly as a bomber jacket or bomber-style jacket." As the arrest team approached, defendant ran inside the east side of the house at 328 West 23rd Street. The arrest team followed suit, but was forced to wait outside the house until someone opened the door on the east side of the house. Officer Kiser then followed these officers into the house.

Once inside the house, Officer Kiser found defendant and three other individuals in the living room of the house. Defendant was sitting behind a desk wearing a gray sweatshirt with red writing and sitting on the black jacket that Officer Kiser had seen him wearing earlier. Officer Kiser then arrested defendant and searched his jacket. Inside of the right jacket pocket he found small granules of a white substance. Officer Kiser also confiscated $160 from defendant.

Testimony was also provided by Willie Phillips, who purchased crack cocaine at the 300 block of West 23rd Street on 13 December 2004. According to Mr. Phillips, he stopped to pick up a passenger wearing a black jacket, purchased a piece of crack from the individual for $10, and drove around the block before letting the passenger out. When he was stopped by the police, Mr. Phillips threw the crack on the floor, where it was found by the police. Mr. Phillips also testified that he was unfamiliar with the individual who sold him the crack, and could not identify him.

Officer Kiser further testified that on 2 February 2005 he again performed surveillance of 328 West 23rd Street. While performing surveillance, Officer Kiser observed defendant look around, remove items from a clear plastic baggie containing a white substance, hand these items to an individual named Mickens, and place the bag into a trash can. Mr. Mickens then put the items he received in his sock.

After giving the items to Mr. Mickens, defendant walked across the street from 328 West 23rd Street and sat on a porch. While defendant sat on the porch, Mr. Mickens flagged down cars and exchanged items with the passengers. According to Officer Kiser, Mr. Mickens' activity was consistent with a method of distributing narcotics known as "bump running." Once Officer Kiser observed this activity, defendant and Mr. Mickens were arrested. Officers subsequently found a package of "white rocks" in the garbage can, as well as similar white rocks in Mr. Mickens' sock.

Defendant was tried at the 24 July 2006 Criminal Session of Forsyth County Superior Court for five offenses stemming from his actions on 13 December 2004. At trial, the State presented testimony by Special Agent Lisa Edwards, a forensic chemist with the State Bureau of Investigation (SBI). Agent Edwards testified that she had examined the contents of the envelope marked State's exhibit 1 and identified the contents as consisting of one tenth of a gram of a Schedule Two controlled substance, cocaine base, commonly known as crack cocaine. At the close of the State's evidence, defendant's charge for possession of cocaine was dismissed. A jury then found defendant guilty of the four remaining charges. Defendant's convictions for sale of cocaine and resisting a public officer were consolidated for sentencing. Defendant also received a second consolidated sentence for his convictions of possession with intent to sell or deliver cocaine and delivery of cocaine. For these convictions, defendant was sentenced to consecutive prison terms of 20-24 and 11-14 months respectively.

On 28 July 2006, defendant appealed the judgment of the trial court and filed a motion for appropriate relief, challenging the determination that defendant possessed a record level of IV for sentencing purposes. On 31 July 2006, the trial court reviewed defendant's prior convictions during a hearing on the motion for appropriate relief, and concluded defendant was properly classified as possessing a prior record level of IV. The trial judge then denied defendant's motion for relief from the sentence imposed.

I.

[1] Defendant first argues the trial court erred by not declaring a mistrial, *ex mero motu*, when the State's witness, Willie Phillips, could not identify defendant as the person from whom Mr. Phillips tried to purchase crack cocaine on 13 December 2004. We disagree.

Rule 10(b)(1) of our Rules of Appellate Procedure provides:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1) (2007). "Even though Rule 10(b)(1) is a general rule pertaining to the preservation of questions for appellate review, this Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion[.]" *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). We have previously held that the decision " 'to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion.' " *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998) (citation omitted), *cert. denied*, 534 U.S. 862, 151 L. Ed. 2d 95 (2001). The trial court should declare a mistrial only when such serious improprieties exist as " ' "would make it impossible to attain a fair and impartial verdict under the law." ' " *Steen*, 352 N.C. at 279, 536 S.E.2d at 31 (citations omitted).

In the case *sub judice*, defendant did not move for a mistrial following the testimony of Mr. Phillips. Rather, defendant now argues that a mistrial should have been granted *ex mero motu* by the trial judge. According to defendant, the lack of such a ruling amounted to either reversible or plain error. As previously discussed, this Court has not applied the plain error rule to issues within the discretion of the trial court, so we will review the trial court's actions for an abuse of discretion. *See Steen*, 352 N.C. at 256, 536 S.E.2d at 18. Upon a review of the record, defendant has failed to produce sufficient evidence that such serious improprieties existed as would deprive defendant of his right to a fair and impartial verdict. On appeal, defendant's only claim is that neither Mr. Phillips nor Officer Kiser could clearly see the individual who dealt the cocaine seized in Mr.

Phillips' car. Thus, defendant argues, the State presented insufficient evidence that Mr. Mack was the perpetrator of the crime charged.

Despite defendant's contention, the record reveals that the State presented evidence sufficient to identify Mr. Mack as the perpetrator of the crime. At trial, the State presented testimony by Officer Kiser describing the individual he observed conducting drug transactions on 13 December 2004. According to Officer Kiser, this individual was wearing "[b]lue jeans, a gray sweatshirt with red writing on the front, and a black jacket known commonly as a bomber jacket or bomber-style jacket." Upon entering the house at 328 West 23rd Street to arrest this individual, Officer Kiser observed defendant wearing a gray sweatshirt with red writing and sitting on a black jacket, clothing identical to that worn by the individual selling drugs. In addition, the State presented evidence that defendant was involved in drug transactions, similar to the transactions on 13 December 2004 ("December transactions"), in February 2005. These February transactions, performed by defendant, were sufficiently similar to the December transactions as to provide evidence that defendant may have been involved in the December transactions as well. Our Supreme Court has held:

> The judge declares the law arising upon the evidence, and the jury should be governed by his instructions, but they are the sole triers of the facts, subject to the right of the [judge] to say what evidence is competent and relevant, and what it tends to prove. What it does prove is the peculiar question for the jury to decide.

State v. Windley, 178 N.C. 670, 674, 100 S.E. 116, 118 (1919). Therefore, we hold the trial judge did not err in failing to declare a mistrial when competent evidence was presented that tended to identify defendant as the perpetrator of the crime charged.

II.

[2] Second, defendant argues the trial court erred by failing to grant a continuance or recess for defendant before allowing the admission of previously undisclosed evidence. Specifically, defendant objects to the introduction of evidence concerning defendant's actions subsequent to the initial drug charge. Defendant also objects to the introduction of an SBI lab report as well as the testimony of SBI Agent Lisa Edwards. We are unpersuaded by defendant's contentions.

N.C. Gen. Stat. § 15A-902(a) (2005) provides that a defendant may seek discovery from the State by submitting a written request for vol-

untary compliance. *See State v. Blankenship*, 178 N.C. App. 351, 353, 631 S.E.2d 208, 210 (2006). "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Once the State provides the requested discovery, "the discovery is deemed to have been made under an order of the court[.]" N.C. Gen. Stat. § 15A-902(b); *see Blankenship*, 178 N.C. App. at 354, 631 S.E.2d at 210. In addition, once the State voluntarily provides discovery pursuant to § 15A-902(b), the discovery provided to defendant "shall be to the same extent as required by subsection (a) of [§ 15A-903.]" N.C. Gen. Stat. § 15A-903(b) (2005). N.C. Gen. Stat. § 15A-903(a) provides that upon a defense motion, the Court must order the State to

> **[g]ive notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial.** Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. **The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.**

Id. (emphasis added). Once the State provides discovery, a continuing duty exists to disclose the existence of additional evidence. N.C. Gen. Stat. § 15A-907 (2005). Should the State fail to comply with a discovery order pursuant to § 15A-903, such a failure will not automatically require the exclusion of the undisclosed evidence. *State v. Quarg*, 334 N.C. 92, 103, 431 S.E.2d 1, 6 (1993). "The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988). " '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.' " *Quarg*, 334 N.C. at 103, 431 S.E.2d at 6 (citation omitted).

In the case at bar, defendant mailed a request for voluntary discovery to the State. In this request, defendant asked for, *inter alia*, any reports of physical or mental examinations, tests, measurements or experiments made in connection with this case, and the

names and addresses of all prospective expert witnesses for the State. Although defendant acknowledges the State's discovery materials included the State's investigative materials, defendant contends the State did not disclose all of the evidence outlined in defendant's request for discovery. This late notice, defendant argues, amounted to a violation of both N.C. Gen. Stat. § 15A-903(a)(2) and the United States Constitution.

A.

Defendant initially contends that the State's introduction of evidence on the initial day of the trial violated N.C. Gen. Stat. § 15A-903(a)(2). Specifically, defendant objects to the introduction of (i) testimony by SBI Agent Lisa Edwards as an expert witness, (ii) results of a lab report produced by the SBI analyzing a substance collected following the December transactions, and (iii) evidence of defendant's involvement in the February transactions. According to defendant, this evidence should not have been admitted because he did not receive notice of the State's intention to present the aforementioned evidence until the first day of trial. Thus, defendant argues, the case must be remanded for appropriate sanctions. We disagree.

A review of the record reveals that although defendant may have been given short notice as to the introduction of the contested evidence, defendant failed to preserve any error associated with such notice for appeal. *See* N.C. R. App. P. 10(b)(1). Our Supreme Court, in *Herring*, previously denied relief for violations of the discovery code where the defendant failed to object to these violations at trial. 322 N.C. at 748, 370 S.E.2d at 373. In *Herring*, the defendant argued the trial court should have sanctioned the State for failing to disclose the results of footprint comparisons to the defendant. *Id.* In overruling defendant's contention, the Supreme Court noted:

> When the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. The defendant may not now complain that the trial court abused its discretion in failing to sanction the State for this alleged discovery violation. Having failed to draw the trial court's attention to the alleged discovery violation, the defendant denied the court an opportunity to consider the matter and take appropriate steps.

Id. In the case *sub judice*, defendant claims he was first informed of the State's intention to introduce the contested evidence during a pre-

trial conference with the judge. However, defendant raised no objection to the introduction of (1) the SBI lab report or (2) the testimony of SBI Agent Lisa Edwards, either during the pretrial conference or during trial. Defendant's sole objection, with respect to the contested evidence, concerned the introduction of evidence with regard to defendant's involvement in drug transactions on 2 February 2005. In response to the State's declaration that it intended to introduce evidence of defendant's involvement in another drug transaction, defense counsel responded that she "would be objecting to that on multiple grounds." The North Carolina Rules of Appellate Procedure require that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). Here, although defense counsel objected to the introduction of the aforementioned evidence, she did not state any grounds for the objection. As it is unclear upon what grounds she objected, we hold defendant failed to draw the trial court's attention to the alleged discovery violation. *See Herring*, 322 N.C. at 748, 370 S.E.2d at 373. Thus, we hold the trial court was denied an opportunity to consider the discovery violations alleged by defendant. As such, defendant is barred from asserting the trial court abused its discretion for failing to sanction the State. *See Herring*, 322 N.C. at 748, 370 S.E.2d at 373.

B.

[3] Defendant further contends that the trial court committed constitutional error by allowing the introduction of the police report concerning defendant's involvement in the February transactions on the initial day of trial. According to defendant, the police report contained evidence that no lab report had been filed as to the substance seized from those involved in the February transactions. Defendant claims the lack of a lab report amounted to favorable evidence, and the State's failure to produce this evidence prior to trial amounted to the suppression of this evidence. We disagree.

" '[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution.' " *State v. Holadia*, 149 N.C. App. 248, 256, 561 S.E.2d 514, 520 (2002) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963)), *cert. denied*, 355 N.C. 497,

562 S.E.2d 432 (2002). The duty to disclose such evidence applies irrespective of whether there has been a request by the accused and encompasses impeachment evidence as well as exculpatory evidence. *Id.* at 256, 561 S.E.2d at 520. "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 257, 561 S.E.2d at 521 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985)). " 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " *State v. Thompson*, 139 N.C. App. 299, 306, 533 S.E.2d 834, 840 (2000) (quoting *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494). When determining whether defendant's lack of access to specific evidence violated his due process rights, "the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial." *State v. Hunt*, 339 N.C. 622, 657, 457 S.E.2d 276, 296 (1995); *see State v. Lynn*, 157 N.C. App. 217, 220, 578 S.E.2d 628, 631 (2003).

In the case *sub judice*, the police report in question was made available to defendant at the start of trial. Defendant makes no contention that access to the report was prohibited or limited during trial, but simply asserts that the late introduction of this evidence amounted to suppression. Here, defendant's main assertion appears to be that he was denied material evidence during his preparation for trial, rather than during the trial itself. Upon review, we find defendant's argument unpersuasive. As the focus of the inquiry should be on the impact of the undisclosed evidence at trial, rather than on defendant's ability to prepare for trial, we hold that the introduction of evidence in this case did not amount to suppression. *Id.* The late disclosure of this evidence had no effect upon its availability at trial. The record contains no evidence, nor does defendant argue, that the late introduction of this evidence materially affected the outcome of the trial. Therefore, defendant's assignment of error is overruled.

III.

[4] Third, defendant argues the trial court erred by admitting evidence concerning the subsequent acts of defendant. Specifically, defendant contends the evidence concerning defendant's involvement in drug transactions on 2 February 2005 should not have been admitted under Rule 404(b) of the North Carolina Rules of Evidence because this evidence was dissimilar to the current offense and unfairly prejudicial. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) provides:

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

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990), *cert. denied*, 421 S.E.2d 360 (1992). Further, Rule 404(b) allows for the admission of both subsequent and prior acts of defendant. *State v. Hutchinson*, 139 N.C. App. 132, 136, 532 S.E.2d 569, 572 (2000).

When introducing evidence under Rule 404(b), our courts have recognized the need to " 'adequately safeguard against the improper introduction of character evidence against the accused.' " *State v. Carpenter*, 361 N.C. 382, 387, 646 S.E.2d 105, 109 (2007) (citation omitted). Thus, the admission of evidence under this rule is subject to several constraints. *Id.* at 388, 646 S.E.2d at 110. "Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime." *Id.*; N.C. Gen. Stat. § 8C-1, Rule 401 (2005). In addition, the general rule of inclusion articulated in *Coffey* is constrained by requirements of similarity and temporal proximity. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). For evidence of another crime to satisfy the similarity component, it must constitute " 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act.' " *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (citation omitted).

In the instant case, defendant contends evidence of his involvement in the February transactions caused him to be unfairly prejudiced. According to defendant, the December transactions were not sufficiently similar to the February transactions to show either: (1) defendant was the person who committed the current crime or (2) the existence of a common scheme or plan. Thus, defendant argues, the trial court erred in allowing the introduction of such evidence for the aforementioned purposes and for instructing the jury:

> Evidence has been received tending to show that two months after the events which are being tried, that the Defendant was in the same community . . . doing some acts similar as to what is being tried in this case.
>
> This evidence was received solely not to show that the Defendant, just because he did something after the offense that's being tried, that he is guilty of the offense that actually is being tried, but it will show—or introduced to show (sic) the identity of the person who committed the crime. You can consider it for that purpose or you may consider it for the purpose that there existed in the mind of the Defendant a plan, scheme, or system, design involving the crime charged in this case.

After reviewing defendant's contentions, we find them to be without merit.

In the case *sub judice*, the State presented evidence at trial which tended to show, *inter alia*, (1) defendant was present during the drug transactions that took place on 13 December 2004 and 2 February 2005, (2) both the December transactions and the February transactions occurred in the vicinity of 328 West 23rd Street, and (3) defendant was seen in the possession of a plastic baggie containing a "white substance" during both the December and February transactions. The main difference between the two transactions appears to have been defendant's role in the transactions themselves: in the December transactions defendant approached the cars himself, while in the February transactions he handed a "white substance" to a man named Mickens, who then approached the cars. According to Officer Kiser, this behavior, known as "bump running," is a method of distributing narcotics designed to lessen the chances of police apprehension. Given the similarities between the December transactions and the February transactions, the fact that defendant played a different role in the February transactions is insufficient, by itself, to classify the two transactions as dissimilar. Upon review, we hold the evidence of the February transactions represented substantial evidence from which a reasonable jury could find defendant had committed a similar act. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. Therefore, defendant's contention that evidence of the February transactions should not have been admitted under Rule 404(b) is overruled.

IV.

[5] Fourth, defendant argues the trial court erred in sentencing defendant at a prior record level of IV. Specifically, defendant contends the State did not present sufficient evidence of defendant's prior record level. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) (2005) provides that a prior conviction may be proved by: (1) "[s]tipulation of the parties[,]" (2) "[a]n 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[,]" or by (4) "[a]ny other method found by the court to be reliable." In proving the prior record level, "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14. A statement by the State asserting that an offender has a certain number of points, corresponding to a specified record level, is not sufficient to meet the requirements of the catchall provision found in N.C. Gen. Stat. § 15A-1340.14, even if the statement is uncontested by the defendant. *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003); *see* N.C. Gen. Stat. § 15A-1340.14(f)(4). However, defense counsel "need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005); *see State v. Albert*, 312 N.C. 567, 579-80, 324 S.E.2d 233, 241 (1985).

In the case at bar, the following exchange occurred during the sentencing hearing on 25 July 2006:

> THE COURT: All right, the Defendant is a prior record Level III for sentencing?
>
> [PROSECUTOR]: Your Honor, at this point he will be a record Level IV.
>
> [DEFENSE COUNSEL]: IV.
>
> THE COURT: And two class D's, one H, and of course, that misdemeanor of delaying.
>
> [DEFENSE COUNSEL]: I believe one G and two H—
>
> [PROSECUTOR]: Sale will be a G, and other two felonious (sic) should be an H.

Following this exchange, the trial judge then completed defendant's sentencing worksheet and determined defendant to be a record level IV possessing a total of nine sentencing points. In accordance with this determination, the trial judge sentenced defendant as a level IV. For each conviction, defendant was given a sentence within the presumptive range as provided by N.C. Gen. Stat. § 15A-1340.17 (2005).

On appeal, defendant contends that the State did not present sufficient evidence to prove defendant's prior record level. According to defendant, defense counsel's statement of "IV", in response to the prosecution's assertion that defendant possessed a prior record level of IV, was not a stipulation sufficient to satisfy N.C. Gen. Stat. § 15A-1340.14. Instead, defendant argues defense counsel was merely repeating an assertion made by the State. As the State failed to present any further evidence of defendant's prior record level, defendant argues, it did not meet its burden of proof. *See id.*

After reviewing the record, we hold defendant's comments at trial sufficient to show defendant stipulated to possessing a prior record level of IV. When the trial judge inquired as to the correct sentencing level for defendant, the State informed the judge that defendant was a level IV, and not a level III as the judge suggested. Defense counsel responded to the aforementioned comments by simply stating "IV." We note that defense counsel did not voice any objection to the State's assertion, nor did defense counsel seek clarification as to how the record level was determined. Defense counsel simply stated "IV" when asked what prior record level applied to defendant. Thus, we hold that defendant stipulated to his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1).

V.

[6] Fifth, defendant argues the trial court erred by finding defendant should be sentenced at a prior record level of IV for his conviction for selling cocaine. Specifically, defendant contends the trial court erred in adding an additional sentencing point on the grounds that one of defendant's prior offenses included all of the elements of his present conviction for selling cocaine. We agree.

N.C. Gen. Stat. § 15A-1340.14(a) provides that generally "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or . . . the jury, finds to have been proved in accordance with this section." Section 15A-1340.14 further provides that an additional point should be added "[i]f all the ele-

ments of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level[.]" N.C. Gen. Stat. § 15A-1340.14(b)(6). Although a stipulation by the defendant may be sufficient to prove defendant's prior record level, the trial court's assignment of a prior record level is a conclusion of law, which we review *de novo*. *State v. Fraley*, 182 N.C. App. 683, 690, 643 S.E.2d 39, 44 (2007).

In the case *sub judice*, the trial judge determined defendant to be a level IV for sentencing purposes. The judge then sentenced defendant accordingly, issuing two sentences for defendant's current offenses: (1) defendant was sentenced for a minimum term of 20 months and a maximum term of 24 months for selling cocaine and for resisting a public officer and (2) defendant was sentenced for a minimum term of 11 months and a maximum term of 14 months for delivering cocaine and for possession with intent to sell or deliver cocaine.

On appeal, defendant argues the trial judge incorrectly attributed an additional sentencing point to defendant's sentence for selling cocaine, as provided in N.C. Gen. Stat. § 15A-1340.14(b)(6), because none of defendant's previous offenses contained all of the elements of the current offense of selling cocaine. Although we have found that defendant stipulated to possessing a prior record level of IV, we will review defendant's record level to determine if it was unauthorized at the time it was imposed. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2005).

Upon review, we note the record contains inconsistencies regarding the number of sentencing points attributable to defendant and how these points were calculated. However, according to the sole sentencing worksheet, defendant was assigned eight sentencing points from his previous convictions with an additional point added pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6). We note that the addition of this final point elevated defendant from the lower prior record level of III to the higher prior record level of IV. Given that this worksheet appears to have been used to determine the prior record level for both sentences, we must now determine if the worksheet accurately reflects the defendant's prior record level for each sentence.

N.C. Gen. Stat. § 15A-1340.15 (2005) provides:

> If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and

> impose a single judgment for the consolidated offenses. **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, unless applicable statutes require or authorize another minimum sentence of imprisonment.

Id. (emphasis added). In the instant case, defendant received two consolidated sentences, each based on the determination that defendant possessed a prior record level of IV. A review of the sentencing worksheet reveals defendant has previously been convicted of several felonies, including possession with the intent to sell or deliver cocaine. Because the offenses of delivering cocaine and possession of cocaine with intent to sell or deliver are both Class H felonies, a consolidated sentence may be issued based on the prior record level corresponding to the possession offense. Thus, the addition of a sentencing point in accordance with N.C. Gen. Stat. § 15A-1340.14(b)(6) was appropriate for defendant's conviction of delivering cocaine.

However, a further review of the sentencing worksheet reveals that defendant had never been convicted of any offense containing all of the elements of selling cocaine. As selling cocaine was the more serious of the two offenses contained in defendant's sentence for selling cocaine and resisting a public officer (a Class G Felony versus a Class 2 Misdemeanor), the sentence should have been issued in accordance with the prior record level that would accompany the conviction for selling cocaine. *See* N.C. Gen. Stat. § 15A-1340.15(b) (2005). Because the record contains no evidence that any points should have been added to defendant's prior record level as it pertained to his convictions for selling cocaine and resisting a public officer, we hold the trial court erred by including the additional sentencing point. *See State v. Prush*, 185 N.C. 472, 478, 648 S.E.2d 556, 561 (2007). We therefore remand this case for re-sentencing on defendant's conviction for selling cocaine.

VI.

[7] Lastly, defendant argues the trial court erred by denying defendant's motion to dismiss the charges of possession with intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine because the State failed to produce sufficient evidence of each offense. We disagree.

"In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996) (*Carr I*). "Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (*Carr II*). "All the evidence, whether direct or circumstantial, must be considered by the trial court in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence, being drawn in favor of the State." *Carr I*, 122 N.C. App. at 372, 470 S.E.2d at 72.

In the instant case, defendant was convicted of: (i) possession with intent to sell or deliver cocaine, (ii) delivery of cocaine, and (iii) selling cocaine. "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *Carr II*, 145 N.C. App. at 341, 549 S.E.2d at 901; *see* N.C. Gen. Stat. § 90-95(a)(1) (2005). Similarly, "[t]o prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both." *Carr II*, 145 N.C. App. at 341, 549 S.E.2d at 901; *see* N.C. Gen. Stat. § 90-95(a)(1). To prove the defendant possessed a controlled substance, the State may prove such possession was either actual or constructive. *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001).

Defendant now argues that the State did not present sufficient evidence of each element of defendant's guilt with regard to the aforementioned charges. However, upon review of the record, we find that the jury was presented with sufficient evidence of each of the alleged offenses to support a conviction. The State presented evidence that, *inter alia*, (1) Officer Kiser observed an individual wearing blue jeans, a gray sweatshirt, and a black jacket remove a baggie containing a white substance from his jacket pocket; (2) this individual approached witness Willie Phillips' car, entered the car, and sold crack cocaine to Mr. Phillips; and (3) defendant was arrested thereafter wearing a gray sweatshirt with red writing and sitting on a black jacket. From this evidence, a reasonable jury might conclude that defendant possessed contraband, intended to sell this contraband, and then sold and delivered the contraband to Mr. Phillips. Despite defendant's contentions, the fact that the trial court dismissed the

additional charge of possession of cocaine, without any additional support, does not demonstrate that the evidence was insufficient with regard to the other charges. Therefore, we hold the trial court did not err in denying defendant's motion to dismiss the drug charges for insufficiency of the evidence.

In addition to defendant's contentions that have been previously addressed, defendant asserts he was denied his right to effective assistance of counsel. We have reviewed these claims and find them to be without merit.

No error in part, reversed and remanded in part.

Judges CALABRIA and STEPHENS concur.

STEVIE JOHNSON, EMPLOYEE-PLAINTIFF v. CITY OF WINSTON-SALEM, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA07-536

(Filed 5 February 2008)

1. Workers' Compensation— carpel tunnel syndrome—compensable occupational disease—sufficiency of evidence

The evidence in a workers' compensation case was sufficient to support the Industrial Commission's finding that plaintiff's carpal tunnel syndrome was a compensable occupational disease. Plaintiff worked as a recreational center custodian and used machines which vibrated and required gripping and twisting, and his treating physician testified that his job contributed significantly to the development of his carpal tunnel syndrome.

2. Workers' Compensation— temporary disability—carpel tunnel syndrome—recreational center custodian

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is temporarily disabled and entitled to compensation under N.C.G.S. § 97-29. Given plaintiff's limited education, limited work experience, and limited training, in addition to his poor health, his compensable injury causes him a greater degree of incapacity than the same injury would cause another person.

3. Workers' Compensation— total disability—multiple medical conditions—benefits not apportioned

The Industrial Commission correctly awarded plaintiff full compensation for his total disability, without apportioning plaintiff's benefits for non-work related medical conditions. There was competent evidence to support the Commission's finding that plaintiff was disabled as a result of his bilateral carpal tunnel syndrome, and insufficient evidence was presented from which the Commission could apportion the award.

4. Workers' Compensation— maximum medical improvement—treatment discontinued—lost health insurance

The Industrial Commission correctly determined that a workers' compensation plaintiff had not reached maximum medical improvement from his carpel tunnel syndrome. Plaintiff discontinued his treatment when his health insurance expired after he left work due to his medical conditions, hardly a voluntary decision, and the evidence indicates that he will resume treatment when he is financially able.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Defendant from Opinion and Award entered 5 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 November 2007.

Roderick T. McIver for Plaintiff.

Wilson & Coffey, LLP, by Kevin B. Cartledge and Jason L. Jelinek, for Defendant.

STEPHENS, Judge.

Stevie Johnson ("Plaintiff"), a custodial maintenance worker for the City of Winston-Salem ("Defendant"), developed bilateral carpal tunnel syndrome, gout, and arthritis, and claimed disability benefits resulting therefrom. Defendant denied Plaintiff's claim by filing a Form 61 with the Industrial Commission.

In an Opinion and Award filed 17 May 2006, Deputy Commissioner Bradley W. Houser held that Plaintiff's employment caused or significantly contributed to the development of his bilateral carpal tunnel syndrome. He further determined that there was insufficient evidence to conclude that Plaintiff's employment caused or signifi-

cantly contributed to his development of gout or arthritis. Plaintiff was awarded temporary total disability benefits pursuant to N.C. Gen. Stat. § 97-29 and medical expenses related to his bilateral carpal tunnel syndrome. Both parties appealed to the Full Commission.

In an Opinion and Award filed 5 February 2007, a majority of the Full Commission affirmed Deputy Commissioner Houser's Opinion and Award with modifications, finding that Plaintiff was not at maximum medical improvement and ordering further medical treatment for Plaintiff.

From the Opinion and Award of the Full Commission, Defendant appeals.

I. FACTS

Plaintiff, a 38-year-old high school graduate, worked for Defendant as a recreational center custodian for approximately 15 years. His duties included sweeping, mopping, dusting, polishing, washing windows, washing baseboards, disposing of trash, and removing gum from floors and bleachers. In performing these duties, Plaintiff was required to use a mechanized buffer on the floors and a machine to shampoo the carpet. Additionally, Plaintiff worked some overtime for Defendant on weekends, stripping and waxing gym floors in several recreational centers throughout Winston-Salem. His primary duty during his overtime work was to operate the stripping and buffing machinery, which necessitated the nearly constant gripping and twisting of his hands and wrists. Plaintiff performed all of these duties throughout his 15-year period of employment.

Prior to filing his workers' compensation claim, Plaintiff had been diagnosed with the following: gout, arthritis, hypercholesterolemia, congestive heart failure, underlying idiopathic cardiomyopathy, shortness of breath, chest pain, bilateral knee pain, obesity, atrial fibrillation, tingling and numbness in his hands, hypertension, diabetes, and degenerative joint disease in his knees.

Dr. Anthony DeFranzo, who treated Plaintiff for his carpal tunnel syndrome and was aware of Plaintiff's prior medical conditions, testified to the following: Plaintiff's gout and arthritis were aggravated by his employment but were not caused by his work activities; the combination of Plaintiff's gout, arthritis, and carpal tunnel syndrome resulted in a significant disability in both hands; Plaintiff's employment exposed him to an increased risk of developing

carpal tunnel syndrome as opposed to members of the general public not so exposed; and Plaintiff had not yet reached maximum medical improvement.

Dr. James T. Burnette, Ph.D., CPE, an ergonomist, reviewed Plaintiff's work activities and determined that they were repetitive in nature and exposed him to an increased risk of developing bilateral carpal tunnel syndrome as opposed to members of the general public not so exposed.

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).

A. Compensable Injury

[1] Defendant first contends that the evidence was insufficient to support the Full Commission's determination that Plaintiff's carpal tunnel syndrome is a compensable injury. Specifically, Defendant argues there was insufficient evidence for the Full Commission to find that Plaintiff's employment with Defendant increased his risk of contracting carpal tunnel syndrome. We disagree.

For an injury to be compensable under our Workers' Compensation Act, it must be either the result of an "accident arising out of and in the course of employment or an 'occupational disease.' " *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E.2d 101, 105 (1981). Although certain "occupational diseases" are specifically listed as compensable conditions under N.C. Gen. Stat. § 97-53, carpal tunnel syndrome is not among them. Thus, this disorder is compensable only if (1) it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment[,]" and (2) it is not an "ordinary disease of life to which the general public is equally exposed outside of the employment." *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979); N.C. Gen. Stat. § 97-53(13) (2005).

"A disease is 'characteristic' of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question." *Booker*, 297 N.C. at 472, 256 S.E.2d at 198. A disease is "peculiar to the occupation" when the conditions of the employment result in a hazard which distinguishes it in character from employment generally; the disease need not be one that originated exclusively from the employment. *Id.* at 473, 256 S.E.2d at 199. Furthermore, the statute does not preclude coverage for all ordinary diseases of life, but only for those " 'to which the general public is *equally exposed* outside of the employment.' " *Id.* at 475, 256 S.E.2d at 200 (quoting N.C. Gen. Stat. § 97-53(13)).

Here, Dr. DeFranzo testified that Plaintiff's job contributed significantly to the development of Plaintiff's carpal tunnel syndrome. He explained:

> [F]rom what I understand, [Plaintiff] did multiple duties as a custodian using his hands to do various tasks all day, but he also used vibrating equipment like floor buffers and things. And when it comes to carpal tunnel syndrome, tools that vibrate are notorious for aggravating and causing carpal tunnel syndrome.
>
> . . . .
>
> [L]ess than one (1) percent—point six (.6) percent of the population develops carpal tunnel syndrome in the general population that do not do repetitive tasks at work. And there is about a six (6) percent incidence of carpal tunnel syndrome in job activities that require repetitive work. So there's about a ten (10) times increase . . . of carpal tunnel syndrome in patients that do lots of work with their hands.

Moreover, when directly asked whether Plaintiff's job duties would "increase his risk of [developing] carpal tunnel syndrome[,]" Dr. DeFranzo replied, "Yes. . . . [P]atients that do repetitive work [with their hands] have an increased incidence of carpal tunnel syndrome." This testimony is sufficient evidence to support the Full Commission's finding that "Plaintiff's employment with Defendant . . . exposed him to an increased risk of developing bilateral carpal tunnel syndrome as opposed to members of the general public not so exposed."

Defendant cites *Keller v. City of Wilmington Police Dep't*, 65 N.C. App. 675, 309 S.E.2d 543 (1983),[1] *disc. review allowed*, 310 N.C. 625, 315 S.E.2d 690 (1984),[2] for the proposition that Plaintiff must prove that carpal tunnel syndrome is "peculiar to janitors or custodians." However, in *Lumley v. Dancy Constr. Co.*, 79 N.C. App. 114, 339 S.E.2d 9 (1986), this Court disavowed the holding in *Keller*, stating: "It is well settled that this Court may not overrule nor modify decisions of the Supreme Court of North Carolina. Thus, any language in *Keller* which might be interpreted as defining the language 'peculiar to' differently than was set forth in *Booker* is ineffective and should have no precedential value." *Lumley*, 79 N.C. App. at 121-22, 339 S.E.2d at 14 (citation omitted).

Accordingly, based on Dr. DeFranzo's testimony and the test enunciated in *Booker*, we conclude the evidence was sufficient to support the Full Commission's finding that Plaintiff's carpal tunnel syndrome is a compensable occupational disease.

B. Disability

[2] Defendant next contends that Plaintiff failed to establish disability within the meaning of the Act. We disagree.

An employee who suffers a compensable injury is disabled under the Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). Consequently, determination of whether a worker is disabled focuses on the injured employee's diminished capacity to earn wages, rather than upon his physical impairment. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). The employee has the burden of proving the existence and extent of his disability, *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E.2d 857 (1965), and he may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable

1. In *Keller*, this Court held that the Commission improperly awarded compensation to the plaintiff, a patrol officer, for phlebitis because that disease was "not peculiar to the occupation of patrol officer, but rather is peculiar to all occupations which require a great deal of sitting whether the profession be that of a secretary, judge, or airline pilot." 65 N.C. App. at 678, 309 S.E.2d at 545.

2. Although the North Carolina Supreme Court granted discretionary review, the case was never heard so no Supreme Court decision was rendered.

> of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

The Full Commission concluded that Plaintiff is temporarily totally disabled and thus entitled to an award for total disability under N.C. Gen. Stat. § 97-29, and that Plaintiff met his burden of proving disability under the first prong of *Russell*. While we agree with the Full Commission's ultimate conclusion that Plaintiff is totally disabled and entitled to temporary total disability benefits, we conclude that Plaintiff has met his burden of proving disability under the third prong of *Russell*.

In support of its conclusion that Plaintiff is entitled to an award for total disability, the Full Commission made the following pertinent findings of fact:

> 1. As of the date of the hearing before the Deputy Commissioner, Plaintiff was thirty-eight years of age, having a date of birth of September 8, 1967, and was a high school graduate.
>
> 2. At the time of the filing of his claim, Plaintiff had worked for Defendant as a custodian at an assigned recreational center for approximately fifteen years. . . .
>
> . . . .
>
> 5. . . . Dr. DeFranzo diagnosed Plaintiff as having bilateral carpal tunnel syndrome and excused Plaintiff from work beginning March 4, 2004. . . .
>
> 6. Prior to the filing of his claim in this matter, Plaintiff had been diagnosed with gout, arthritis, hypercholesterolemia, congestive heart failure, underlying idiopathic cardiomyopathy, obesity, atrial fibrillation, hypertension, diabetes, and degenerative joint disease of his knees. . . .
>
> . . . .

> 9. For treatment of Plaintiff's bilateral carpal tunnel syndrome, Dr. DeFranzo recommended surgical release procedures. On June 12, 2004, Dr. DeFranzo performed a release on Plaintiff's left wrist. Dr. DeFranzo medically excused Plaintiff from all work pending an appointment with a rheumatologist and referred him to physical therapy. Dr. DeFranzo recommended performing the right release procedure after Plaintiff had sufficiently recovered from the left release procedure. As of the hearing date before the Deputy Commissioner, Plaintiff had not undergone this right wrist procedure.
>
> 10. Dr. DeFranzo continued to treat Plaintiff until September 2004, when he referred Plaintiff to a rheumatologist. As of the date of the hearing before the Deputy Commissioner, a rheumatologist had not treated Plaintiff. . . .
>
> . . . .
>
> 16. Based upon the credible medical and vocational evidence of record, the Full Commission finds that as a result of his bilateral carpal tunnel syndrome, Plaintiff has been unable to earn any wages in any employment since March 4, 2004.

A thorough review of the record establishes that these findings of fact are supported by competent evidence and thus are binding on appeal. Defendant argues, however, that Plaintiff did not offer any evidence that it would be futile for him to search for a job. In support of this argument, Defendant relies on Dr. DeFranzo's testimony that

> this kind of a person could have a security job, for instance, where they're just punching a time clock. And if they're, you know, not in a position where they have to combat an individual. If they're looking at monitor screens, you know, there are probably things he could do if his education would allow or if he can be reeducated to allow him to do other things.

In *Little v. Anson Cty. Schs. Food Serv.*, 295 N.C. 527, 246 S.E.2d 743 (1978), our Supreme Court determined that the Full Commission erred in denying the plaintiff benefits for total disability based on the testimony of a physician that "there are some gainful occupations that someone with [plaintiff's] degree of neurological problem could pursue[.]" *Id.* at 531, 246 S.E.2d at 745. The Court stated:

> We first note that [the physician's] quoted statement is an oblique generality which sheds no light on plaintiff's capacity to earn

> wages. Uncontradicted evidence establishes that she is over fifty years of age, somewhat obese, has an eighth grade education, and at the time of her accident had been working as a laborer earning less than $2.00 per hour. The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity.
>
> . . . .
>
> [The physician's] testimony sheds no light on plaintiff's capacity to pursue gainful employment. Consequently his testimony affords no basis for the Commission to conclude plaintiff has not suffered total incapacity for work.

Id. at 531-32, 246 S.E.2d at 746.

As in *Little*, here the relevant inquiry is whether Plaintiff himself is capable of working and earning wages, not whether all or some persons with Plaintiff's degree of injury have such capacity. Dr. DeFranzo's quoted statement is a generality which sheds no light on Plaintiff's capacity to earn wages. Thus, this statement affords no basis to conclude that Plaintiff has not suffered total incapacity for work. In fact, Dr. DeFranzo never released Plaintiff to work. He testified that Plaintiff "was unable to perform any job that would involve significant repetitive activity or any type of heavy-duty lifting with his hands" and that if Plaintiff was no better than the last time Dr. DeFranzo had seen Plaintiff in September 2004,[3] he would suggest that Plaintiff seek vocational rehabilitation to be assigned a "permanent sedentary light-duty type of job . . . ."

Furthermore, the fact that Plaintiff can perform light-duty work does not in itself preclude the Full Commission from making an award for total disability if the evidence shows that, because of pre-existing limitations, Plaintiff is not qualified to perform the kind of light-duty jobs that might be available in the marketplace. *Peoples*, 316 N.C. 426, 342 S.E.2d 798.

> [I]f other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compen-

3. At the hearing, Plaintiff was unable to make a fist with his left hand and indicated that it is "swollen all the time now." Plaintiff also testified that he has no use of his right hand as he can't grip anything with it, and that "everything" has gotten worse.

> sated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health.

Little, 295 N.C. at 532, 246 S.E.2d at 746.

Here, the uncontradicted evidence established that Plaintiff has only a high school education, had been working as a custodian for Defendant for almost his entire adult working life, and has a litany of medical problems including gout, arthritis, hypercholesterolemia, congestive heart failure, underlying idiopathic cardiomyopathy, obesity, atrial fibrillation, hypertension, diabetes, and degenerative joint disease of his knees. There was no evidence that Plaintiff was offered or received any kind of vocational rehabilitation services. Given Plaintiff's limited education, limited work experience, and limited training, in addition to his poor health, his compensable injury causes him a greater degree of incapacity than the same injury would cause some other person with superior education or work experience, or who is in better health. Thus, all the evidence tends to show that any current effort by Plaintiff to obtain sedentary light-duty employment, the only employment Dr. DeFranzo testified that Plaintiff is physically capable of performing, would have been futile.[4]

Accordingly, the Full Commission did not err in concluding that Plaintiff is temporarily totally disabled under N.C. Gen. Stat. § 97-29 and entitled to compensation therefor.

C. Apportionment

[3] Next, Defendant contends the Full Commission erred in not apportioning Plaintiff's benefits because the evidence presented indicated that "only a small quantifiable percentage of Plaintiff's injuries were [sic] related to his employment."

Where a plaintiff is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the plaintiff is entitled to an award for total disability under N.C. Gen. Stat. § 97-29. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 465 S.E.2d 343 (1996).

4. We note that, as of the date of the hearing, treatment recommended by Dr. DeFranzo for Plaintiff's carpal tunnel syndrome had not been completed, Plaintiff had not reached maximum medical improvement, and Dr. DeFranzo testified without contradiction that it would be necessary for Plaintiff to be further evaluated to determine the extent of permanent impairment to his hands after he reached maximum improvement.

However, a plaintiff's total disability benefits may be apportioned when sufficient evidence is presented to allow the Commission to ascertain the percentage of the plaintiff's disability that is caused by the occupational disease. *Weaver v. Swedish Imports Maint., Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987). Thus, apportionment is not proper where there is no evidence attributing a percentage of the plaintiff's total incapacity to earn wages to his compensable injury, *Errante v. Cumberland Cty. Solid Waste Mgmt.*, 106 N.C. App. 114, 415 S.E.2d 583 (1992), or where the evidence before the Commission renders an attempt at apportionment between work-related and non-work-related causes speculative. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

In *Errante*, the evidence established that the plaintiff's non-work-related anemia and diabetes caused part of the plaintiff's permanent and total disability, thus permitting the application of judicial apportionment. However, "no evidence was presented attributing any percentage of plaintiff's total incapacity [to earn wages] solely to his compensable injuries." *Errante*, 106 N.C. App. at 120, 415 S.E.2d at 586. Furthermore, a testifying physician stated that there was "no way anybody [could] honestly say" what percentage of the plaintiff's total disability was caused by his compensable injuries and what percentage was caused by his noncompensable medical problems. *Id.* at 120, 415 S.E.2d at 587. Accordingly, the Court ruled that the "plaintiff [was] entitled to full compensation for total and permanent disability." *Id.*

In *Counts*, 121 N.C. App. 387, 465 S.E.2d 343, the plaintiff injured her shoulders while working on an assembly line. A doctor assigned a 20 percent permanent partial disability rating to the use of both arms. The plaintiff also suffered from a non-job-related arthritic condition of her hands. This Court refused to apportion the plaintiff's award of total disability compensation as the permanent partial disability rating did not address what percentage of the plaintiff's total disability to earn wages was attributable to her compensable arm and shoulder injury and what percentage was attributable to her non-compensable osteoarthritic condition. "Thus, there was no evidence from which the Commission could apportion the award and [the] plaintiff [was] entitled to full compensation for her total and permanent disability." *Id.* at 391, 465 S.E.2d at 346.

Here, on direct examination, Dr. DeFranzo testified as follows:

> A. . . . I thought that [Plaintiff] had about a five (5) percent permanent impairment in each hand from carpal tunnel syn-

drome . . . and that the gout and osteoarthritis was so severe in this patient that he may have actually had a fifty (50) percent disability in each hand; but five (5) percent of that impairment would be from carpal tunnel syndrome in each hand.

. . . .

Q. Doctor, is the Plaintiff's carpal tunnel syndrome debilitating to any extent?

A. The carpal tunnel syndrome itself has given him a five (5) percent disability in each hand, however, his arthritis and his gout have given him significant more disability. And in my opinion, I thought he had probably a fifty (50) percent disability in each hand. His joints are extremely stiff and they do not move, which limits his grip strength, and he has pain when he attempts to use his hands repetitively now. And all those factors together contribute to his disability.

. . . .

Q. Doctor, you—in your letter—assigned the patient a permanent partial disability rating of up to fifty (50) percent of his hands?

. . . .

Would it be necessary for you to give an accurate opinion of his partial and permanent disability—would it be necessary for you to see him again or would it be helpful?

A. Yes. When we do a disability rating, we actually measure the motion in each joint—each and every joint of the hand. . . .

On cross-examination, Dr. DeFranzo further testified as follows:

Q. Is there any way to say—to categorize the job or, you know, any sort of attributation of the job as contributing to his carpal tunnel "x" percent over the gout or over the arthritis that he has?

A. If it's osteoarthritis and gout—and the gout is reasonably well controlled, in my opinion is probably, you know, sixty (60) percent the job, since he did it for fifteen (15) years, and forty (40) percent the other factors. That would be probably my assessment; however, I think his disability purely from carpal tunnel syndrome is probably going to be five (5) percent in each hand from carpal tunnel syndrome. So the majority of his disability is

from the arthritis and the gout, and the stiffness in his hands and lack of motion, which are caused by the arthritis.

. . . .

Q. I know you gave a five (5) percent PPD rating for carpal tunnel, but there's another rating of fifty (50) percent. Do I understand it correctly that you're saying, "I'm giving him a fifty (50) percent as of February, but really to make this an accurate diagnosis, I'd like to see him again." . . .

A. Yes, it—I'm just saying that five (5) percent of his disability is from the carpal tunnel syndrome in each hand; however, his hands just don't work ninety-five (95) percent.

. . . .

He's got at best—I thought—at that time about a fifty (50) percent use of his hands, not from just the carpal tunnel syndrome, but from all the other contributing conditions. Now, a large part of that sixty (60) percent might be work-related if it's just wear-and-tear osteoarthritis.

Defendant argues that the above testimony shows that carpal tunnel syndrome accounts for only five percent of Plaintiff's disability. We disagree. To the contrary, it appears that the five percent "disability" to which Dr. DeFranzo testified most likely represents a permanent partial disability (or functional impairment) rating and not the extent to which Plaintiff's carpal tunnel syndrome contributed to his overall disability. As in *Counts*, a permanent partial disability rating is not evidence of the extent to which Plaintiff's carpal tunnel syndrome contributed to his inability to earn wages. At best, Dr. DeFranzo's testimony is equivocal as to whether he was expressing an opinion on a permanent partial impairment rating or attempting to apportion the percentage to which Plaintiff's occupational disease contributed to his disability. When evidence is capable of more than one interpretation, the Commission is not required to accept an interpretation urged by one party over other obvious interpretations. It is also notable that Dr. DeFranzo was never asked what percentage of Plaintiff's inability to earn wages was attributable solely to his carpal tunnel syndrome. As in *Errante* and *Counts*, we thus conclude here that the evidence was insufficient to require the Commission to apportion the award.

In *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 360 S.E.2d 696 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988), this

Court remanded the case to the Industrial Commission for further findings regarding whether any portion of the plaintiff's total incapacity to work was caused by conditions unrelated to employment. The plaintiff was diagnosed with silicosis after 23 years of exposure to silica dust and stopped working as a result. The Commission awarded the plaintiff total disability benefits. Advisory Medical Committee reports suggested that the plaintiff was completely incapacitated for work by reason of silicosis. However, the testimony and report of a physician tended to show that the plaintiff had, in addition to silicosis, a chronic obstructive lung disease which was due to smoking and possibly to asthma. The physician also stated that 50 percent of the plaintiff's total respiratory impairment was unrelated to the silicosis. The Commission found that the plaintiff was "totally disabled because of his pulmonary condition. The occupational disease silicosis makes a very significant contribution to plaintiff's total disability." *Id.* at 211, 360 S.E.2d at 697. However, because the Commission failed to make specific findings regarding the portion of the plaintiff's total incapacity to work that was caused by his non-work-related health conditions, this Court remanded the case for specific findings.

In this case, however, it is not proper to remand to the Full Commission for further findings of fact because, unlike in *Pitman* where the Commission "failed to resolve crucial issues of fact" regarding apportionment, *id.* at 215, 360 S.E.2d at 699, here, the Commission specifically found that "[b]ased upon the credible medical and vocational evidence of record, the Full Commission finds that as a result of his bilateral carpal tunnel syndrome, Plaintiff has been unable to earn any wages in any employment since March 4, 2004." Insufficient evidence was presented showing what, if any, percentage of Plaintiff's disability was caused solely by his carpal tunnel syndrome. Moreover, the evidence does not establish that Plaintiff would have been disabled as the result of his pre-existing health conditions in the absence of the work-related carpal tunnel syndrome. Even after Plaintiff was diagnosed with congestive heart failure and gout, and suffered two mini strokes, he continued to work with no change in his performance or duties. It was only after he "lost all the uses of [his] hands and wrists" as a result of his carpal tunnel syndrome that he was forced to stop doing his job.

Accordingly, as there was competent evidence to support the Commission's finding that Plaintiff was disabled as a result of his bilateral carpal tunnel syndrome, and insufficient evidence was

presented from which the Commission could apportion the award, the Commission correctly awarded Plaintiff full compensation for his total disability.

D. Maximum Medical Improvement

[4] By its final assignment of error, Defendant contends the Full Commission erred in concluding that Plaintiff had not reached maximum medical improvement from his carpal tunnel syndrome. We disagree.

The term "maximum medical improvement" is not defined by statute. N.C. Gen. Stat. § 97-31 provides compensation for temporary disability during the "healing period." The healing period ends when, "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 289, 229 S.E.2d 325, 329 (1976). The point at which the injury has stabilized is often called "maximum medical improvement." *Carpenter v. Indus. Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985).

Here, Dr. DeFranzo testified that he first saw Plaintiff in February of 2004, and that nerve conduction studies were done on Plaintiff's hands. The results of those studies were so significant for carpal tunnel syndrome that Dr. DeFranzo did not feel Plaintiff should continue to work until after surgery. Plaintiff was written out of work on 4 March 2004 and never released back to work. Plaintiff underwent surgery on his left hand on 19 April 2004, but surgery was never done on Plaintiff's right hand. Dr. DeFranzo testified that he would want to see Plaintiff again to determine if Plaintiff may need surgery on his right hand, or whether Plaintiff "may continue to have problems with his hands that later will not be correctable by surgery."

Although Plaintiff needed physical therapy after his left carpal tunnel release surgery, he was only able to go to therapy a couple of times before his health insurance ran out. He testified that each visit to the therapist would have cost him "maybe between 50 and 100 dollars" and that continuing his medical insurance under COBRA would have cost him about $300 a month, almost one third of his monthly income.

Plaintiff was last examined by Dr. DeFranzo on 29 September 2004. Dr. DeFranzo testified that if Plaintiff had not received any treatment since that date, he would need further medical treatment for his hands. Dr. DeFranzo also testified that it would be necessary

to see Plaintiff again in order to give an accurate opinion on Plaintiff's "proper disability rating[.]"

Defendant argues that, like the plaintiff in *Aderholt v. A.M. Castle Co.*, 137 N.C. App. 718, 529 S.E.2d 474 (2000), who voluntarily chose not to undergo further surgery, and thus was found to have reached maximum medical improvement, Plaintiff's "decision to discontinue treatment" in this case necessarily leads to the conclusion that he has reached maximum medical improvement. However, as Defendant points out, Plaintiff discontinued his treatment for financial reasons. More specifically, Plaintiff's health insurance expired after he left work due to his medical conditions. Thus, unlike the plaintiff in *Aderholt*, Plaintiff's inability to seek medical treatment here was hardly a voluntary "decision to discontinue treatment." Furthermore, unlike the plaintiff in *Aderholt*, evidence in this case indicates that Plaintiff will resume the treatment required to stabilize his carpal tunnel syndrome when he is financially able to do so.

Accordingly, as the evidence tends to show that Plaintiff's medical treatment for his carpal tunnel syndrome may not be complete, that Plaintiff requires further medical evaluation at a minimum, and that Plaintiff's condition has not stabilized, the Commission correctly determined that Plaintiff has not reached maximum medical improvement. Defendant's assignment of error is overruled.

For the reasons stated above, the decision of the Full Commission is

AFFIRMED.

Judge CALABRIA concurs.

Judge ARROWOOD concurs in part and dissents in part per separate opinion.

ARROWOOD, Judge concurring in part and dissenting in part.

I concur in the holdings announced in Sections A, B, and D of the Court's majority opinion. I respectfully dissent from Section C of the Court's opinion affirming the Commission's failure to apportion Claimant's disability.

The Commission found and concluded that Claimant's employment neither caused nor significantly contributed to his gout or

arthritis. These findings and conclusions when coupled with Dr. DeFranzo's testimony cited by the majority at pages 15 through 17 of the Opinion are, in my opinion, sufficient to require the Commission to make additional findings regarding what portion of Claimant's disability is related to his employment.

I would, therefore, remand this case for further findings regarding what percentage of Claimant's disability is attributable to his job with the City. I believe such additional findings are mandated by *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987) and *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 360 S.E.2d 696 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.29 924 (1988).

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

No. COA06-1712

(Filed 5 February 2008)

1. Appeal and Error; Schools and Education— appealability—school funding—mootness

Defendant county commissioners' appeal from a school funding dispute under N.C.G.S. § 115C-431 was not moot even though it involved fiscal year 2006-2007 which has ended, because: (1) N.C.G.S. § 115C-431 was amended in 2006 prior to the date of the hearing of the present appeal, and it provided that the conclusion of the school or fiscal year shall not be deemed to resolve the question in controversy between the parties while an appeal is still pending; and (2) defendant filed notice of appeal within the 2006-2007 fiscal school year.

2. Schools and Education— school funding dispute—subject matter jurisdiction

The trial court had subject matter jurisdiction over plaintiff board of education's action in a school funding dispute case because: (1) plaintiff's claim is specifically authorized by N.C.G.S. § 115C-431(c); and (2) neither *Leandro I*, 346 N.C. 336 (1997), nor *Leandro II*, 358 N.C. 605 (2004), contain any suggestion that the trial court lacked jurisdiction to adjudicate this dispute under N.C.G.S. § 115C-431.

3. Schools and Education— school funding dispute—motion to dismiss—School Budget Act

The trial court did not err by denying defendant county commissioners' motion to dismiss plaintiff board of education's complaint in a school funding dispute case even though defendant contends the complaint and action are contrary to the North Carolina Constitution as interpreted in *Leandro I* and *Leandro II*, because: (1) contrary to defendant's reliance on *Leandro I* and *Leandro II*, this case is governed by the School Budget Act under N.C.G.S. § 115C-431(c); and (2) plaintiff's complaint was sufficient to state a claim upon which relief could be granted, and it also included as attachments the plaintiff's budget request with allegations of detailed information as to the amounts of funding needed to support the county's public schools.

4. Schools and Education— school funding dispute—motion for continuance—trial scheduled for next session of court

The trial court did not abuse its discretion or err by denying defendant board of commissioners' motion for a continuance of the trial of a school funding dispute even though defendant contends it denied defendant's due process rights under the North Carolina and United States Constitutions by holding the trial so quickly after plaintiff board of education filed the action instead of waiting for the first succeeding term of the superior court in the county as provided under N.C.G.S. § 115C-431, because: (1) the court scheduled the trial for the next session of court, which was the next week; (2) the statute, read as a whole, sets forth a detailed procedure for school budget disputes to be resolved as quickly as possible, and the legislature intended for the jury trial to be held as soon as possible; (3) the time which would normally be needed for discovery in other types of civil litigation may not be a consideration under N.C.G.S. § 115C-431 since the county board of commissioners has full authority to call for, and the board of education has the duty to make available to the commissioners upon request, all books, records, audit reports, and other information bearing on the financial operation of the local school administrative unit under N.C.G.S. § 115C-429(c); and (4) the record contained no indication that defendant requested any information that plaintiff failed to provide in regard to the budget request, either under N.C.G.S. § 115C-429 or through discovery under the Rules of Civil Procedure.

5. Schools and Education— school funding dispute—necessary parties

The trial court did not err by failing to grant defendant county commissioners' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(7) based on an alleged failure to join necessary parties, including the State of North Carolina and the North Carolina Board of Education, because: (1) N.C.G.S. § 115C-431(c) does not address the contribution of the State to the school budget and makes no provision for the State to participate at any stage of the process, including submission of the budget request and mediation to resolve the dispute; and (2) nothing in *Leandro I* or *Leandro II* indicated the State of North Carolina was a necessary party to a lawsuit under N.C.G.S. § 115C-431(c).

6. Schools and Education— school funding dispute—motion for directed verdict

The trial court did not err by denying defendant county commissioners' two motions for directed verdict, one based on the same grounds as the N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss that plaintiff board of education allegedly failed to allege or prove that defendant did not adequately fund school current expenses in a category the General Assembly has established a positive duty for a county to fund, and another under N.C.G.S. § 1A-1, Rule 50 at the close of plaintiff's case, because: (1) a thorough review of the trial transcript showed that plaintiff presented sufficient evidence for its case to be submitted to the jury; (2) plaintiff presented evidence as to the amount of money needed from sources under the control of defendant; (3) plaintiff was not required to present evidence as to the amount of money needed from the State Public School Fund, which was not under the control of defendant, in order to survive a motion for directed verdict; and (4) the issue to be decided by the jury related only to the local current expense fund, and plaintiff presented evidence of all sources of revenue to this fund and of all of the expenses to be paid from this fund.

Appeal by defendant from judgment entered 9 August 2006 by Judge William C. Griffin, Jr., in Superior Court, Beaufort County. Heard in the Court of Appeals 23 August 2007.

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

Garris Neil Yarborough for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment entered by Judge William C. Griffin, Jr. in Superior Court, Beaufort County determining that $10,200,000 was the amount of money needed by plaintiff to maintain a system of free public schools. For the following reasons, we find no error.

I. Background

Plaintiff Beaufort County Board of Education filed a complaint against defendant Beaufort County Board of Commissioners pursuant to N.C. Gen. Stat. § 115C-431(c), seeking resolution of a dispute regarding the funding of the Beaufort County schools for the 2006-2007 fiscal year.[1] Plaintiff alleges: On 27 March 2006, plaintiff approved its budget for the 2006-2007 fiscal year. On 1 May 2006, plaintiff submitted its budget request for the 2006-2007 fiscal year to defendant. On 5 June 2006, plaintiff approved a revised budget request and submitted this revised request to defendant. The revised budget request included increases necessary to comply with state mandated budget increases. On 28 June 2006, defendant adopted a budget ordinance for fiscal year 2006-2007, which allocated $9,434,217 from county revenues to the Beaufort County school administrative local current expense fund, an amount which was $2,672,087 less than plaintiff had requested.

On 29 June 2006, plaintiff adopted a resolution which found in part that "the amount of money appropriated by the Beaufort County Board of Commissioners for the 2006-2007 school year to the Board of Education's local current expense fund is not sufficient under North Carolina General Statute § 115C-431, or otherwise, to support a system of free public schools." Plaintiff requested a joint mediation with defendant, as provided for by N.C. Gen. Stat. § 115C-431. The two boards held a joint public meeting on 5 July 2006 to consider the 2006-2007 fiscal year budget request. The boards then participated in mediation on 5 and 13 July 2006, which ended in an impasse on 13 July 2006. On Friday, 14 July 2006, plaintiff filed a complaint against defendant pursuant to N.C. Gen. Stat. § 115C-431, seeking a jury trial

1. The fiscal year runs from 1 July to 30 June. N.C. Gen. Stat. § 115C-423(4) (2006). The 2006-2007 fiscal year, which is at issue here, ran from 1 July 2006 to 30 June 2007. *See* N.C. Gen. Stat. § 115C-423(4).

to resolve the dispute regarding the funding of the Beaufort County schools for the 2006-2007 fiscal year.

On Monday, 17 July 2006, the parties' attorneys and the court held a telephone conference to discuss scheduling issues. Both parties were directed to appear before the court on 19 July 2006. On Tuesday, 18 July 2006, defendant filed a "Verified Motion To Calendar Civil Case For Trial," requesting that trial begin during the next term of court, which would begin on 1 January 2007. On Wednesday, 19 July 2006, the trial court denied defendant's motion and ordered the parties to appear for trial starting on 20 July 2006, the next day. On 19 July 2006, defendant filed a petition for writ of supersedeas and temporary stay with this Court, seeking to delay the trial. On the same date this Court allowed the motion for temporary stay. On 20 July 2006, this Court denied the petition for writ of supersedeas and dissolved the temporary stay. The trial proceedings began on 19 July 2006 and ended on 27 July 2006.

During the trial, on 24 July 2006, defendant filed two motions to dismiss. The first motion to dismiss was based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) "for failure to state a claim upon which relief may be granted," based upon

> the funding standards for public schools established by the North Carolina Supreme Court in *Leandro, et al. v. State of North Carolina, et al.*, 346 N.C. 336, 488 S.E.2d 249 (1997) 'Leandro I', and *Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 358 N.C. 605, 599 S.E.2d 365 (2004), 'Leandro II.'

The second motion to dismiss was based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(7), alleging that plaintiff failed to join "necessary parties, to wit, the State of North Carolina and the State Board of Education, in this action involving current expense funding only for local public education". Defendant argued that pursuant to *Leandro I* and *Leandro II* the "State has the primary obligation for funding the current expense aspects of public education at the local level in a higher amount than the standard under N.C. Gen. Stat. § 115C-431 in each and every county of the State." The trial court denied both motions to dismiss and also denied defendant's motion for directed verdict at the close of plaintiff's evidence.

The issue submitted to the jury was "[w]hat amount of money is needed from sources under the control of the Board of County Commissioners to maintain a system of free public schools in the Beaufort County School System[.]" The jury verdict was in the

amount of $10,200,000, and the trial court entered judgment in this amount on 9 August 2006.

Defendant appeals from this judgment, raising six issues: (1) whether the trial court lacked subject matter jurisdiction; (2) whether the trial court erred in denying defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because the complaint and action were contrary to North Carolina law; (3) whether the trial court erred in denying defendant's motion for a continuance; (4) whether the trial court erred in denying defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7); (5) whether the trial court erred in denying defendant's motion for directed verdict because the complaint and action were contrary to North Carolina law; and (6) whether the trial court erred in denying defendant's motion for directed verdict at the close of plaintiff's case because plaintiff failed to meet the burden of showing it was entitled to additional current expense funding from defendant.

II. Mootness

[1] The first issue we must address is whether this appeal is moot, as the 2006-2007 fiscal year is now over. This Court held in *Cumberland Co. Bd. of Educ. v. Cumberland Co. Bd. of Comrs.* that an appeal of a school funding dispute under N.C. Gen. Stat. § 115C-431 is moot if the fiscal year for which funding is in dispute has ended. 113 N.C. App. 164, 438 S.E.2d 424 (1993). However, N.C. Gen. Stat. § 115C-431(d) has been amended since the *Cumberland County* case. *See* N.C. Gen. Stat. § 115C-431(d) (2007); *see also Cumberland Co. Bd. of Educ.*, 113 N.C. App. 164, 438 S.E.2d 424.

The amendment was ratified 14 June 2007 and approved 20 June 2007, prior to the date of hearing of this appeal. N.C. Gen. Stat. § 115C-431(d). The amended statute provides that "[t]he conclusion of the school or fiscal year shall not be deemed to resolve the question in controversy between the parties while an appeal is still pending." *See id.* Defendant filed notice of appeal on 24 August 2006, within the 2006-2007 fiscal school year. Therefore, this appeal was "pending" when the fiscal year ended and this appeal is not moot because "[t]he conclusion of the . . . fiscal year [did] not . . . resolve the question in controversy." *See id.*

III. Subject Matter Jurisdiction

[2] Defendant argues that the judgment must be vacated because the court did not have subject matter jurisdiction over the plain-

tiff's action. Defendant contends that the court has no jurisdiction to hear this matter, based upon, *inter alia*, Article IX, § 2 of the North Carolina Constitution as well as *Leandro I* and *Leandro II*. Essentially defendant argues that under North Carolina law, local governments have very limited requirements for funding the public schools, as the primary responsibility for funding a "general and uniform system of free public schools" is upon the State of North Carolina. *See* N.C. Const. art. IX, § 2. Defendant contends its contribution is mostly discretionary. Defendant bases this argument upon the North Carolina Constitution, specifically that

> [t]he General Assembly *may* assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education *may* use local revenues to add to or supplement any public school or post-secondary school program.

See id. (emphasis added). Defendant argues it has provided the required school funding and that any additional funding is discretionary, and thus it cannot be forced to fund more than it already has.

"This Court employs *de novo* review when it evaluates questions of subject matter jurisdiction." *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006), *disc rev. allowed*, 361 N.C. 351, 645 S.E.2d 767 (2007). We find defendant's reliance upon the North Carolina Constitution and *Leandro I* and *Leandro II* to be misplaced. *See Leandro II*, 358 N.C. 605, 599 S.E.2d 365 (2004); *Leandro I*, 346 N.C. 336, 488 S.E.2d 249 (1997). Defendant is correct that *Leandro I* and *Leandro II* recognize the primary constitutional responsibility of the State of North Carolina to provide sufficient funding for the public schools in the state so that "every child of this state [has] an opportunity to receive a sound basic education[.]" *Leandro I* at 347, 488 S.E.2d at 255; *see also Leandro II*, 358 N.C. 605, 599 S.E.2d 365. However, *Leandro I* also notes that "Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools" and further "provides that local governments may add to or supplement their school programs as much as they wish." *Leandro I* at 349, 488 S.E.2d at 256. "[T]he legislature has required local boards of education 'to provide *adequate* school systems within their respective local school administrative units, as

directed by law.' " *Leandro I* at 347, 488 S.E.2d at 255 (quoting N.C. Gen. Stat. § 115C-47(1) (Supp. 1996) (emphasis in original).

North Carolina has a very detailed statute governing school financing, "The School Budget and Fiscal Control Act" ("SBFCA"). N.C. Gen. Stat., Chap. 115C, Art. 31 (2005). The SBFCA prescribes a "uniform system of budgeting and fiscal control" which repeals "all provisions of general laws and local acts in effect as of July 1, 1976, and in conflict with the provisions of [] Article [31]". N.C. Gen. Stat. § 115C-424 (2005). The General Assembly has delineated the responsibilities of the State of North Carolina and local governments regarding school funding in the SBFCA and has recognized that at times there may be disputes as to the level of funding required on the local level between the boards of education and the boards of county commissioners; resolving such a dispute is exactly the purpose of N.C. Gen. Stat. § 115C-431. N.C. Gen. Stat. § 115C-431 (2005). N.C. Gen. Stat. § 115C-431(c) provides that "[w]ithin five days after an announcement of no agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice." *See id.*

Under North Carolina law, defendant is required to provide funding to plaintiff and upon disagreement as to sufficient funding plaintiff was authorized to file this suit. *See* N.C. Const. art. IX, § 2; N.C. Gen. Stat., Chap. 115C, Art. 31; N.C. Gen. Stat. § 115C-431(c); *see also Leandro I* at 349, 488 S.E.2d at 256. Plaintiff's claim is specifically authorized by N.C. Gen. Stat. § 115C-431(c), and neither *Leandro I* nor *Leandro II* contain any suggestion that the trial court lacked jurisdiction to adjudicate this dispute under N.C. Gen. Stat. § 115C-431. This assignment of error is overruled.

IV. Failure to State a Claim

[3] Defendant argues the trial court erred in failing to grant its motion to dismiss because plaintiff's complaint and action are contrary to the North Carolina Constitution as interpreted in *Leandro I* and *Leandro II*. Defendant claims plaintiff failed to allege or prove that "[d]efendant board of commissioners did not adequately fund school current expenses in a category the General Assembly has established a positive duty for a county to fund." Defendant argues that without this duty plaintiff could not bring a viable complaint or action.

> The standard of review on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is

> whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 600, 646 S.E.2d 826, 830 (2007) (citation and internal quotations omitted).

Again, defendant's reliance on *Leandro I* and *Leandro II* is misplaced. *See Leandro II*, 358 N.C. 605, 599 S.E.2d 365; *Leandro I*, 346 N.C. 336, 488 S.E.2d 249. This case is governed by the SBFCA. *See* N.C. Gen. Stat. § 115C-431(c).

Plaintiff's complaint alleges "[t]he amount appropriated by the FY 2007 Budget Ordinance to the Beaufort County school administrative unit local current expense fund for the fiscal year 2006-2007 is not sufficient to support a system of free public schools in Beaufort County" and is therefore "sufficient to state a claim upon which relief may be granted under [North Carolina General Statute § 115C-431]." *See Pinewood Homes, Inc.* at 600, 646 S.E.2d at 830. The complaint also included as attachments the plaintiff's budget request with allegations of detailed information as to the amounts of funding needed to support the Beaufort County public schools. Accordingly, these assignments of error are overruled.

V. Motion to Continue

[4] Defendant contends that the trial court erred in denying defendant's motion for a continuance because holding the trial so quickly after filing the action denied defendant due process pursuant to the North Carolina Constitution and the United States Constitution. Defendant argues that N.C. Gen. Stat. § 115C-431, which provides for trial to be set for the "first succeeding term of the superior court in the county," uses the word "term" as "the typical six-month assignment of superior court judges," while a "session" means "the typical one-week assignments within the term" and cites to *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005). Defendants therefore contend that the "first succeeding term" of court would have been the six month term beginning in January 2007. However, the court scheduled the trial for the next "session" of court, which was the next week. Defendant argues that it was forced to proceed to the trial of a multi-million dollar dispute "without any discovery, pretrial motions or even an answer . . . ."

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that dis-

> cretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Taylor, 354 N.C. 28, 33-34, 550 S.E.2d 141, 145 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002) (internal citations omitted).

N.C. Gen. Stat. § 115C-431 sets forth the procedure for resolution of a dispute regarding school funding between boards of education and boards of county commissioners. *See* N.C. Gen. Stat. § 115C-431. N.C. Gen. Stat. § 115C-431(c) provides in pertinent part that

> *[w]ithin five days* after an announcement of no agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice. The court shall find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total. Either board has the right to have the issues of fact tried by a jury. When a jury trial is demanded, the cause *shall be set for the first succeeding term of the superior court* in the county, and *shall take precedence over all other business of the court*. However, if the judge presiding certifies to the Chief Justice of the Supreme Court, either before or during the term, that because of the accumulation of other business, the public interest will be best served by not trying the cause at the term next succeeding the filing of the action, the Chief Justice shall *immediately call a special term* of the superior court for the county, *to convene as soon as possible*, and assign a judge of the superior court or an emergency judge to hold the court, and the cause shall be tried at this special term. The issue submitted to the jury shall be what amount of money is needed from sources under the control of the board of county commissioners to maintain a system of free public schools.

Id. (emphasis added). This statute, read as a whole, sets forth a detailed procedure for school budget disputes to be resolved as quickly as possible. *See* N.C. Gen. Stat. § 115C-431.

The SBFCA dictates each step of the process, from the preparation of the budget through any potential appeals. *See* N.C. Gen. Stat. §§ 115C-429(2005); 115C-431. The SBFCA requires a joint meeting, mediation, and the board of education to "make available to the board of county commissioners, upon request, all books, records, audit reports, and other information bearing on the financial operation of the local school administrative unit." N.C. Gen. Stat. § 115C-429(c), -431(a), (b). The SBFCA sets specific time deadlines for various steps, including 15 May for presentation of the budget request by the board of education, and upon disagreement a joint meeting of the two boards "within seven days after the day of the county commissioners' decision on the school appropriations[,]" completion of mediation by August 1, and filing a lawsuit "within five days after an announcement of no agreement by the mediator[.]" N.C. Gen. Stat. §§ 115C-429(a),-431(a)-(c). When we consider the SBFCA's procedural detail and time schedule as a whole, it is obvious that the procedure established is *sui generis*. *See* N.C. Gen. Stat. § 115C-431(d); N.C. Gen. Stat., Chap. 115C, Art. 31.

We note that the meaning of "term" and "session" of court often depends upon the context of its use. *See Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154, 446 S.E.2d 289, 292, n.1,2 (1994), *rehearing denied*, 337 N.C. 807, 449 S.E.2d 566. Our Supreme Court has stated that

> the words 'session' of court and 'term' of court are often used interchangeably. When used with reference to a court, term signifies the space of time during which the court holds a session. A session signifies the time during the term when the court sits for the transaction of business . . . . Although 1962 amendments to the North Carolina Constitution changed the word 'term' to 'session' when referring to the period of time during which superior court judges are assigned to court . . . the continued use of both 'term' and 'session' is proper . . . . The use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignments within the term.

Id. (internal citations and internal quotations omitted).

We must therefore consider the meaning of the "first succeeding term" of court in the specific context of N.C. Gen. Stat. § 115C-431(c). *See* N.C. Gen. Stat. § 115C-431(c). In this context, it is apparent that the legislature intended for the jury trial to be held as soon as possi-

ble. *Id.* Indeed, N.C. Gen. Stat. § 115C-431(c) uses the very words "as soon as possible" when it is necessary to call a special term of court for the trial because of other matters before the court. *See id.* If we were to accept defendant's interpretation of "term" as used in the statute, once mediation fails as of 1 August, and a lawsuit is filed within five days, the budget dispute lawsuit would then automatically be delayed, from early August until after 1 January of the next year, when the next six-month "term" of court begins. *See* N.C. Gen. Stat. § 115C-431(b), (c). This interpretation of the statute cannot be what the legislature intended, particularly as there is provision for the Chief Justice of the Supreme Court to "immediately" call a special term to hear the case, "to convene as soon as possible," if the "accumulation of other business" is such that "the public interest will be best served by not trying the cause at the term next succeeding the filing of the action [.]" *See* N.C. Gen. Stat. § 115C-431(c).

We also note that the time which would normally be needed for discovery in other types of civil litigation may not be a consideration under N.C. Gen. Stat. § 115C-431, as the county board of commissioners has "full authority to call for, and the board of education shall have the duty to make available to the board of county commissioners, upon request, all books, records, audit reports, and other information bearing on the financial operation of the local school administrative unit." *See* N.C. Gen. Stat. § 115C-429(c). Plaintiff claims defendant was aware of plaintiff's budget request as of 1 May 2006, when it was submitted to defendant. If defendant did not already have all of the information it deemed necessary for consideration of the budget request, defendant could simply request it pursuant to N.C. Gen. Stat. § 115C-429(c). *See* N.C. Gen. Stat. § 115C-429(c). Defendant admits that the parties had already been through the joint meeting and mediation as required by statute, which afforded two more opportunities to gather information regarding the plaintiff's budget request. *See* N.C. Gen. Stat. § 115C-431(b), (c). The record contains no indication that defendant requested any information that plaintiff failed to provide in regard to the budget request, either under N.C. Gen. Stat. § 115C-429 or through discovery under the Rules of Civil Procedure.

We cannot hold that the trial court abused its discretion or erred by its denial of defendant's motion to continue, considering the specific timing provisions and purposes of the SBFCA. *See* N.C. Gen. Stat. § 115C-431(d); N.C. Gen. Stat., Chap. 115C, Art. 31; *Taylor* at 33-34, 550 S.E.2d at 145. This assignment of error is overruled.

VI. Necessary Party

[5] Defendant next contends that the trial court erred by its failure to grant its motion for dismissal for failure to join necessary parties, specifically the State of North Carolina and the North Carolina Board of Education, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(7). Defendant argues that under *Leandro I* and *Leandro II*, the primary duty to fund educational programs is upon the State of North Carolina, and since plaintiff was seeking additional funding for "current expense categories that counties have no positive duty to fund," the State of North Carolina is a necessary party.

"[D]ismissal under Rule 12(b)(7) is proper only when the defect cannot be cured . . . ." *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). "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 his presence." *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438-39, 527 S.E.2d 40, 44 (2000) (citations and internal quotations omitted).

N.C. Gen. Stat. § 115C-431(c) provides that the parties to a lawsuit regarding a school budget dispute are the board of education and the board of county commissioners. *See* N.C. Gen. Stat. § 115C-431(c). Either board may request trial by jury, and the issue which is to be submitted to the jury is "what amount of money is needed *from sources under the control of the board of county commissioners* to maintain a system of free public schools." N.C. Gen. Stat. § 115C-431(c) (emphasis added). The court is directed to enter judgment "ordering the board of county commissioners to appropriate a sum certain to the local school administrative unit, and to levy such taxes on property as may be necessary to make up this sum when added to other revenues available for the purpose." N.C. Gen. Stat. § 115C-431(c). The statutorily provided for lawsuit deals only with funding of the county schools *"from sources under the control of the board of county commissioners*[.]" *See* N.C. Gen. Stat. § 115C-431(c). N.C. Gen. Stat. § 115C-431 does not address the contribution of the State to the school budget and makes no provision for the State to participate at any stage of the process, including submission of the budget request and mediation to resolve the dispute.

We find nothing in *Leandro I* or *Leandro II* which would indicate that the State of North Carolina is a necessary party to a lawsuit under N.C. Gen. Stat. § 115C-143(c). As the State of North Carolina

and the North Carolina Board of Education are not necessary parties to this action it was proper for the trial judge to deny defendant's 12(b)(7) motion to dismiss. *See Howell* at 491, 272 S.E.2d at 22. This assignment of error is also overruled.

VII. Motions for Directed Verdict

[6] Defendant made two motions for directed verdict. One motion was on the same grounds as the Rule 12(b)(6) motion to dismiss, claiming that plaintiff failed to allege or prove that "[d]efendant board of commissioners did not adequately fund school current expenses in a category the General Assembly has established a positive duty for a county to fund."

> The standard of review on denial of a directed verdict is well-established:
>
> > On appeal, the standard of review on a motion for directed verdict is whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury. The party moving for a directed verdict bears a heavy burden in North Carolina. A motion for directed verdict should be denied where there is more than a scintilla of evidence supporting each element of the plaintiff's case. In addition, when the decision to grant a motion for directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury.

Brookshire v. N.C. Dept. of Transp., 180 N.C. App. 670, 672, 637 S.E.2d 902, 904 (2006) (internal citations and internal quotations omitted). A thorough review of the trial transcript as analyzed below also shows that plaintiff presented sufficient evidence for its case to be submitted to the jury. *See Brookshire* at 672, 637 S.E.2d at 904. For the same reasons as stated above, this motion was properly denied.

Defendant also argues that the trial court erred by its failure to grant defendant's motion for directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50 at the close of plaintiff's case. Here defendant argues that plaintiff failed to present evidence necessary to prove its case because there was no evidence of the amount of the appropriations from the State Public School Fund for the 2006-2007 fiscal year. N.C. Gen. Stat. § 115C-426(e) provides that "[t]he local current expense fund shall include appropriations sufficient, when added to appropri-

ations from the State Public School Fund, for the current operating expense of the public school system[.]" N.C. Gen. Stat. § 115C-426(e) (2005). Thus, defendant argues that one variable in the equation is missing, and the jury could not possibly determine the amount of funding needed from the county if it did not know how much funding would be provided by the State Public School Fund.

As previously noted, on appeal

> [t]he standard of review on denial of a directed verdict . . . is whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.

Brookshire at 672, 637 S.E.2d at 904. North Carolina § 115C-426 provides:

> (a) The State Board of Education, in cooperation with the Local Government Commission shall . . . promulgate[] a standard budget format for use by local school administrative units throughout the State. . . .
>
> (b) The uniform budget format shall be organized so as to facilitate accomplishment of the following objectives: (i) to enable the board of education and the board of county commissioners to make the local educational and local fiscal policies embodied therein; (ii) to control and facilitate the fiscal management of the local school administrative unit during the fiscal year; and (iii) to facilitate the gathering of accurate and reliable fiscal data on the operation of the public school system throughout the State.
>
> (c) The uniform budget format shall require the following funds
>
> (1) The State Public School Fund.
>
> (2) The local current expense fund.
>
> (3) The capital outlay fund.
>
> In addition, other funds may be required to account for trust funds, federal grants restricted as to use, and special programs. . . .
>
> (d) The State Public School Fund shall include appropriations for the current operating expenses of the public school system

from moneys made available to the local school administrative unit by the State Board of Education.

(e) The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

(f) The capital outlay fund shall include appropriations for:

(1) The acquisition of real property for school purposes . . . .

(2) The acquisition, construction, reconstruction, enlargement, renovation, or replacement of buildings and other structures . . . .

(3) The acquisition or replacement of furniture and furnishings, instructional apparatus, data-processing equipment, business machines, and similar items of furnishings and equipment.

(4) The acquisition of school buses as additions to the fleet.

(5) The acquisition of activity buses and other motor vehicles.

(6) Such other objects of expenditure as may be assigned to the capital outlay fund by the uniform budget format.

N.C. Gen. Stat. § 115C-426(a)-(f) (2005).

N.C. Gen. Stat. § 115C-423(5) defines a "fund" as

an independent fiscal and accounting entity consisting of cash and other resources together with all related liabilities, obligations, reserves, and equities which are segregated by appropriate accounting techniques for the purpose of carrying on specific

> activities or attaining certain objectives in accordance with established legal regulations, restrictions or limitations.

N.C. Gen. Stat. § 115C-423(5) (2006). Therefore, each of the three "funds," the State Public School Fund, the local current expense fund, and the capital outlay fund, is an "independent fiscal and accounting entity" with specific activities and objectives. *See* N.C. Gen. Stat. § 115C-423(5), -426(c). The issues in dispute in this case relate only to the local current expense fund, not to the State Public School Fund or to the capital outlay fund. Therefore, plaintiff was required to present evidence of the amount of funding needed for the local current expense fund which would include the funds provided from the State Public School Fund, to provide for the current operating expenses of the Beaufort County Schools for the 2006-2007 fiscal year. *See* N.C. Gen. Stat. § 115C-426(e).

Defendant notes evidence in the record as to testimony on cross-examination from the superintendent, Dr. Jeffrey Moss ("Dr. Moss"), that he did not "have the number in front of [him]", as to the amount "being added by the State Public School Fund" to the local current expense fund. However, Dr. Moss testified in detail as to the amount of funds needed from defendant for the current operating expenses of the schools and plaintiff presented Exhibit P-54, which set forth in detail each revenue and expense item of the local current expense budget request as presented to defendant, showing the needs for the 2006-2007 fiscal year. Dr. Moss also testified as to the state funds that are included in the local current expense budget, stating that some funds from the state "come directly to the local school administrative unit." Dr. Moss noted the local current expense fund included "a total of all of the revenue sources that were available to the Beaufort County Schools in 2005-2006 that just ended June 30th."

Plaintiff presented evidence of the amount needed in the local current expense fund, in addition to the funds provided by the State Public School Fund, to provide for "the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners." N.C. Gen. Stat. § 115C-426(e). The issue which must be decided by the jury was the "amount of money . . . *needed from sources under the control of the board of county commissioners* to maintain a system of free public schools." N.C. Gen. Stat. § 115C-431(c) (emphasis added). Plaintiff presented

evidence as to the amount of money needed from sources under the control of defendant. Plaintiff was not required to present evidence as to the amount of money needed from the State Public School Fund, which is not under the control of defendant, in order to survive a motion for directed verdict. *See id*; *see also Brookshire* at 672, 637 S.E.2d at 904. The issue to be decided by the jury related only to the local current expense fund, and plaintiff presented evidence of all sources of revenue to this fund and of all of the expenses to be paid from this fund. The trial court did not err by its denial of defendant's motion for directed verdict. *See Brookshire* at 672, 637 S.E.2d at 904. This assignment of error is overruled.

VIII. Conclusion

The trial court did not err in entering judgment based upon the jury's verdict as to the funds needed from defendant to maintain a system of free public schools in the Beaufort County School System. For the foregoing reasons, we find no error.

NO ERROR.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. STANLEY MOORE

No. COA06-1671

(Filed 5 February 2008)

1. Criminal Law— use of informants—issues not preserved—credibility for jury

The trial court properly denied defendant's motions to dismiss cocaine charges arising from the use of informants based on improper delegation of authority and outrageous government conduct. Defendant did not preserve for appellate review constitutional issues or the question of entrapment, and the credibility of the informants was an issue for the jury.

2. Drugs— dwelling for keeping and using—use of dwelling as residence—sufficiency of evidence

There was sufficient evidence of maintaining a dwelling for keeping and selling cocaine where defendant used, treated, and

perceived the dwelling he shared with his fiancée as his residence, and not merely as a place he occupied from time to time.

3. Sentencing— prior offenses—out-of-state—stipulations not effective—issue of law

Stipulations to questions of law are generally not binding on the courts. Defendant's stipulation here to out-of-state prior convictions was not effective, the State failed to present evidence that defendant's prior Ohio offenses were substantially similar to North Carolina offenses, and the case was remanded for resentencing.

4. Sentencing— offense committed while on probation and pretrial release—legislative argument

There is no statutory support for defendant's argument that his rights were violated by increasing his prior record level and aggravating his sentence based on his being on probation and pretrial release when these offenses were committed. Further argument should be addressed to the General Assembly. N.C.G.S. § 15A-1340.14(b)(7); N.C.G.S. § 15A-1340.16(d)(12).

5. Appeal and Error— prior opinion of Court of Appeals—binding on subsequent panel

Subsequent panels of the Court of Appeals are bound by prior Court of Appeals decisions if not overturned by higher authority, and defendant's preservation assignments of error concerning aggravated sentencing were overruled.

Judge HUNTER concurring.

Appeal by defendant from judgments entered 13 April 2006 and 17 April 2006 by Judge James U. Downs in Transylvania County Superior Court. Heard in the Court of Appeals 9 October 2007.

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

Anne Bleyman, for defendant-appellant.

JACKSON, Judge.

Stanley Moore ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of two counts of possession of cocaine with the intent to sell or deliver, one count of misdemeanor maintaining and keeping a dwelling for the keeping and selling of

cocaine, and one count of sale and delivery of cocaine. For the following reasons, we hold no error in defendant's trial but remand the case for resentencing.

Detective Charles A. Hutcheson, Jr. ("Detective Hutcheson") of the Brevard Police Department and Officer Robert Shuler ("Officer Shuler") of the Transylvania County Sheriff's Office worked together as part of the Transylvania County Narcotics Task Force ("the Task Force"). Among other drug interdiction and investigatory tactics, members of the Task Force commonly employ the services of paid informants to purchase narcotics and identify drug dealers. Two such informants were Thomas Lamar Wynne ("Wynne") and Mary Ann Ferguson ("Ferguson").

On 1 March 2005, Wynne and his wife met with Detective Hutcheson and Officer Shuler. Detective Hutcheson searched Wynne, Wynne's wife, and their vehicle for drugs, finding none. The officers taped a digital recording device to Wynne's chest and wired Wynne's vehicle with a transmitting device. Detective Hutcheson gave Wynne $60.00 to use for the purchase of crack cocaine. At trial, Detective Hutcheson testified that when he provided informants, such as Wynne, with currency to use in controlled purchases, he would either photocopy the currency or write down the serial numbers. After Detective Hutcheson provided Wynne with the $60.00, Wynne and his wife departed, and Detective Hutcheson and Officer Shuler observed Wynne's vehicle turn onto Loeb Drive. At trial, Wynne testified that (1) he knocked on the door of 109 Loeb Drive, where defendant's fiancée, Wanda Robinson ("Robinson"), rented a house; (2) defendant answered and told Wynne to enter; (3) Wynne stated to defendant, "[L]et me get a 60"; and (4) defendant gave Wynne three rocks in exchange for the $60.00 provided by Detective Hutcheson. Following the transaction, Wynne gave Detective Hutcheson three rocks, stating that he had purchased the crack from defendant. Detective Hutcheson again searched Wynne and Wynne's vehicle, but found no other drugs.

On 8 March 2005, Wynne and his wife again met with Detective Hutcheson, who this time was accompanied by North Carolina Alcohol Law Enforcement Officer Webb Corthell ("Officer Corthell"). Detective Hutcheson searched Wynne and his vehicle for drugs, finding none. Officer Corthell wired Wynne with a digital recording device, and Detective Hutcheson wired Wynne's vehicle with a transmitting device. Detective Hutcheson provided Wynne with another $60.00 to purchase crack cocaine, and Wynne and his wife drove

to 109 Loeb Drive. When Wynne arrived, he encountered defendant working on an automobile in the driveway approximately fifty feet from the house. Wynne testified that he did not enter the house during this visit. Because it was getting dark outside, defendant asked Wynne to retrieve a flashlight, which Wynne obtained from his aunt across the street. Defendant testified, "[T]hat's the only time I said anything to [Wynne] and other than that, I had my head in that car . . . ." Wynne testified that after retrieving a flashlight, he told defendant that he "need[ed] a little" and that he was "in a rush." Wynne further testified that he asked defendant for "a 60" and that defendant provided "three rocks" in exchange for the $60.00. Defendant denied hearing Wynne ask for drugs. After the transaction, Wynne gave Detective Hutcheson three rocks. Detective Hutcheson again searched Wynne and Wynne's vehicle, but found no other drugs.

On 19 March 2005, defendant was arrested. The police never executed a search warrant on 109 Loeb Drive to determine if defendant possessed the currency provided to Wynne by Detective Hutcheson, and Detective Hutcheson acknowledged at trial that the specific dollar bills provided to Wynne were not recovered. On 22 March 2005, defendant posted bond and was released from pre-trial custody.

Meanwhile, Ferguson informed Detective Hutcheson that she likely could purchase drugs from defendant as well as individuals at the residence of Kenny Townsend ("Townsend") on Silversteen Road. On 14 June 2005, Ferguson met with Officer Shuler and Detective Tony Owen ("Detective Owen") of the Brevard Police Department. Detective Owen searched Ferguson for drugs, finding none, and Officer Shuler wired her with a digital recording device. Detective Owen provided Ferguson with $40.00 with which to purchase crack cocaine. Detective Owen and Officer Shuler then drove Ferguson to a restaurant within approximately 250 yards of Townsend's residence and watched as she walked toward Silversteen Road. When Ferguson knocked on the downstairs door of Townsend's residence, defendant answered. Ferguson was not expecting to see defendant there. Ferguson testified,

> I said is Kenny [Townsend] around and he [defendant] said no, what you need, something to that effect. And I says anything going on, and he said what you want? And I said I got 40. And he said . . . step inside [and] . . . close the door. When I closed the door it became very dark in that room, but I watched him walk

> back to the back left corner of that room, messed around there a little bit, he came back up to me, and there was a table right beside the door.
>
> He was at the table a minute, and I went to offer him the $40, and he just kind of stepped back. And I said oh, you want me to lay it down. I thought maybe he just, you know, felt a little weird about taking the money. When I laid it down, I cracked the door open, there were two rocks of crack cocaine laying on the table. They hadn't been there before. He brought them up and laid them down there.
>
> I picked up the crack and I said thanks, and he picked up . . . the money.

Defendant denied selling crack cocaine to Ferguson and testified that he was at Townsend's residence to borrow tools. After the transaction, Ferguson gave the crack cocaine to Detective Owen, and the officers searched Ferguson for other drugs, finding none.

On 7 February 2006, defendant was indicted for two counts of possessing cocaine with the intent to sell or deliver, one count of possessing a Schedule II controlled substance with the intent to sell or deliver, one count of maintaining a place to keep controlled substances, and two counts of selling or delivering a Schedule II controlled substance. On 13 April 2006, a jury found defendant (1) not guilty of one count of selling or delivering a Schedule II controlled substance, (2) not guilty of one count of possessing cocaine with the intent to sell or deliver, and (3) guilty of all remaining charges. After making findings on aggravating and mitigating factors, the trial court sentenced defendant as a prior record level III offender to the following consecutive terms of imprisonment: (1) two terms of twelve to fifteen months; (2) one term of twenty to twenty-four months; and (3) one term of 120 days. Defendant gave timely notice of appeal.

[1] On appeal, defendant first argues that the trial court erred in denying his motions to dismiss on the grounds of improper delegation of authority and outrageous government conduct. Specifically, defendant contends that the Task Force's practice of paying informants, such as Wynne and Ferguson, for each controlled purchase of drugs constituted an improper delegation of law enforcement duties and "the very sort of unfair, improper, extreme, unjustifiable or outrageous government conduct the courts must protect its citizens against." We disagree.

It is well-established that

> [t]he 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 quotation marks and citations omitted). "The trial court's conclusions of law, however, are reviewable *de novo*." *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Preliminarily, we note that defendant's arguments with respect to both delegation of law enforcement authority and outrageous government conduct are constitutional issues. *See*, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 424, 88 L. Ed. 834, 848 (1944) (indicating that delegation of governmental power to private individuals may violate due process); *United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989) (describing the outrageous government conduct defense in terms of due process). Defendant, however, made no constitutional argument at trial and, therefore, failed to preserve such an argument for appellate review. *See State v. Roache*, 358 N.C. 243, 291, 595 S.E.2d 381, 412 (2004).

Additionally, defendant argues in his brief, quoting *Velarde-Villarreal v. United States*, 354 F.2d 9, 13 (9th Cir. 1965), that "an eager informer is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." The issue of entrapment was not raised before the trial court. Therefore, we decline to review this on appeal. *See* N.C. R. App. P. 10(b)(1) (2006).

In his brief, defendant contends that "the Task Force's regular policy of paying drug addicts $100 per drug buy without careful management of those eager informers poses a clear danger." However, "paying informants to assist the government in uncovering criminal

conduct" is a "long-standing practice," *United States v. Anty*, 203 F.3d 305, 310-11 (4th Cir.), *cert. denied*, 531 U.S. 853, 148 L. Ed. 2d 84 (2000), and "it is sometimes necessary to compensate an informant before the informer will agree to undertake the often dangerous task of undercover investigation." *Reese v. State*, 877 S.W.2d 328, 332 (Tex. Crim. App. 1994). Although defendant quotes from a Ninth Circuit Court of Appeals decision that "[a] prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system," *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993), that same court ultimately

> decided on balance not to prohibit, as some have suggested, the practice of rewarding self-confessed criminals for their cooperation, or to outlaw the testimony in court of those who receive something in return for their testimony. Instead, we have chosen to rely on (1) the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system; (2) trial judges and stringent discovery rules to subject the process to close scrutiny; (3) defense counsel to test such evidence with vigorous cross examination; and (4) the wisdom of a properly instructed jury whose duty it is to assess each witness's credibility and not to convict unless persuaded beyond a reasonable doubt of the accused's guilt.

Id. at 335 (internal citations omitted).

In *State v. Brice*, 167 N.C. App. 72, 604 S.E.2d 356 (2004), this Court agreed with the Ninth Circuit's characterization of the issue as a credibility determination for the jury and not a decision for a trial court on a motion to dismiss. *Brice*, 167 N.C. App. at 77, 604 S.E.2d at 359 ("Our Supreme Court has stated that it is a 'long-standing principle in our jurisprudence . . . that it is the province of the jury, not the court, to assess and determine witness credibility.' " (omission in original) (quoting *Hyatt*, 355 N.C. at 666, 566 S.E.2d at 77)). Although defendant attempts to distinguish *Brice* on the basis that the payments to the informant in *Brice* "were not made to secure either her cooperation in defendant's arrest or her testimony at trial," *id.* at 77, 604 S.E.2d at 360, the record belies defendant's assertion. Detective Hutcheson testified: "We typically pay $100 per purchase that we document and that we feel like is a credible case to present to the court." There is no evidence here, however, that payments to Wynne and Ferguson were contingent upon arrests, testimony, convictions, or

any other factor. Their credibility was an issue for the jury, and the trial court properly denied defendant's motions to dismiss. Accordingly, defendant's assignment of error is overruled.

[2] Defendant next contends that the trial court erred in denying his motions to dismiss and submitting to the jury the charge of maintaining and keeping a dwelling for the purpose of keeping and selling cocaine.

Pursuant to North Carolina General Statutes, section 90-108(a)(7), it is illegal "[t]o knowingly keep or maintain any . . . dwelling house . . . 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." N.C. Gen. Stat. § 90-108(a)(7) (2005). Violation of this provision constitutes a misdemeanor, but "if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony." N.C. Gen. Stat. § 90-108(b) (2005). " 'Knowingly' means a person is aware of a high probability of a given activity's existence, whereas a person acts intentionally if he or she desires to cause the consequences of his or her act or that he or she believes the consequences are substantially certain to result." *State v. Hart*, 179 N.C. App. 30, 43, 633 S.E.2d 102, 110 (2006) (internal quotation marks, alterations, and citations omitted), *rev'd in part on other grounds*, 361 N.C. 309, 644 S.E.2d 201 (2007). In the case *sub judice*, defendant was indicted for felonious keeping or maintaining a dwelling for the purpose of keeping or selling a controlled substance, and the jury found defendant guilty of a misdemeanor pursuant to section 90-108(a)(7).

Defendant first argues that there was insufficient evidence that he kept or maintained the house at 109 Loeb Drive—the location of the 1 March 2005 transaction. This argument is without merit.

As this Court has held, to "[m]aintain 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) (omission in original) (quoting *Black's Law Dictionary* 859 (5th ed. 1979)), *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992). Whether a defendant "keeps or maintains" a dwelling requires the consideration of several factors, including, but not limited to, "ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of

repair expenses; and payment of rent." *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 417 (2001).

Here, the evidence tended to show that defendant (1) resided with his children and Robinson in the house at 109 Loeb Drive; (2) watched the children while Robinson worked in the evenings; and (3) contributed money toward household expenses when he had the ability. Additionally, defendant consistently described 109 Loeb Drive as his home and his property, and he noted that he earned income by repairing automobiles "at home, in my yard, and my driveway." Although defendant stated that there were times when he did not live with Robinson at 109 Loeb Drive, defendant clarified that these instances were the result of "little quarrels" between defendant and Robinson and that during these isolated instances, he lived in the shed behind the house. Defendant also explained that he kept various personal belonging in the shed, including his scooter, clothes, and tools. Finally, Robinson testified that defendant had two children with another woman and that those children would spend weekends with defendant and Robinson at 109 Loeb Drive. Although defendant contends that the State failed to present substantial evidence that he kept or maintained a dwelling at 109 Loeb Drive, the evidence shows that defendant used, treated, and perceived the dwelling as his residence and not merely as a place he "occupied . . . from time to time." *State v. Harris*, 157 N.C. App. 647, 652, 580 S.E.2d 63, 66 (2003).

Defendant further contends that even if the evidence showed that he kept and maintained the dwelling, the evidence failed to demonstrate that he kept and maintained the dwelling for the purpose of keeping and selling cocaine. *See State v. Carter*, 184 N.C. App. 706, 709 n.1, 646 S.E.2d 846, 849 (2007) (describing this as "the 'purpose' element" of section 90-108(a)(7)).

"The determination of whether a building or other place is used for keeping or selling a controlled substance 'will depend on the totality of the circumstances.' " *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001) (quoting *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994)). Here, defendant testified that his neighborhood has "a high crime rate of drugs," and the evidence demonstrated that two separate drug transactions actually transpired at 109 Loeb Drive. This Court recently held that evidence that a defendant used the same vehicle for two separate drug transactions, both of which were observed and recorded by police, was sufficient to withstand a

motion to dismiss a charge brought pursuant to section 90-108(7). *See State v. Calvino*, 179 N.C. App. 219, 222-23, 632 S.E.2d 839, 842-43 (2006). Additionally, we note that to withstand a motion to dismiss, overwhelming evidence is not needed. " 'In "borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury . . . .' " *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (omission in original) (quoting *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)). Therefore, the trial court did not err in ruling that the totality of the circumstances demonstrate that the dwelling at 109 Loeb Drive was used for the purpose of keeping or selling drugs pursuant to section 90-108(a)(7). Accordingly, defendant's assignment of error is overruled.

[3] In his next argument, defendant contends that the trial court's determination of his prior record level was not supported by sufficient evidence. Specifically, defendant contends that although he stipulated to the prior record level worksheet submitted by the State, his stipulation was ineffective with respect to his prior out-of-state convictions. We agree.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . ." N.C. Gen. Stat. § 15A-1340.14(f) (2005). A prior conviction may be proven by, *inter alia*, stipulation by the parties. *See id.* For purposes of determining a defendant's prior record level for felony sentencing,

> a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2005).

In the case *sub judice*, defense counsel stipulated to sentencing defendant as a prior record level III offender. Defendant's prior record level worksheet included four Ohio convictions, with three classified as Class I felonies in North Carolina. The trial court, in turn, assigned four prior record level points for two of the Ohio convictions. This Court, however, has held

> "that the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court[, and] . . . [s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate."

State v. Palmateer, 179 N.C. App. 579, 581, 634 S.E.2d 592, 593 (2006) (first alteration added) (quoting *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603-04 (2006)). The State in *Palmateer* failed to prove, and the trial court failed to determine, that the out-of-state convictions were substantially similar to felony offenses under North Carolina statutes. Therefore, this Court remanded for resentencing, holding "that the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective." *Id.* at 582, 634 S.E.2d at 594. Similarly, the State in the instant case failed to present evidence that the Ohio offenses were substantially similar to North Carolina offenses. *Compare State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (holding that "copies of [out-of-state] statutes, and comparison of their provisions to the criminal laws of North Carolina, were sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina."), *disc. rev. denied*, 349 N.C. 374, 516 S.E.2d 605 (1998). Accordingly, we must remand for resentencing.

[4] Defendant next contends that the trial court erred in using the fact that defendant was on probation and pre-trial release at the time he committed the instant offenses to both increase his prior record level and aggravate his sentence. We disagree.

As a preliminary matter, we note that although defendant failed to object on this ground at trial, defendant nevertheless may raise the issue on appeal, as the issue concerned whether his sentence was illegally imposed or was otherwise invalid as a matter of law, pursuant to North Carolina General Statutes, section 15A-1446(d)(18). *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2005).

North Carolina General Statutes, section 15A-1340.14(b)(7) permits a trial court to assign one point for prior record level purposes when "the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision." N.C. Gen. Stat. § 15A-1340.14(b)(7) (2005). Section 15A-1340.16(d), in turn, lists aggravating factors to be considered by the court, including

whether "[t]he defendant committed the offense while on pretrial release on another charge." N.C. Gen. Stat. § 15A-1340.16(d)(12) (2005). Although probationary status is not specifically included as an aggravating factor, section 15A-1340.16(d)(20) permits a trial court to aggravate a sentence based upon "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20) (2005).

Although defendant contends that using the same factors to increase his prior record level and aggravate his sentence violated "his state and federal rights,"[1] defendant has failed to point to any specific right, and instead, argues that such a procedure was "improper." The General Assembly has provided that (1) "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation," N.C. Gen. Stat. § 15A-1340.16(d) (2005); (2) "the same item of evidence shall not be used to prove more than one factor in aggravation," *id.*; and (3) "[i]n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2005). The General Assembly has not provided any similar statutory right supporting defendant's argument, and therefore, "any further argument by defendant should be addressed to the General Assembly." *State v. Bauberger*, 176 N.C. App. 465, 474, 626 S.E.2d 700, 707 (holding that there is no statutory provision prohibiting a trial court from using the same prior convictions both as evidence of malice during trial and to increase the defendant's prior record level), *aff'd*, 361 N.C. 105, 637 S.E.2d 536 (2006) (per curiam). Accordingly, defendant's assignment of error is overruled.

[5] Finally, defendant argues that the aggravated sentences imposed by the trial court were not authorized at the time they were entered and therefore violated the due process and *ex post facto* clauses. Defendant, however, concedes that his arguments fail under recent case law from this Court. *See State v. Heinricy*, 183 N.C. App. 585, 592, 645 S.E.2d 147, 152-53, *disc. rev. denied*, 362 N.C. 90, 656 S.E.2d 593 (2007); *State v. Borges*, 183 N.C. App. 240, 248-49, 644 S.E.2d 250, 253-55, *disc. rev. denied*, 361 N.C. 570, 650 S.E.2d 816 (2007), *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 776 (2008) (07-7828); *State v. Johnson*, 181 N.C. App. 287, 291-93, 639 S.E.2d 78, 80-82, *disc. rev. denied*, 361 N.C. 364, 644 S.E.2d 555 (2007). Defendant explains that

1. To the extent defendant bases his argument on constitutional violations, such an argument is not properly before this Court. *See Roache*, 358 N.C. at 291, 595 S.E.2d at 412.

he has raised this issue for preservation purposes and also to urge this Court to "re-examine" its holdings in *Heinricy*, *Borges*, and *Johnson*. However, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). 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 as to trial; Remanded for resentencing.

Judge WYNN concurs.

Judge HUNTER concurs in a separate opinion.

HUNTER, Judge, concurring.

The majority relies heavily on the case *State v. Palmateer*, 179 N.C. App. 579, 634 S.E.2d 592 (2006), in its analysis of defendant's stipulations to out-of-state convictions. While I believe the majority's analysis is correct because we are bound by *Palmateer*,[2] I believe the analysis in *Palmateer* was incorrect and write separately to so note.

In *Palmateer*, the defendant and the State stipulated to the accuracy of the contents of the defendant's prior record level worksheet, which contained several of the defendant's "out-of-state convictions, the date of these convictions, and their classification"; the stipulation included " 'the classification and points assigned to any out-of-state convictions[.]' " *Palmateer*, 179 N.C. App. at 581, 634 S.E.2d at 593.

> However, our Court recently held in *State v. Hanton* ["*Hanton* II"], 175 N.C. App. 250, 623 S.E.2d 600 (2006), that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." Our Court further stated that " '[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the

2. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989) ("where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

> courts, either trial or appellate.' " Although this Court did not explicitly state that a defendant could not stipulate to the substantial similarity of out-of-state convictions, the Court did conclude that this Court's prior statement in *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000) ["*Hanton* I"], that a defendant might stipulate to this question, was "non-binding dicta." We are bound by prior decisions of a panel of this Court. Thus, we conclude that the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective. Accordingly, we remand for resentencing.

Palmateer, 179 N.C. App. at 581-82, 634 S.E.2d at 593-94 (citations omitted).

In *Hanton* I, the defendant argued that his stipulation to his *guilt* of the out-of-state crimes on the prosecutor's sentencing worksheet did *not* include a stipulation that those crimes were *substantially similar* to certain felonies in this state. *Hanton* I, 140 N.C. App. at 690, 540 S.E.2d at 383. This Court held that, since no such stipulation was validly made by the defendant and the State had presented no evidence on the point, the record contained no evidence to support a conclusion that the crimes were substantially similar. *Id.* at 690-91, 540 S.E.2d at 383. In the defendant's next appeal, *Hanton* II, stipulations were no longer at issue; the defendant argued that the Court's statement in *Hanton* I that "a defendant might stipulate that out-of-state offenses are substantially similar to corresponding North Carolina felony offenses" proved that the question of substantial similarity was a question of fact, which must be submitted to the jury per *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *See Hanton* I, 140 N.C. App. at 690, 540 S.E.2d at 383; *Hanton* II, 175 N.C. App. at 254, 623 S.E.2d at 603. It was in response to that argument that this Court held that the language in *Hanton* I was dicta and concluded that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *Id.* at 254-55, 623 S.E.2d at 603-04. Thus, *Blakely* did not apply. The Court also stated that " '[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts[.]' " *Id.* at 253, 623 S.E.2d at 603. However, nowhere in *Hanton* I or *Hanton* II did this Court suggest that the trial court must entirely disregard stipulations by a defendant to the similarity of his prior out-of-state convictions to offenses in North Carolina. While such admissions are not binding, the Court may certainly refer to them and take

the statements into account when resolving the question of law before it; indeed, a valid stipulation could standing alone provide a valid basis for the court's conclusion of law that certain offenses are substantially similar. The conclusion in *Palmateer* is that a defendant's stipulation to these facts must be considered ineffective, and thus any conclusion drawn by the trial court that takes into account those stipulations must be reversed. This misinterprets the holding of *Hanton* II to the extent that it forbids the trial court from taking into account any admissions by a defendant.

As *Palmateer* is binding on this Court, I concur.

BERNARD SCARBOROUGH, Plaintiff v. DILLARD'S INC., formerly Dillard Department Stores, Inc., a North Carolina Corporation, Defendant

No. COA07-281

(Filed 5 February 2008)

Malicious Prosecution— punitive damages—willful or wanton conduct—malice

The trial court erred by granting judgment notwithstanding the verdict (JNOV) in a malicious prosecution case in regard to the jury's punitive damages award, and the grant of JNOV as to punitive damages is reversed, because: (1) an employer's failure to fully investigate an incident before causing an employee to be prosecuted for embezzlement is sufficient for a finding of reckless and wanton disregard of the employee's rights, and there was sufficient evidence of willful or wanton conduct including defendant store's possession of the paper with the customer name they were attempting to retrieve from plaintiff, defendant's failure to attempt to find or contact the customer, and the store manager's threats to "mess up" plaintiff's full-time job; (2) there was sufficient evidence of malice including the store manager mentioning a prior difficulty with plaintiff evidencing personal ill-will; and (3) the requirement under N.C.G.S. § 1D-15(c) that the officers, directors, or managers participated in or condoned the conduct giving rise to punitive damages was satisfied since the store manager participated in the conduct constituting the aggravating factors of willful and wanton conduct and malice.

Judge HUNTER dissenting.

Appeal by plaintiff from order entered 8 January 2007 by Judge Hugh B. Campbell, Jr. in District Court, Mecklenburg County. Heard in the Court of Appeals 18 September 2007.

David Q. Burgess, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by David W. Long and Douglas M. Martin, for defendant-appellee.

WYNN, Judge.

A motion for judgment notwithstanding the verdict should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case.[1] Here, the plaintiff argues the trial court erred in granting the defendant's motion for judgment notwithstanding the verdict as to punitive damages because there was sufficient evidence to support the jury's punitive damages award. Because we find more than a scintilla of evidence to support the jury's punitive damages award, we must reverse the trial court's grant of judgment notwithstanding the verdict as to punitive damages.

The evidence presented at trial tended to show that on 27 October 1997, Plaintiff Bernard Scarborough worked in the ladies' shoe department of Dillard's Department Store, where he had been employed part-time for approximately two years. Around 8:00 p.m., Mr. Scarborough waited on two women for approximately thirty-five to forty minutes, showing them about twenty pairs of shoes. When one of the women decided to purchase two pairs of shoes, Mr. Scarborough took the shoes to the register, scanned the shoes, and placed the two pairs in a bag. As Mr. Scarborough completed the transaction, the other woman came to the register and asked him about trying on a pair of shoes. Mr. Scarborough voided the first transaction so that he could check the price of the shoes for the second woman, and so that his employee number would not remain in the register when he went into the stockroom to look for the shoes. Mr. Scarborough was unable to find shoes in the woman's width and agreed to stretch the shoes for her. The two women stated that they would return for the third pair in a few minutes. The two women then left Dillard's with two pairs of shoes that were not paid for.

The women later returned and asked Mr. Scarborough if he could hold the third pair of shoes until the next day. Mr. Scarborough

1. *Scarborough v. Dillard's, Inc.*, 179 N.C. App. 127, 132, 632 S.E.2d 800, 803 (2006); N.C. Gen. Stat. § 1D-15 (2005).

agreed, and the woman wanting the shoes wrote her name down on a piece of paper, which Mr. Scarborough attached to the shoe box along with his employee number so he could receive credit for the sale.

After the two women left, two employees who had watched the transaction, Lynette Withers and Selma Brown, looked at the journal tape and confirmed that the women had taken the first two pair of shoes without paying for them.[2] Ms. Brown told Mr. Scarborough that the sales transaction was missing, so he called Steven Gainsboro,[3] the manager on duty that night, to tell him what happened. Mr. Gainsboro told Mr. Scarborough that he would discuss the incident the next day with David Hicklin, the shoe department manager.

When Mr. Scarborough arrived at Dillard's the next evening, he met with Mr. Hicklin, Kevin McClusky, the store manager, and Officer Cullen Wright, a Dillard's loss prevention employee, who also worked full time as an officer for the Charlotte-Mecklenburg Police Department. During the two-hour interview, Mr. Scarborough explained that he had made a mistake, took responsibility for the incident, and offered to pay Dillard's for the shoes. Mr. Scarborough also offered to submit to a polygraph exam. Mr. McClusky accused Mr. Scarborough of knowing the two women and threatened to have him prosecuted for embezzlement and ruin his full-time job at First Union Bank if he did not provide the names of the women. Mr. Scarborough stated that he did not know the women and therefore was unable to provide their names, although he did mention the name "Betty." Officer Wright also participated in questioning Mr. Scarborough about the incident and took a written statement from him. At the end of the interview, Mr. McClusky terminated Mr. Scarborough for embezzlement.

After Mr. Scarborough's termination, Officer Ken Schul, another Dillard's security guard who was employed full time as a sergeant for the Charlotte-Mecklenburg Police Department, took statements from three Dillard's employees—Ms. Withers, Ms. Brown, and Mr. Gainsboro—about Mr. Scarborough's failed transaction. On 12 November 1997, Officer Schul met with Assistant District Attorney Nathaniel Proctor to present a case against Mr. Scarborough. Assistant District Attorney Proctor then authorized the prosecution of Mr. Scarborough for embezzlement.

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2. The register journal tape showed that the transaction for the first two pairs of shoes had been voided but not re-rung. The tape also showed that the transaction for the third pair of shoes had not included sales tax, which would support the contention that it was a price check.

3. We note that Gainsboro is also spelled "Gainesborough" in the transcript.

Approximately two weeks after his termination from Dillard's, Mr. Scarborough was arrested in the atrium of One First Union Center in Charlotte, on his way to his office. Uniformed police officers handcuffed Mr. Scarborough and escorted him outside to a police car. Upon his release from jail, Mr. Scarborough returned to First Union to find that his employment was terminated because of his arrest for embezzlement, and he would only be eligible to return to work if the charges against him were cleared.

On 27-28 May 1998, Mr. Scarborough was tried for embezzlement in Superior Court, Mecklenburg County resulting in a jury verdict of not guilty.

On 4 April 2001, Mr. Scarborough initiated this action for malicious prosecution. Following a trial in January 2005, the jury returned a verdict in Mr. Scarborough's favor, awarding him $30,000 in compensatory damages and $77,000 in punitive damages for malicious prosecution. On 24 February 2005, the trial court granted Dillard's motion for judgment notwithstanding the verdict and entered an order setting aside the punitive damages award. Mr. Scarborough appealed, and on 1 August 2006, this Court remanded the case because, contrary to N.C. Gen. Stat. § 1D-50, the trial court's 24 February 2005 order contained no reasons as to why the trial court set aside the jury verdict. *Scarborough v. Dillard's, Inc.*, 179 N.C. App. 127, 130, 632 S.E.2d 800, 803 (2006). Upon remand, the trial court filed an order on 8 January 2007 indicating the basis for its judgment not withstanding the verdict. Mr. Scarborough appealed from that order.

On appeal, Mr. Scarborough contends the trial court erred by granting the judgment not withstanding the verdict because there was sufficient evidence to support the jury's punitive damages award. We must agree.[4]

We review the trial court's grant of a judgment notwithstanding the verdict *de novo*, and the standard of review is well established:

> On appeal the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict, whereby

4. We deny Dillard's motion to dismiss because Mr. Scarborough correctly appeals from the trial court's 8 January 2007 order. As we stated in the previous *Scarborough* case, the 24 February 2005 order was in error because "[c]ontrary to the requirements of section 1D-50 . . . [it] contains no reasons as to why the trial court set aside the jury's verdict on the punitive damages claim." *Scarborough*, 179 N.C. App. at 130, 632 S.E.2d at 803.

> this Court determines whether the evidence was sufficient to go to the jury. The standard is high for the moving party, as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference.

Id. at 132, 632 S.E.2d at 803-04 (internal citations omitted). Our Supreme Court has defined "scintilla of evidence" as "very slight evidence." *State v. Lawrence*, 196 N.C. 562, 582, 146 S.E. 395, 405 (1929).

Punitive damages may only be awarded where the claimant proves the defendant is liable for compensatory damages and proves the existence of fraud, malice, or willful or wanton conduct by clear and convincing evidence. N.C. Gen. Stat. § 1D-15. A party need only show one of the aggravating factors to recover punitive damages. *Scarborough*, 179 N.C. App. at 132, 632 S.E.2d at 804 (citing *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 320, 317 S.E.2d 17, 20 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985)). Under our General Statutes, punitive damages may be awarded against a corporation only if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c).

Mr. Scarborough first argues that the judgment notwithstanding the verdict was in error because there was sufficient evidence of willful or wanton conduct. We agree.

As defined in our punitive damages statute, willful or wanton means "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2005). Willful or wanton conduct is "more than gross negligence." *Id.* An employer's failure to fully investigate an incident before causing an employee to be prosecuted for embezzlement is sufficient for a finding of reckless and wanton disregard of the employee's rights. *See Jones v. Gwynne*, 312 N.C. 393, 409-10, 323 S.E.2d 9, 19 (1984) (holding that the jury could have found the employer's superficial and cursory investigation of an employee's alleged embezzlement to be a "reckless and wanton disregard of the plaintiff's rights"); *Williams*, 69 N.C. App. at 320, 317 S.E.2d at 20-21 (holding that the jury could find the plaintiff-employee was prose-

cuted in a reckless and wanton manner, where the employee who had plaintiff arrested failed to take an inventory, did not check plaintiff's sales book, and did not check with anyone regarding plaintiff's personnel record or character).

Mr. Scarborough argues that Dillard's acted willfully and wantonly by quickly procuring his prosecution for embezzlement, despite evidence that Mr. Scarborough made a mistake due to forgetfulness, and knowing that it would cause him to lose his full-time job at First Union Bank. Mr. Scarborough testified that during the meeting the day after the failed transaction, Mr. McClusky accused him of knowing the two women and repeatedly threatened to "mess up" his job at First Union if Mr. Scarborough did not tell him who the customers were. Mr. Scarborough testified that he told Mr. McClusky that he did not know the women, but he believed one of them was named Betty. At the time of the meeting, Dillard's was already in possession of the piece of paper with the name Betty Jordan on it, as Mr. Scarborough had placed it on the shoe box he had put on hold for one of the women. Officer Wright testified that although he did not personally find the paper with "Betty Jordan" written on it, a document was found in a pair of shoes that was in Dillard's possession.

That Mr. McClusky threatened to "mess up" Mr. Scarborough's full-time job is also evidence that he knew prosecuting him for embezzlement would harm Mr. Scarborough. Giving Mr. Scarborough the benefit of every reasonable inference, Dillard's possession of the paper with the name "Betty Jordan," its failure to attempt to find or contact Ms. Jordan, and Mr. McClusky's threats to "mess up" Mr. Scarborough's full-time job at First Union, present more than a scintilla of evidence that Dillard's showed a conscious and intentional disregard for Mr. Scarborough's rights. *See* N.C. Gen. Stat. § 1D-5(7).

Mr. Scarborough next argues that the judgment notwithstanding the verdict was in error because there was sufficient evidence of malice. We agree.

As defined by the punitive damages statute, malice means "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5).

Here, Mr. Scarborough argues that the jury could have inferred ill will from evidence of a prior difficulty between Mr. Scarborough and Mr. McClusky and from evidence that Dillard's considered him to be inept. Mr. Scarborough testified that when he met with Dillard's

management the day after his failed transaction, the first thing Mr. McClusky said to him was, "I cannot believe you're in my office again." Mr. McClusky was referring to Mr. Scarborough's recent written reprimand for referring a customer to another store for tennis shoes. Taking the evidence supporting Mr. Scarborough's claims as true and resolving any inconsistencies in his favor, we find that Mr. McClusky's mention of a prior difficulty with Mr. Scarborough is more than a scintilla of evidence of his personal ill will toward Mr. Scarborough.

Although we conclude there is sufficient evidence of malice and willful and wanton conduct, for punitive damages to be awarded against Dillard's, we must also determine whether Dillard's officers, directors, or managers participated in or condoned the conduct giving rise to punitive damages.[5] N.C. Gen. Stat. § 1D-15. We have defined "manager" as "one who conducts, directs, or supervises something." *Miller v. B.H.B. Enterprises, Inc.*, 152 N.C. App. 532, 540, 568 S.E.2d 219, 225 (2002).

Here, the record shows that Mr. McClusky was the store manager of Dillard's at the time Mr. Scarborough was terminated and prosecuted. Mr. Scarborough testified that during his meeting with Mr. McClusky, Mr. Hicklin, and Officer Wright, Mr. McClusky repeatedly threatened to charge him with embezzlement and "mess up" his full-time job at First Union if he did not tell him the names of the customers. Mr. Scarborough also testified that Mr. McClusky stated to him, "I cannot believe you're in my office again." Because Mr. McClusky participated in the conduct constituting the aggravating factors of willful and wanton conduct and malice, we find that section 1D-15(c) is satisfied, thereby subjecting Dillard's to punitive damages. N.C. Gen. Stat. § 1D-15(c).

In sum, because we find sufficient evidence of malice, willful and wanton conduct, and manager participation to support the jury's punitive damages award, we must reverse the trial court's grant of judgment notwithstanding the verdict as to punitive damages.

Reversed.

Judge JACKSON concurs.

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5. The trial court's 8 January 2007 order concluded "[t]here was no clear and convincing evidence that Dillard's (the corporation) instituted a malicious prosecution of the plaintiff," but it is not clear whether the order was based on insufficient evidence of malice, of willful and wanton conduct, or of management involvement.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

Because I believe Bernard Scarborough ("plaintiff") did not prove by clear and convincing evidence that defendant's actions constituted willful or wanton conduct or malice warranting punitive damages, I respectfully dissent.

I.

The majority states that our standard of review is whether or not a scintilla of evidence existed to support the jury's award. This is true for our review of the granting of a motion for judgment notwithstanding the verdict. However, per statute, the evidentiary standard for punitive damages is whether the existence of an aggravating factor—fraud, malice, or willful or wanton conduct—was proven by "clear and convincing evidence." N.C. Gen. Stat. § 1D-15(b) (2005). One of this Court's previous cases is particularly helpful in clarifying the interaction between these standards.

In *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 559, 613 S.E.2d 503, 507, *disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), this Court considered a trial court's grant of the defendant's motion for directed verdict on the issue of punitive damages. As we have noted many times, "[o]n appeal, the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict[.]" *Scarborough v. Dillard's, Inc.*, 179 N.C. App. 127, 132, 632 S.E.2d 800, 803 (2006).

> "The standard of review . . . is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." Our North Carolina statutes establish the requirements for punitive damages as follows:
>
> Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

> N.C. Gen. Stat. § 1D-15(a) (2003). The existence of the aggravating factor must be proved by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(b) (2003). . . . To award punitive damages against a corporation, "the officers, directors, or managers of the corporation [must have] participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c) (2003). . . . [T]he issue on appeal is whether there was sufficient evidence that the officers, directors, or managers of defendant, HNA Holdings, Inc., participated in or condoned willful or wanton conduct. *See id.*
>
> Plaintiffs contend Winter's order to destroy Whitlock's memorandum constituted willful and wanton conduct by defendant. However, *plaintiffs have not proved by clear and convincing evidence* that destruction of the memorandum constituted "conscious and intentional disregard of and indifference to the rights and safety of others." N.C. Gen. Stat. § 1D-5(7).

Schenk, 170 N.C. App. at 559-60, 613 S.E.2d at 507 (citations omitted) (emphasis added). The Court went on to examine the other evidence brought by the defendant under a clear and convincing standard. *Id.* at 560-61, 613 S.E.2d at 507-08. When the Court concluded no sufficient evidence had been presented, it overruled the plaintiffs' assignment of error regarding the directed verdict. *Id.* at 562, 613 S.E.2d at 509.

II.

As such, it seems clear that the question before this Court is whether plaintiff provided clear and convincing evidence of willful or wanton conduct or malice on the part of defendant. Because I believe no such evidence was presented, I would affirm.

"The clear and convincing evidence standard is greater than a preponderance of the evidence standard required in most civil cases and requires 'evidence which should "fully convince." ' " *Schenk*, 170 N.C. App. at 560, 613 S.E.2d at 508 (citation omitted). Punitive damages may be awarded against a corporation only if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c). Thus, plaintiff must prove that (1) the officers, directors, or managers of defendant Dillard's participated in or condoned (2) conduct that was (a) fraudulent, (b) malicious, or (c) willful and wanton. This he cannot do.

A.

First, as to the conduct of Dillard's employees, we note that plaintiff did not assign error to any of the trial court's findings of fact, and as such, they are presumed to be correct. *See Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000). Among these unchallenged findings of fact are these: Schul met with the assistant district attorney solely in his capacity with the Charlotte-Mecklenburg Police Department, not as a part-time employee of Dillard's; Dillard's would not have been allowed to take part in any way in the initiation of a felony prosecution; Dillard's took no part in the proceedings before the grand jury to obtain an indictment against plaintiff; and there was no evidence at trial that Dillard's had any role in the location, timing, or circumstances of plaintiff's arrest. Taking these findings as true, it is clear that plaintiff did not provide clear and convincing evidence to the trial court that Dillard's officers, directors, or managers took part in the actions complained of. As such, he has not satisfied the first element to obtain punitive damages.

B.

Plaintiff next argues that there was sufficient evidence of (a) willful or wanton or (b) malicious conduct. I disagree.

1.

In 1995, our legislature enacted a statute regarding punitive damages that heightened the standard of proof for the "aggravating factors"—fraud, malice, or willful or wanton conduct—to clear and convincing evidence, and also established that punitive damages will not be awarded on the basis of vicarious liability. 1995 N.C. Sess. Laws ch. 514, § 1D-15. "Willful or wanton" means "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2005). Willful or wanton conduct is "more than gross negligence." *Id.*

Plaintiff argues that Dillard's acted willfully and wantonly by quickly procuring his prosecution for embezzlement, despite evidence that plaintiff made a mistake due to forgetfulness and knowing that it would cause him to lose his full-time job at First Union Bank. In support of this claim, plaintiff cites two cases in which our Supreme Court found sufficient evidence for punitive damages based on "a reckless and wanton disregard of plaintiff's rights." *See Jones v.*

Gwynne, 312 N.C. 393, 409-10, 323 S.E.2d 9, 18 (1984) (holding that the jury could have found the employer's superficial and cursory investigation of an employee's alleged embezzlement " 'reckless and wanton disregard of the plaintiff's rights' "); *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 320, 317 S.E.2d 17, 20-21 (1984) (holding that the jury could find that the plaintiff-employee was prosecuted in a reckless and wanton manner where the employee who had plaintiff arrested for theft failed to seek out existing evidence in plaintiff's favor).

However, these cases were decided prior to the enactment of our current punitive damages statute in 1995, discussed above. As such, the standard of proof in those cases was not clear and convincing, and these cases are no longer applicable.

Plaintiff further argues that Dillard's acted willfully and wantonly by failing to inquire into his character or record and failing to obtain statements from all possible witnesses, including Betty Jordan, one of the two women who received the shoes, before terminating him and procuring his prosecution for embezzlement. Plaintiff also argues that Dillard's failed to present exculpatory evidence to the police, as the police officers were not told that Mr. Gainsboro, the manager on duty on the night of the incident, stated that he thought Mr. Scarborough made "a mistake."

However, Officers Wright and Schul took various steps to investigate plaintiff's possible embezzlement. The day after the incident, before plaintiff was terminated, he was interviewed by Mr. Hicklin, Mr. McClusky, and Officer Wright, and Officer Wright took a written statement from him. At that time, Dillard's had the register tape from the previous evening confirming that no payment was received for the shoes, and Mr. Gainsboro had spoken to witnesses Ms. Brown and Ms. Withers, the latter of whom believed Mr. Scarborough had purposely given away the shoes. Before Officer Schul met with Assistant District Attorney Proctor to discuss the embezzlement charge, he interviewed and obtained written statements from Ms. Brown, Ms. Withers, and Dillard's manager Mr. Gainsboro. Ms. Withers stated that Mr. Gainsboro seemed to think that Mr. Scarborough made "a mistake," but Mr. Gainsboro did not assert such in his statement to police. Although Dillard's could have conducted a more thorough investigation, including interviewing positive character witnesses and Betty Jordan, Mr. Scarborough has not proven by clear and convincing evidence that Dillard's actions constituted a reckless and wanton disregard of his rights.

2.

Plaintiff next argues that there was sufficient evidence of malice. I disagree.

"Malice" is defined by statute as "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5) (2005). Plaintiff argues that the jury could have inferred such ill will from evidence that Dillard's store manager, Mr. McClusky, had previously reprimanded him for referring a customer to another shoe store, and from evidence that Dillard's considered plaintiff to be inept. These rationales are speculative and depend on a series of inferences that could have been made by the jury, but certainly do not constitute clear and convincing evidence that defendant acted with malice.

III.

Because I believe that the correct standard in this case is the clear and convincing standard set out by statute, and that plaintiff has not met that standard, I would affirm.

LORYN HERRING, PLAINTIFF-APPELLANT v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, DEFENDANT-APPELLEE

No. COA07-35

(Filed 5 February 2008)

1. Collateral Estoppel and Res Judicata— dismissal of action—sovereign immunity—adjudication on merits—subsequent constitutional claims barred

An action by plaintiff student who was inured on her way to a school bus stop against defendant county board of education based upon alleged state constitutional violations of her rights to due process and equal protection was barred by res judicata where plaintiff's prior action against defendant board for negligence, breach of fiduciary duty, and constructive fraud was dismissed on the ground of sovereign immunity because: (1) dismissal of the prior action on the ground of sovereign immunity operated as an adjudication on the merits; (2) plaintiff's constitutional claims could have been brought in the original action, but

plaintiff failed to amend her complaint to allege those claims; (3) the parties were identical in both actions; and (4) the claims in the second action related to the same facts as the claims in the original action.

2. Pleadings— Rule 11 sanctions—complaint well-grounded in fact and warranted by existing law or good faith argument for extension, modification or reversal of existing law

The trial court in a student's action against a county board of education based upon state constitutional claims erred by sanctioning plaintiff's attorneys under N.C.G.S. § 1A-1, Rule 11, because plaintiff's complaint was well-grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law when: (1) the trial court mischaracterized plaintiff's claim, and thus the pertinent finding of fact and conclusion of law were not supported by the evidence; (2) the trial court's finding of fact that the evidence presented to the trial court that defendant board of education had insurance to cover the claims in each of those cases was not supported by the evidence; (3) plaintiff's attorneys performed a reasonable inquiry into the facts and did reasonably believe that the complaint was well-grounded in fact including checking the public record whereupon the attorneys discovered three cases in which male plaintiffs had sued defendant, had not alleged in their complaints that defendant had waived sovereign immunity by the purchase of insurance, and defendant settled those cases; and (4) Rule 11 sanctions are inappropriate when the issue raised by a plaintiff's complaint is one of first impression, and no case had specifically held that a dismissal on grounds of sovereign immunity was a final adjudication on the merits barring subsequent actions.

Appeal by Plaintiff from order entered 12 July 2006, *nunc pro tunc* 2 June 2006, and order entered 12 July 2006 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 10 October 2007.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for Plaintiff-Appellant.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Bossio, for Defendant-Appellee.

McGEE, Judge.

Loryn Herring (Plaintiff) appeals from an order granting summary judgment to the Winston-Salem/Forsyth County Board of Education (Defendant) on the ground of *res judicata*. Plaintiff also appeals from an order sanctioning Plaintiff's attorneys under Rule 11 of the North Carolina Rules of Civil Procedure. We affirm the summary judgment order and reverse the order sanctioning Plaintiff's attorneys.

In a prior action, Plaintiff, through a guardian ad litem, and Plaintiff's mother (the plaintiffs) filed a complaint on 3 June 1998 and an amended complaint on 7 August 1998 against Defendant and Ronald Liner (the defendants). In that action, the plaintiffs alleged that Plaintiff had been assaulted on her school bus by three boys and that the defendants had changed Plaintiff's bus stop to a new bus stop that was more dangerous. The plaintiffs further alleged that approximately five months later, Plaintiff was hit by a vehicle while walking to the new bus stop. The plaintiffs alleged claims for negligence, breach of fiduciary duty, and constructive fraud. In their answer, the defendants raised the defense of sovereign immunity, *inter alia*, and moved to dismiss the complaint.

The trial court converted the motion to dismiss into a motion for summary judgment, and denied the motion. The defendants appealed, and our Court held that "sovereign immunity bar[red] the claims presented by the plaintiffs in this case, [and] . . . conclude[d] that the trial court erred in denying the defendants' summary judgment motion based on the sovereign immunity defense." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 690, 529 S.E.2d 458, 465, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000) (*Herring I*). Our Court remanded the matter to the trial court for entry of summary judgment for the defendants. *Id.*

On remand, the trial court entered an order allowing the defendants' motion for summary judgment. However, the plaintiffs filed a Rule 60(b)(6) motion to set aside the order as to Ronald Liner, and the trial court entered an order allowing the plaintiffs' motion. Ronald Liner then filed a motion for summary judgment. The trial court allowed the motion and dismissed the case. The plaintiffs appealed and our Court affirmed the trial court's order and held that the plaintiffs' claim against Ronald Liner was barred by sovereign immunity. *Herring v. Liner*, 163 N.C. App. 534, 594 S.E.2d 117 (2004) (*Herring II*).

Plaintiff filed the complaint in the present case against Defendant and Ronald Liner on 1 April 2005. Plaintiff alleged State constitutional claims for a violation of her rights to due process and equal protection. Plaintiff's claims arose out of the same set of facts set forth in the complaint in *Herring I*. However, Plaintiff also alleged that she was treated differently from the three boys who attacked her on the bus. Plaintiff further alleged that she "was treated differently from similarly situated claimants, and . . . Defendants' decision not to settle her particular case was arbitrary and capricious. Upon information and belief, . . . Defendant Board has in the past settled negligence or tort claims without raising the defense of sovereign immunity[.]" Defendant and Ronald Liner responded by raising, *inter alia*, the defense of *res judicata*. Plaintiff subsequently filed a notice of voluntary dismissal without prejudice with respect to Ronald Liner. Defendant then filed a motion for summary judgment and a motion for sanctions.

The trial court entered an order on 12 July 2006, *nunc pro tunc* 2 June 2006, granting summary judgment for Defendant on the ground of *res judicata*. The trial court also entered an order on 12 July 2006 granting Defendant's motion for Rule 11 sanctions against Plaintiff's attorneys. Plaintiff appeals.

I.

[1] Plaintiff argues the trial court erred by granting summary judgment for Defendant on the ground of *res judicata*. "[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.*

"Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005).

> In order to successfully assert the doctrine of res judicata, a litigant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

Id. at 84, 609 S.E.2d at 262.

Plaintiff argues that the dismissal with prejudice of the earlier action on the ground of sovereign immunity was not an adjudication on the merits. Rather, Plaintiff argues the dismissal was a matter of practice or procedure. It is true that " '[a] judgment must be on the merits and not merely relate to matters of practice or procedure in order to have res judicata effect.' " *Kirby v. Kirby*, 26 N.C. App. 322, 323, 215 S.E.2d 798, 799 (1975) (quoting 2 McIntosh, N.C. Practice and Procedure, § 1732 (2d Ed., Phillips Supp. (1970)). However, for the reasons that follow, we hold that a dismissal on grounds of sovereign immunity is a final judgment on the merits for purposes of *res judicata*.

Our Court has recognized that "[a] dismissal with prejudice is an adjudication on the merits and has res judicata implications." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). In *Caswell Realty*, although the prior action was not decided on grounds of sovereign immunity, our Court held that "[t]he order of summary judgment . . . was a final adjudication on the merits for purposes of the doctrine of res judicata[.]" *Id.* at 721, 496 S.E.2d at 611; *see also Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff'd per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000) (stating: "In general, a cause of action determined by an order for summary judgment is a final judgment on the merits."). Moreover, our Supreme Court has recognized that "[t]he purpose of summary judgment is to bring litigation to an early decision *on the merits* without the delay and expense of a trial when no material facts are at issue." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (emphasis added). Furthermore, it is well settled that " '[a] dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.' " *Clancy v. Onslow Cty.*, 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002) (quoting *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992)). The only difference between a Rule 12(b)(6) motion and a summary judgment motion is that the trial court decides the former on the complaint alone, while the trial court may receive and consider other evidence when ruling on the latter, as the trial court did in the present case. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

Plaintiff cites *Clegg v. United States*, 112 F.2d 886 (10th Cir. 1940), for the proposition that the term "merits" means "the real or substantial grounds of *action or defense* as distinguished from

matters of practice, procedure, jurisdiction or form." *Id.* at 887 (emphasis added). However, *Clegg* supports our decision in the present case because sovereign immunity is an affirmative defense. *See McIver v. Smith*, 134 N.C. App. 583, 584, 518 S.E.2d 522, 524 (1999), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000) (recognizing that sovereign immunity is an affirmative defense). Therefore, based upon *Clegg*, a ruling on the affirmative defense of sovereign immunity is a ruling on the merits. *See Clegg*, 112 F.2d at 887.

Our decision is further supported by decisions of courts in other jurisdictions. In *Kutzik v. Young*, 730 F.2d 149, 151 (4th Cir. 1984), the Fourth Circuit recognized that "[i]n Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion." In *Flores v. Edinburg Consol. Independent School Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984), *reh'g denied en banc*, 747 F.2d 1465 (5th Cir. 1984), the Fifth Circuit noted that under Texas law, "[a] summary judgment on grounds of sovereign immunity is a judgment on the merits for purposes of res judicata." In *Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098, 104 L. Ed. 2d 1003 (1989) (citation omitted), the Ninth Circuit stated that whereas, "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court," if "the bar of sovereign immunity is absolute . . . [and] no other court has the power to hear the case," the case is properly dismissed "with prejudice." *See also Bloomquist v. Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) (stating that "[a] dismissal based on sovereign immunity is a decision on the merits, as it determines that a party has no cause of action or substantive right to recover against the United States.").

We next consider Plaintiff's argument that there was no identity of the causes of action between *Herring I* and the present case. "The doctrine of *res judicata* . . . applies to those 'issues which could have been raised in the prior action but were not. Thus, the doctrine is intended to force parties to join all matters which might or should have been pleaded in one action.' " *Clancy*, 151 N.C. App. at 271-72, 564 S.E.2d at 923 (quoting *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990) (citations omitted), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991)). Plaintiff argues she could not have brought her constitutional claims in the prior action because no such cause of action existed until our Court decided *Dobrowolska v. Wall*, 138 N.C. App. 1, 530

S.E.2d 590 (2000), *disc. review improvidently allowed in part*, 355 N.C. 205, 558 S.E.2d 174 (2002). Plaintiff is mistaken.

In *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950), our Supreme Court recognized that "[i]t is our province to declare the law, but not to make it." *Id.* at 82, 59 S.E.2d at 204. Accordingly, when our Court ruled in *Dobrowolska* that the trial court erred by entering summary judgment for the defendant on the plaintiff's due process and equal protection claims, our Court did not create a new cause of action. *See Dobrowolska*, 138 N.C. App. at 18-19, 530 S.E.2d at 602. Rather, based upon precedent related to those constitutional provisions, our Court held that there were genuine issues of material fact as to "whether or not the policy of the City [had] violated [the] plaintiffs' due process and equal protection rights due to arbitrary and capricious behavior, and likewise, whether such behavior [was] reasonably related to a legitimate governmental objective." *Id.* at 19, 530 S.E.2d at 602. In *Dobrowolska*, the plaintiff's claims were based upon the same provisions of the North Carolina Constitution now relied upon by Plaintiff in the present case. In the present case, upon the filing of Defendant's answer, Plaintiff's attorneys were on notice that Defendant was relying upon the defense of sovereign immunity. At that point, Plaintiff's attorneys could have amended the complaint to assert the constitutional claims, as the plaintiffs did in *Dobrowolska*.

Plaintiff cites several cases in support of her argument, all of which are distinguishable. Plaintiff relies upon *Beam v. Almond*, 271 N.C. 509, 157 S.E.2d 215 (1967), in contending that *res judicata* does not apply where the trial court heard no evidence in the former action. However, in *Beam*, the first action was dismissed for failure to join all necessary parties, *id.* at 511, 157 S.E.2d at 218, and it is clear that a dismissal for failure to join a necessary party does not operate as an adjudication on the merits, *see* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2007) (stating that "a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits").

Plaintiff also relies upon *Pate v. N.C. Dep't of Transp.*, 176 N.C. App. 530, 626 S.E.2d 661, *disc. review denied*, 360 N.C. 535, 633 S.E.2d 819 (2006), and *Alt v. John Umstead Hospital*, 125 N.C. App. 193, 479 S.E.2d 800, *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997). However, in *Pate* and *Alt*, the plaintiffs first brought actions in superior court, which were dismissed, and then filed negligence claims under the Tort Claims Act in the North Carolina Industrial

Commission. *Pate*, 176 N.C. App. at 531-32, 626 S.E.2d at 662-63; *Alt*, 125 N.C. App. at 194, 479 S.E.2d at 801. The plaintiffs in *Pate* and *Alt*, unlike Plaintiff in the present case, could not have brought their Tort Claims Act claims in the prior superior court proceedings because exclusive original jurisdiction for Tort Claims Act cases lies with the Industrial Commission. *Pate*, 176 N.C. App. at 535, 626 S.E.2d at 665; *Alt*, 125 N.C. App. at 198, 479 S.E.2d at 804.

Plaintiff also relies upon *Blair v. Robinson*, 178 N.C. App. 357, 631 S.E.2d 217 (2006), where a judgment was entered for the plaintiffs against a company and, after the plaintiffs were unable to recover on the judgment, the plaintiffs filed a second action against the shareholders, directors, and officers of the company. *Id.* at 358, 631 S.E.2d at 219. Our Court recognized that the individual defendants in the second case were not parties to the first, and that the second action sought to pierce the corporate veil. *Id.* at 360, 631 S.E.2d at 220. In the second action, the plaintiffs also alleged the individual defendants sold off corporate assets for personal gain, which actions occurred after judgment in the first action. *Id.* Our Court held: "Because there is neither identity of parties, subject matter, or issues, *res judicata* is inapplicable and does not bar [the] plaintiffs' present action." *Id.* In the present case, unlike in *Blair*, there was an identity of parties between the two suits and, although the second action alleged different claims, Plaintiff could have brought those claims in the first action.

Plaintiff further cites *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 613 S.E.2d 346, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). However, in *DiLoreto*, the first action involved a transfer of title of the property separate from the transfer at issue in the second action. *Id.* at 666, 613 S.E.2d at 350. Therefore, because the two actions were different, *res judicata* did not bar the second action. *Id.* In the present case, unlike in *DiLoreto*, the claims in the second action relate to the same set of facts as the claims in the first.

Plaintiff also cites *Murillo v. Daly*, 169 N.C. App. 223, 609 S.E.2d 478 (2005), where our Court held that because the plaintiffs' claims were not compulsory counterclaims that should have been brought in a previous action, the plaintiffs' claims were not barred by *res judicata*. *Id.* at 227, 609 S.E.2d at 481. However, because the present case does not involve compulsory counterclaims, *Murillo* is distinguishable. Moreover, in the present case, the same facts gave rise to both the first and second actions.

Plaintiff also relies upon *Beall v. Beall*, 156 N.C. App. 542, 577 S.E.2d 356 (2003). However, in *Beall*, the first action was a motion for an accounting in divorce proceedings, and the second action was a suit filed by the children against their father for fraud, conversion, unfair and deceptive trade practice, and misappropriation. *Id.* at 545, 577 S.E.2d at 359. Our Court held that the first action was "separate and distinct in kind from the earlier." *Id.*

Plaintiff also cites *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 99 L. Ed. 1122 (1955), and *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders*, 78 N.C. App. 108, 336 S.E.2d 694 (1985), in support of her position that she could not have raised the constitutional claims in the first action. However, these cases provide no support for that position. In *Lawlor*, the United States Supreme Court held that the settlement of the first action did not bar the second action because the second action involved facts that occurred after judgment in the first action. *Id.* at 327-28, 99 L. Ed. at 1127-28. Therefore, "[w]hile the [earlier] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* at 328, 99 L. Ed. at 1127-28. Similarly, in *Trustees of Garden of Prayer Baptist Church*, our Court recognized that "where subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action." *Trustees of Garden of Prayer Baptist Church*, 78 N.C. App. at 112, 336 S.E.2d at 697. Our Court held: "Since the issue and the facts upon which it arises were not before the [trial] court in the earlier action, the declaratory judgment in that action does not bar the present action." *Id.* at 113, 336 S.E.2d at 697. In the present case, unlike in *Lawlor* and *Trustees of Garden of Prayer Baptist Church*, the same facts gave rise to both the first and second actions. Therefore, the trial court's entry of summary judgment in the first action operates as a bar to the present action.

Plaintiff also cites several out-of-state cases in support of her position. However, these cases are not binding and are distinguishable, and we do not discuss them.

For the foregoing reasons, we hold the trial court did not err by granting summary judgment for Defendant on the ground of *res judicata*. We overrule this assignment of error. Because we find for Defendant on the merits of this issue, we need not reach Defendant's cross-assignments of error.

II.

[2] Plaintiff also argues the trial court erred by imposing Rule 11 sanctions on Plaintiff's attorneys. We agree. N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007) provides, in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Thus, pursuant to Rule 11, the signer certifies "that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law,' and (3) not interposed for any improper purpose." *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000) (quoting N.C.G.S. § 1A-1, Rule 11(a)). " 'A breach of the certification as to any one of these three prongs is a violation of the Rule.' " *Kohler Co. v. McIvor*, 177 N.C. App. 396, 401, 628 S.E.2d 817, 822 (2006) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)). We review the imposition of Rule 11 sanctions *de novo*, and determine the following: " '(1) whether the trial court's conclusions of law support its judgment or determination; (2) whether the trial court's conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by a sufficiency of the evidence.' " *Id.* at 401-02, 628 S.E.2d at 822 (quoting *Renner v. Hawk*, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375, *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997)).

In the present case, the trial court concluded that Plaintiff's complaint (1) was not well grounded in fact and (2) was not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. We first determine whether the trial court correctly concluded that Plaintiff's complaint was not well grounded in fact. In order to determine whether a complaint was well grounded in fact, we analyze the following: " '(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.' " *Id.* at 402, 628 S.E.2d at 822

(quoting *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995)).

> In the present case, the trial court found as follows:
>
> The assertion that [P]laintiff's rights to equal protection and due process were violated because of the alleged failure to appropriately discipline the boys who allegedly attacked her on the bus has no merit. Plaintiff who was the victim of the alleged attack is not similarly situated to the boys who allegedly attacked her. By definition, the victim of an assault is not similarly situated to the perpetrator of an assault. Plaintiff's attorneys have not pointed to any statute, case or other provision of law that gives a victim of an assault standing to seek damages from the disciplining authority because she did not approve of the discipline meted out to the perpetrators.

Based upon this finding of fact, it appears that the trial court mischaracterized Plaintiff's claim and, therefore, the finding of fact was not supported by the evidence. Plaintiff's claim was one for gender discrimination and, based upon Plaintiff's allegations, Plaintiff and the three boys who attacked her were similarly situated in that they were all students at the same school, riding the same bus, and were involved in the same altercation. We do not hold that Plaintiff's allegations were sufficient to state a claim for relief because that issue is not before us. We simply hold that, for purposes of Rule 11, Plaintiff's complaint was well grounded in fact. Because the trial court's finding of fact was not supported, the trial court's conclusion of law was also not supported.

The trial court also found that Plaintiff's complaint was not well grounded in fact for a separate reason:

> Counsel for [P]laintiff did not conduct a reasonable investigation to support their allegation that [P]laintiff was treated differently from similarly situated bodily injury claimants. The only evidence presented to the [trial] court to support this contention was the Complaints, Answers and Consent Judgments in three cases filed against the Board of Education. The evidence presented to the [trial] court is that the Board of Education had insurance to cover the claims in each of those cases. Plaintiff's attorneys did not contact any of the attorneys or guardians ad litem in those cases to find out if the claims were covered by insurance or why the cases were settled. Furthermore, each of the cases is distinguish-

> able from the instant case in that the students whose claims were settled were injured on school premises. Plaintiff . . . was injured while crossing the street when she was struck by a vehicle not owned or operated by the school system. Plaintiff's attorneys had access to the school system's insurance policies. They could and should have determined that the bodily injury claims upon which they base their constitutional claims were covered by insurance. A reasonable inquiry by Harvey L. [Kennedy] or Harold L. Kennedy, III would have disclosed that the bodily injury claims against [D]efendant which have been settled were settled by the insurance companies from whom [D]efendant had purchased coverage and that immunity was waived by the purchase of that insurance.

However, the trial court's finding of fact that "[t]he evidence presented to the [trial] court is that the Board of Education had insurance to cover the claims in each of those cases[,]" is not supported by the evidence. This finding is based upon the affidavit of Douglas Punger. However, during the hearing on Defendant's summary judgment motion, the trial court ruled that it would not consider Douglas Punger's affidavit in any way: "I'm not going to consider that [affidavit] in any way at all. I think in all fairness until Mr. Punger has withdrawn as attorney, I shouldn't consider his affidavit." Moreover, Plaintiff's attorneys testified that in preparing the complaint in the present case, they checked the public record. Plaintiff's attorneys discovered three cases in which male plaintiffs had sued Defendant and had not alleged in their complaints that Defendant had waived sovereign immunity by the purchase of insurance. However, Defendant settled those cases. This demonstrates that Plaintiff's attorneys did perform a reasonable inquiry into the facts and did reasonably believe that the complaint was well grounded in fact. *See Kohler Co.*, 177 N.C. App. at 402, 628 S.E.2d at 822. Because this finding of fact was not supported by the evidence, we hold that the trial court's conclusion of law, that Plaintiff's complaint was not well grounded in fact, was also not supported.

The trial court also concluded that the complaint was not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. In order to determine the legal sufficiency of a pleading,

> "the court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is com-

> plete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate."

McClerin, 118 N.C. App. at 643-44, 456 S.E.2d at 355 (quoting *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992)). "[R]eference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed." *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. Moreover, Rule 11 sanctions are inappropriate where the issue raised by a plaintiff's complaint is one of first impression. *See DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 606, 544 S.E.2d 797, 802 (2001).

In support of its conclusion of law in the present case, the trial court found:

> The [trial] court finds that there is no reasonable basis for [P]laintiff's attorneys to believe that they could file this action seeking to recover damages arising out of the June 1995 motor vehicle accident almost five years after the North Carolina Court of Appeals held that the claims were barred by sovereign immunity.

We hold that this finding was unsupported because at the time Plaintiff filed the complaint, no case had specifically held that a dismissal on grounds of sovereign immunity was a final adjudication on the merits barring subsequent actions. Although we reach that conclusion in the present case, it is not appropriate to sanction Plaintiff's attorneys for filing the complaint in the present case when no case had specifically held so at that time. Accordingly, we hold that the trial court's conclusion of law was unsupported. For the foregoing reasons, we reverse the order sanctioning Plaintiff's attorneys.

Affirmed in part; reversed in part.

Judges TYSON and ELMORE concur.

SUGAR CREEK CHARTER SCHOOL, INC., KENNEDY CHARTER SCHOOL, CROSSROADS CHARTER SCHOOL, CAROLINA INTERNATIONAL SCHOOL, AND METROLINA REGIONAL SCHOLARS ACADEMY, PLAINTIFFS v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION AND PETER C. GORMAN,[1] SUPERINTENDENT IN HIS OFFICIAL CAPACITY, D/B/A "CHARLOTTE-MECKLENBURG SCHOOLS," DEFENDANTS

No. COA07-207

(Filed 5 February 2008)

1. Schools and Education— charter school funding by county—allocation of pre-kindergarten funds

The trial court erred by excluding an at-risk pre-kindergarten appropriation from amounts to be apportioned between charter schools and the Charlotte-Mecklenburg Board of Education. Assuming that the kindergarten program (Bright Beginnings) is a special program, the Board of County Commissioners would have been within its statutory authority to allocate money to a special program fund, but instead allocated the money to the local current expense fund, earmarked for the program. The charter schools were entitled to a pro rata share of all the money in the local current expense fund.

2. Schools and Education— charter school funding by county—fund from which money appropriated—not all appropriations included

The statutory scheme for calculating a county's per pupil funding for charter schools allows the transfer of local appropriations among funds so that not all of the appropriations to the school system are included in the current local expense fund, from which the charter school funding is appropriated.

3. Schools and Education— charter school funding by county—allocation of under-achieving high school program

The trial court did not err in an action to determine a county's funding for charter schools by concluding that an under--

1. Plaintiffs' original Complaint named James L. Pughsley, in his official capacity as the Superintendent of the Charlotte-Mecklenburg Schools. Subsequent to the filing of the Complaint and an Amended Complaint, Frances Haithcock was appointed Superintendent of Charlotte-Mecklenburg Schools, and the caption of this matter was altered to reflect this change. Subsequent to the trial court's entering its Declaratory Judgment Order dated 27 September 2006, but prior to the parties' filing the Joint Record on Appeal, Peter C. Gorman was appointed Superintendent of Charlotte-Mecklenburg Schools, and the caption in this matter was modified accordingly.

achieving high school program was not a special program, and therefore correctly determined that the money should have been included in the local current expense fund, from which the funds for the school systems and charter schools were appropriated.

4. Schools and Education— distribution of funds to charter schools—calculation of enrollment

The trial court did not err in an action to determine the distribution of county funds to charter schools by holding that the method of calculating the funding was inconsistent with N.C.G.S. § 115C-238.29H, which required the county to transfer to the charter schools an amount equal to the per pupil local expense appropriation received by the Charlotte-Mecklenburg Board of Education (CMS). The calculation of enrollment resulted in the CMS per pupil amount increasing as enrollment for CMS schools and charter schools decreased during the year.

5. Schools and Education— charter school funding—statute of limitations—determination of correct amount at end of year

The trial court did not err by ruling that plaintiff charter school was not barred by the statute of limitations from filing its claim concerning funding. The action was filed within the three-year limitations period because the school system made payments in such a way that plaintiffs could not determine whether the correct statutory amount had been paid until the end of the fiscal year.

Appeal by Plaintiffs and Defendants from judgment entered 27 September 2006 by Judge Robert Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2007.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, for Plaintiffs.

Helms Mulliss & Wicker, PLLC, by James G. Middlebrooks, for Defendants.

STEPHENS, Judge.

I. FACTS AND PROCEDURE

This case was initiated when Plaintiffs Sugar Creek Charter School, Inc., Kennedy Charter School, Crossroads Charter School, and Carolina International School filed a Complaint against De-

fendants in Mecklenburg County Superior Court on 25 May 2005. Thereafter, on 17 August 2005, Plaintiffs filed an Amended Complaint adding Metrolina Regional Scholars Academy as an additional Plaintiff. Plaintiffs ("Charter Schools") sought damages for "unpaid appropriations" based upon allegations that the manner in which Defendants, the Charlotte-Mecklenburg Board of Education and the Charlotte-Mecklenburg County Superintendent of Schools (collectively "CMS"), apportioned funds appropriated for public education was improper, thereby causing the Charter Schools to be "underfunded."

For each of the fiscal years at issue, from 2001-02 through 2004-05, CMS submitted a proposed budget to the Mecklenburg Board of County Commissioners ("Board"). After receiving the proposed budget, the Board determined the amount of money to appropriate to CMS for the budget year and appropriated that amount to CMS.

Each budget proposal and subsequent appropriation included an allocation for the purpose of funding a pre-kindergarten program called Bright Beginnings. Bright Beginnings served approximately 3,100 at-risk four-year-olds in Mecklenburg County each year. The program was not open to all four-year-olds, and applicants were screened to determine their eligibility. All of the children who participated in Bright Beginnings were younger than the populations served by both the CMS schools and the Charter Schools.

In the fall of 2004, after the normal local appropriation process had been concluded for the 2004-05 fiscal year, the Board asked CMS for a proposal to assist students at three under-achieving high schools in the Charlotte-Mecklenburg public school system. CMS sent a proposal to the Board which subsequently awarded CMS a High School Challenge grant of $6,000,000 to assist the three schools. From the 2001-02 through 2004-05 school years, CMS did not apportion to the Charter Schools any of the appropriations used for Bright Beginnings or the High School Challenge.

As required by N.C. Gen. Stat. § 115C-238.29H(b), CMS funded the Charter Schools based on a per pupil local current expense figure. CMS arrived at this figure at the beginning of each academic year by first estimating the total student enrollment for the CMS and the Charter Schools, and then dividing the projected funding from the Board for the local current expense fund for the year (minus the Bright Beginnings and High School Challenge amounts) by the esti-

mated student enrollment. Each month of the school year, the Charter Schools submitted reports to CMS showing the actual number of students attending the Charter Schools. CMS then made periodic payments to the Charter Schools of amounts determined by multiplying the per pupil local current expense figure by the actual number of students attending the Charter Schools in a given month. CMS did not require public schools to submit similar reports detailing actual monthly attendance numbers to receive funding; instead, CMS retained the balance of the local current expense fund not transferred to the Charter Schools for CMS public school students.

On 2 February 2006, the Charter Schools moved for summary judgment, and on 27 September 2006, Judge Ervin entered a Declaratory Judgment Order. Judge Ervin concluded, among other things, that (i) Bright Beginnings was a "special program," and, therefore, CMS could fund Bright Beginnings without appropriating that money between CMS and the Charter Schools; (ii) the statute of limitations precluded Metrolina Regional Scholars Academy from pursuing claims for the fiscal year 2001-02, but that all the other Charter Schools could pursue claims for the fiscal years 2001-02 forward; (iii) CMS must include the money received for the High School Challenge in the local current expense fund to be apportioned between CMS and the Charter Schools; and (iv) CMS's method of calculating the per pupil local current expense appropriation is inconsistent with N.C. Gen. Stat. § 115C-238.29H(b).

The Charter Schools appealed the trial court's ruling that the money received by CMS for Bright Beginnings should not be included in the amounts to be apportioned between CMS and the Charter Schools. CMS appealed the trial court's rulings that the Charter Schools' claims for the 2001-02 fiscal year were not barred by the statute of limitations, that CMS's method of calculating the local per pupil funding was inconsistent with the statute, and that the money received for the High School Challenge must be included in the amounts to be apportioned between CMS and the Charter Schools.

II. STANDARD OF REVIEW

In reviewing a grant of summary judgment in a declaratory judgment action, this Court examines the whole record to determine "(1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving

party was entitled to judgment as a matter of law." *Tucker v. City of Kannapolis*, 159 N.C. App. 174, 178, 582 S.E.2d 697, 699 (2003). Here, the facts are undisputed; therefore, the only question is whether the Charter Schools were entitled to summary judgment as a matter of law.

III. BRIGHT BEGINNINGS

[1] The Charter Schools contend the trial court erred by excluding the portion of the Board's appropriations used for Bright Beginnings from the amounts to be apportioned between CMS and the Charter Schools for the fiscal years 2001-02 through 2004-05. We agree.

For each of the fiscal years at issue, CMS submitted a proposed budget to the Board. N.C. Gen. Stat. § 115C-429(a) (2001). After receiving the proposed budget from CMS, the Board determined the amount of county revenues to appropriate to CMS for the budget year and then appropriated those revenues to CMS. N.C. Gen. Stat. § 115C-429(b) (2001); N.C. Gen. Stat. § 115C-437 (2001). "The board of county commissioners may, in its discretion, allocate part or all of its appropriation by purpose, function, or project as defined in the uniform budget format." N.C. Gen. Stat. § 115C-429(b).

CMS must adhere to the uniform budget format promulgated by the State Board of Education. N.C. Gen. Stat. § 115C-426 (2001). Pursuant to N.C. Gen. Stat. § 115C-426:

> (c) The uniform budget format shall require the following funds:
>
> (1) The State Public School Fund.
>
> (2) The local current expense fund.
>
> (3) The capital outlay fund.
>
> In addition, other funds may be required to account for trust funds, federal grants restricted as to use, and special programs. Each local school administrative unit shall maintain those funds shown in the uniform budget format that are applicable to its operations.
>
> (d) The State Public School Fund shall include appropriations for the current operating expenses of the public school system from moneys made available to the local school administrative unit by the State Board of Education.

> (e) The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system . . . . These appropriations shall be funded by revenues accruing to the local school administrative unit by [among other sources] . . . moneys made available to the local school administrative unit by the board of county commissioners . . . .
>
> . . . .
>
> Appropriations in the capital outlay fund shall be funded by revenues made available for capital outlay purposes by the State Board of Education and the board of county commissioners . . . .
>
> (g) Other funds shall include appropriations for such purposes funded from such sources as may be prescribed by the uniform budget format.

Id.

Thus, reading N.C. Gen. Stat. §§ 115C-429 and 115C-426 together, the Board may, in its discretion, allocate part or all of its appropriation to CMS for local current operating expenses, capital outlay expenses, or other special program expenses. The Board is constrained only by the mandate that it allocate to the local current expense fund sufficient money to augment the State Public School Fund for the current operating expenses of the public school system. N.C. Gen. Stat. § 115C-426(e). CMS must maintain separate funds for current operating expenses, capital outlay, and any special programs. A " '[f]und' is an independent fiscal and accounting entity . . . for the purpose of carrying on specific activities or attaining certain objectives . . . ." N.C. Gen. Stat. § 115C-423(5) (2001).

Accordingly, money made available to CMS by the Board for current operating expenses shall be deposited into the local current expense fund; money made available to CMS by the Board for capital outlay shall be deposited into the capital outlay fund; and money made available to CMS by the Board for special programs shall be deposited into funds specifically established for those special programs.

"If a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year."

N.C. Gen. Stat. § 115C-238.29H(b) (2001).[2] In *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 563 S.E.2d 92 (2002), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003), this Court held that the phrase "local current expense appropriation" in the Charter School Funding Statute, N.C. Gen. Stat. § 115C-238.29H(b), is synonymous with the phrase "local current expense fund" in the School Budget and Fiscal Control Act, N.C. Gen. Stat. § 115C-426(e). *Delany*, 150 N.C. App. at 346, 563 S.E.2d at 98. Thus, the Charter Schools are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund.

In its ruling in this case, the trial court made the following conclusion of law:

> 2. Bright Beginnings is a "special program" under N.C. Gen. Stat. § 115C-426(c) because it benefits pre-kindergarten students, who are not students in the public school system. In each of the years in question, the at-risk, pre-kindergarten nature of the Bright Beginnings program was spelled out in the CMS budget requests to the Mecklenburg County Board of County Commissioners, which, in turn, funded the requests. Therefore, CMS was and is permitted to fund Bright Beginnings without apportioning local funds between itself and the [C]harter [S]chools (*i.e.*, by excluding the Bright Beginnings amounts in each of the fiscal years in dispute set forth above).

The term "special program" is not defined by statute. Assuming *arguendo*, that Bright Beginnings was a special program, the Board would have been within its statutory authority to allocate money for the program, separate and apart from money allocated for current operating expenses, capital outlay expenses, or other special programs. However, instead of allocating money to a Bright Beginnings special program fund, the County Commissioners allocated the money for Bright Beginnings to the local current expense fund, earmarked for Bright Beginnings. Furthermore, CMS was required to set up and maintain a separate special fund for the Bright Beginnings program, pursuant to N.C. Gen. Stat. § 115C-426(c); this they failed to do. As a result, the Bright Beginnings money was requested for the local current expense fund, allocated to the local current expense

2. "The amount transferred under this subsection that consists of revenue derived from supplemental taxes shall be transferred only to a charter school located in the tax district for which these taxes are levied and in which the student resides." N.C. Gen. Stat. § 115C-238.29H(b) (2003).

fund, deposited into the local current expense fund, and deducted from the local current expense fund. Because the Charter Schools were entitled to a *pro rata* share of all the money in the local current expense fund, CMS was required to apportion this money on a per pupil basis between CMS and the Charter Schools before the Bright Beginnings program was funded.

Accordingly, the trial court erred by excluding the portion of the Board's current local expense appropriations used for Bright Beginnings from the amounts that should have been apportioned between CMS and the Charter Schools. Thus, we reverse the trial court's order as it pertains to the Bright Beginnings program and remand to the trial court for entry of order determining the amount of CMS's underpayment of the Charter Schools due to CMS's failure to properly apportion the Bright Beginnings funds, and requiring CMS to pay such amount to the Charter Schools.

[2] The Charter Schools further argue that the fact the uniform budget format mandates an "independent fiscal and accounting entity" for a special program does not address the need to apportion the revenues diverted to that fund where, as here, those revenues originally are part of the moneys "made available" to CMS by the Board. In essence, the Charter Schools contend that *all* moneys made available to CMS by the Board are part of the current local expense fund, and thus must be apportioned *pro rata* between the CMS schools and the Charter Schools before any of those moneys are diverted to other funds. This is inaccurate.

Pursuant to N.C. Gen. Stat. § 115C-426(e), the local current expense fund includes "moneys made available to the local school administrative unit by the board of county commissioners . . . ." Additionally, N.C. Gen. Stat. § 115C-426(f) provides that "the capital outlay fund shall be funded by revenues made available for capital outlay purposes by . . . the board of county commissioners . . . ." Finally, N.C. Gen. Stat. § 115C-426(g) states that "[o]ther funds shall include appropriations for such purposes funded from such sources as may be prescribed by the uniform budget format." Accordingly, CMS's local current expense fund, capital outlay fund, and any other funds it establishes may all include money made available to CMS by the Board.

Furthermore, pursuant to N.C. Gen. Stat. § 115C-431, "[i]f the board of education determines that the amount of money appropriated to the local current expense fund, or the capital outlay fund, or

both, by the board of county commissioners is not sufficient[,]" then a meeting between the two boards must be held to discuss the matter. This statute explicitly contradicts the Charter Schools' contention that all the moneys made available to CMS by the Board are included in the local current expense fund.

Finally, pursuant to N.C. Gen. Stat. § 115C-433(d), "[CMS] may amend the budget to transfer money to or from the capital outlay fund to or from any other fund . . . ." This statute contemplates transferring local appropriations to and from the capital outlay fund, to or from any number of other funds, not just the local current expense fund. Therefore, since "[t]he board of county commissioners may, in its discretion, allocate part or all of its appropriation by purpose, function, or project as defined in the uniform budget format[,]" N.C. Gen. Stat. § 115C-429(b), the Board may allocate its appropriations among the different funds set up by CMS. Thus, contrary to the Charter Schools' contention, not *all* appropriations from the Board to CMS are included in the current local expense fund and thus subject to apportionment under N.C. Gen. Stat. § 115C-238.29H(b). Since the Charter Schools are only entitled to a *pro rata* share of all money in the local current expense fund, the Charter Schools are therefore entitled to a *pro rata* share of the money made available to CMS by the County Commissioners specifically for the current local expense fund.

IV. THE HIGH SCHOOL CHALLENGE

[3] CMS contends the trial court erred by including the portion of the Board's appropriations used for the High School Challenge in the amounts to be apportioned between CMS and the Charter Schools for the fiscal year 2004-05. We disagree.

As discussed above, the Board "may, in its discretion, allocate part or all of its appropriation by purpose, function, or project as defined in the uniform budget format." N.C. Gen. Stat. § 115C-429(b). Additionally, CMS must adhere to the uniform budget format and maintain separate funds for current operating expenses, capital outlay, and special programs. N.C. Gen. Stat. § 115C-426. Finally, the Charter Schools are entitled to a per pupil, *pro rata* share of the money in the local current expense fund. *Delany*, 150 N.C. App. 338, 563 S.E.2d 92.

In its ruling, the trial court made the following conclusion of law:

> 3. The High School Challenge program is a local program funded by Mecklenburg County. The funding for this program comes from the "moneys made available to the local school administrative unit by the board of county commissioners." See N.C.G.S. § 115C-426(e). Because these funds are directed at students served by the public school system, CMS must calculate the "per pupil local current expense" amount due the [C]harter [S]chools under N.C. Gen. Stat. § 115C-238.29H(b) in a manner that includes the monies used for the High School Challenge program (*i.e.*, by including the High School Challenge amount in 2004-05 as set forth above).

As the trial court determined that the High School Challenge was not a special program, the trial court correctly concluded that the money received by CMS from the Board for the program should have been included in the local current expense fund and apportioned between CMS and the Charter Schools. We need not address whether the trial court was correct in deciding that this was not a special program because, even if the High School Challenge was a special program, CMS failed to set up the required separate special fund for the High School Challenge money. Consequently, since the High School Challenge money became part of the local current expense fund, and since the Charter Schools were entitled to a *pro rata* share of all the moneys in the local current expense fund, CMS was required to apportion the moneys received for the High School Challenge on a per pupil basis between CMS and the Charter Schools before the High School Challenge program was funded.

Accordingly, the trial court did not err in determining that the Board's appropriations to CMS for the High School Challenge should have been apportioned between CMS and the Charter Schools before the High School Challenge program was funded.

V. PER PUPIL FUNDING CALCULATION

[4] CMS argues that the trial court erred in ruling that CMS's method of calculating the local per pupil funding was inconsistent with N.C. Gen. Stat. § 115C-238.29H. We disagree.

Pursuant to N.C. Gen. Stat. § 115C-238.29H(b), "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." In its ruling, the trial court made the following conclusions of law:

5. CMS's method of calculating the per pupil funding amount was inconsistent with N.C. Gen. Stat. § 115C-238.29H because it failed to allocate the funds to the [C]harter [S]chools and CMS on the same basis.

6. To properly apportion the local current expense funds it received from Mecklenburg County during the period in dispute, CMS is directed to recalculate the amounts due to or from the [C]harter [S]chools in a manner consistent with the foregoing conclusions of law for that period of time. In doing so, CMS may either calculate the amounts due for both itself and the [C]harter [S]chools based on beginning of the year projections of the student population, on enrollments, or some other method, so long as that method is consistent for both CMS and the [C]harter [S]chools. The Court will not impose its own method of apportioning the local current expense funds unless the method that CMS proposes fails to apportion those funds between CMS and the [C]harter [S]chools in a manner consistent with the statute.

CMS calculated the per pupil local current expense figure at the beginning of each school year based on estimates of total enrollment for the CMS schools and the Charter Schools. CMS then paid the Charter Schools based on actual monthly enrollment of students in the Charter Schools. However, CMS did not pay the CMS schools based on actual monthly enrollment of students in the CMS schools, and instead funded CMS schools with the money not dispersed to the Charter Schools. Because student enrollment for both the Charter Schools and the CMS Schools decreased during each school year, CMS's per pupil amount actually increased throughout the fiscal year. CMS's method, therefore, failed to transfer to the Charter Schools an amount "equal to" the per pupil local current expense appropriation that CMS received for the fiscal year, in violation of N.C. Gen. Stat. § 115C-238.29H(b). Accordingly, we hold the trial court correctly determined that CMS's method of calculating the local per pupil funding was inconsistent with N.C. Gen. Stat. § 115C-238.29H, and the trial court correctly ordered CMS to allocate the funds to the Charter Schools and CMS on the same basis.

VI. STATUTE OF LIMITATIONS

[5] Finally, CMS contends the trial court erred in ruling that the Charter Schools were not barred by the statute of limitations from pursuing claims arising from funding for the 2001-02 school year. We disagree.

A three-year statute of limitations applies for any action "[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." N.C. Gen. Stat. § 1-52(2) (2001). Because N.C. Gen. Stat. § 115C-238.29H contains no limitations period, the three-year statute of limitations controls and operates as a bar to all claims accruing more than three years prior to the date the action was commenced. "In general, a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises[.]" *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962) (quotation marks and citation omitted).

CMS contends that the Charter Schools' cause of action for funding calculations and transfers for the 2001-02 school year occurred more than three years before the filing of the Charter Schools' Complaint on 25 May 2002 and, thus, is time-barred. CMS's calculation of the per pupil current local expense figure for the 2001-02 school year was made and communicated to the Charter Schools in October 2001. CMS contends that funds were then paid to the Charter Schools on a monthly basis and that "where obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due." *Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 357, 396 S.E.2d 327, 332 (1990).

However, contrary to CMS's contentions, CMS was not required by statute to make payments to the Charter Schools in installments, nor did CMS actually make payments to the Charter Schools in regular, monthly installments. CMS was required to transfer to the Charter Schools "an amount equal to the per pupil local current expense appropriation to [CMS] for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b). The statute does not specify a particular payment schedule that CMS was required to follow. Furthermore, CMS made payments on different days, in different months, and in varying amounts throughout the fiscal year, with "catch-up" payments made at the end of the fiscal year. Accordingly, CMS's payments to the Charter Schools were not "installment payments" and the statute of limitations did not run against each payment independently.

Additionally, given the erratic payment schedule, the Charter Schools could not have determined whether CMS had paid each of the Charter Schools "an amount equal to the per pupil local current expense appropriation to [CMS] for the fiscal year" until the end of that fiscal year. Therefore, the Charter Schools could not have determined whether CMS had underfunded the Charter Schools, or the

extent of such underfunding, until the end of the 2001-02 fiscal year. As a result, the Charter Schools' cause of action for underfunding did not accrue until after the end of the 2001-02 school year. Since their action accrued less than three years prior to the date they filed their Complaint, the trial court did not err in ruling that the Charter Schools were not barred by the applicable statute of limitations from pursuing claims arising for funding for the 2001-02 school year.

For the reasons stated, the judgment of the trial court is

REVERSED and REMANDED WITH INSTRUCTIONS in part, AFFIRMED in part.

Judges McCULLOUGH and CALABRIA concur.

BLUE RIDGE COMPANY, L.L.C., Petitioner v. THE TOWN OF PINEVILLE, North Carolina, Respondent

No. COA07-206

(Filed 5 February 2008)

1. Zoning— trial court review—standards—de novo for legality—whole record for findings

The trial court in a zoning matter used the proper standard of review by applying de novo review to the legality of the general requirements of the ordinance and the whole record test to challenged findings made by a town council.

2. Zoning— subdivision application—impact on local schools

Respondent town's decision to deny petitioner's subdivision application was not supported by competent, material, and substantial evidence on the question of impact on local schools. The neighborhood school policy relied upon by the town was nowhere set out as an adequate standard for petitioner to follow, and, assuming such a policy, the evidence was that the local elementary school was already over capacity, so that concern about neighborhood schools would exist regardless of the subdivision. Finally, although respondent found that petitioner did not present evidence of impact on schools, the ordinance did not require a school impact study.

3. Zoning— subdivision—impact on traffic

A finding by the town council in a zoning dispute that the proposed subdivision does not encourage a safer flow of traffic is not supported in the record. Testimony from a consultant indicated that the expected increase in traffic would not impact the safety of the road, while residents who testified to an adverse effect on the community seemed more concerned about noise and did not have a mathematical or factual basis for rebutting the consultant's testimony.

4. Zoning— subdivision ordinance—advantageous development—single family homes

The subdivision ordinance criteria of "advantageous development" to the surrounding area is vague, but the proposed subdivision here would be an advantageous development for the entire neighboring area because it provided for the development of single family homes, one goal of respondent's Land Use Plan.

5. Zoning— subdivision plan—smaller lot size—improved open space

The smaller lot sizes and improved open space of a proposed subdivision comported with the existing plan for subdivisions in the Land Use Plan. Respondent town's decision to deny the application on the basis of incompatibility with the existing neighborhood and nonconformity with existing plans and polices is not supported by competent evidence.

6. Zoning— remand—clarification of subjective criteria

The trial court did not err in remanding a zoning matter for a new hearing where the remand was for clarification of subjective criteria in the town ordinance.

Appeal by respondent and by petitioner from an order entered 15 December 2006 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2007.

Kennedy Covington Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr. and John H. Carmichael, for petitioner-appellant/appellee.

Poyner & Spruill, L.L.P., by Robin Tatum Currin and Andrew J. Petesch, for respondent-appellant/appellee.

CALABRIA, Judge.

The Town of Pineville ("respondent") appeals from an order reversing respondent's denial of a subdivision application from Blue Ridge Company, L.L.C. ("petitioner"). Petitioner appeals the trial court's order to remand for a new hearing. We affirm.

I. Facts

Petitioner owns 52.43 acres of undeveloped land in Mecklenburg County, in the Town of Pineville, North Carolina ("the property"). The property is adjacent to Lakeview Drive, the main street in a residential neighborhood of about fifty homes ("Lakeview Neighborhood") and the only means of access to the property. The property is zoned R-12. Petitioner applied to the Pineville Planning Board ("Planning Board") for approval of a 102 lot residential subdivision ("Netherby Subdivision").

Petitioner began the application process in August 2005 by submitting a sketch plan to the Planning Board which was approved on 22 September 2005. A preliminary plan was submitted in December 2005. Petitioner revised the preliminary plan twice in response to comments from respondent's staff. On 25 May 2006, the Planning Board unanimously denied the application.

Petitioner appealed the Planning Board's decision to the Town Council. The Town Council held a hearing, found that petitioner did not meet the requirements of the Town of Pineville Subdivision Ordinance section 6.150 ("section 6.150"), and denied the application. The Town Council based their denial on traffic and overcrowding of schools and noted that petitioner failed to show that additional students would not adversely affect the stability, environment, health and character of the neighboring area. Petitioner otherwise complied with the technical and safety requirements for subdivision plans.

Petitioner appealed to Mecklenburg County Superior Court for a writ of certiorari, pursuant to N.C. Gen. Stat. § 160A-381 (N.C. Gen. Stat. § 160A-381(a),(c) (2007) authorizes towns to adopt zoning ordinances and allows appeals to superior court in accordance with § 160A-388). Petitioner argued that denial of its subdivision plan was arbitrary, capricious and unreasonable.

On 15 December 2006, Mecklenburg County Superior Court Judge Richard Boner found that petitioner complied with the objective technical and engineering standards set forth by respondent and denial of the petition was based on subjective requirements which did

not provide petitioner with sufficient notice of what respondent expected. The trial court reversed the Town Council's denial of petitioner's application and remanded for a new hearing with respondent. In addition, the court ordered respondent to provide petitioner with any plans in existence at the time the application was filed for public facilities required for the subdivision and specific criteria regarding the environmental, health, and character of neighboring areas considered by the Town Council in determining whether the proposed subdivision complies with section 6.150.

Respondent appeals the trial court's order on the basis that respondent's decision to deny the subdivision was supported by competent, material and substantial evidence; the ordinance requirements are lawful and were lawfully applied; and respondent is under no obligation to instruct subdivision applicants before a hearing as to what and how they should present their application. Petitioner appeals on the basis that the subdivision plan should be approved without remanding for a new hearing.

II. Standard of Review

[1] Appellate courts exercise review (1) to determine whether the trial court exercised the appropriate scope of review, and (2) if appropriate, deciding whether the court did so properly. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 219, 488 S.E.2d 845, 849 (1997) (citation omitted); *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000). The superior court judge sits as an appellate court on review pursuant to writ of certiorari of an administrative decision. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990); *Sun Suites Holdings*, 139 N.C. App. at 271, 533 S.E.2d at 527. If petitioner appeals the Town's decision on the basis of an error of law, the trial court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test. *Guilford Fin. Servs., LLC v. City of Brevard*, 150 N.C. App. 1, 11, 563 S.E.2d 27, 34 (2002) (Tyson, J., concurring and dissenting), *rev'd and dissent adopted by*, 356 N.C. 655, 656, 576 S.E.2d 325, 326 (2003); *Sun Suites Holdings*, 139 N.C. App. at 272, 533 S.E.2d at 527-28. If the trial court applies the whole record test, then the Town's findings of fact are binding on appeal if supported by substantial, competent evidence presented at the hearing. *Tate Terrace Realty*, 127 N.C. App. at 218, 488 S.E.2d at 849. The superior court may apply both standards of review if required, but the standards should be

applied separately to discrete issues. *Sun Suites Holdings*, 139 N.C. App. at 273-74, 533 S.E.2d at 528.

Petitioner challenges the Town Council's decision as vague, arbitrary and capricious, unsupported by the record and claims the ordinance is void as a matter of law. The superior court determined that petitioner presented substantial evidence to support a finding that petitioner met the technical requirements for a subdivision plan, and the plan should have been approved. The superior court concluded that denial of the application was not supported by law because the subjective requirements did not give petitioner notice of the Town Council's expectations for compliance.

The trial court applied the whole record test to the challenged findings and *de novo* review of the Town Council's ordinance. The trial court reviewed the evidence to determine petitioner met the technical requirements of the ordinance and reviewed *de novo* the legality of the general requirements. Therefore, we conclude the trial court conducted the proper scope of review. *Sun Suites Holdings*, 139 N.C. App. at 273-74, 533 S.E.2d at 528.

III. Denial of Subdivision Application

[2] First, we examine whether the trial court erred in reversing the Town Council's decision. Respondent argues its decision to deny petitioner's subdivision application was supported by competent, material and substantial evidence and should have been affirmed. We disagree.

"In reviewing a superior court order entered upon review of a zoning decision by a municipality, the appellate court must determine . . . whether the evidence before the Town Council supported the Council's action." *William Brewster Co. v. Town of Huntersville*, 161 N.C. App. 132, 134, 588 S.E.2d 16, 19 (2003) (internal quotation and citation omitted).

The Town Council denied petitioner's subdivision application on the basis it did not comply with general requirements outlined in the Town of Pineville, Subdivision Ordinance 6.150. The pertinent portions of section 6.150 are as follows:

Subdivision Ordinance

6.150. General Requirements

1. Consistency with adopted public plan and policies. All subdivisions of land approved under these regulations should be con-

> sistent with the most recently adopted public plans and policies for the area in which it is located. This includes general policy regarding development objectives for the area as well as specific policy or plans for public facilities such as streets, parks and open space, schools, and other similar facilities. Plans and policies for the community are on file in the offices of the Secretary to the Pineville Planning Board and in the offices of the Charlotte-Mecklenburg Planning Commission.
>
> 2. Conformity. All proposed subdivisions should be planned so as to facilitate the most advantageous development of the entire neighboring area. In areas with existing development, new subdivisions should be planned so as to protect and enhance the stability, environment, health and character of the neighboring area . . . .

Specifically, the Town Council found that the access route utilizing Lakeview Drive would add 1000 trips per day, increasing current traffic on that road by thirty percent, that homeowners and their children use the streets and sidewalks for bike riding and other recreational activities, that the Lakeview Neighborhood would triple in size from the construction of the Netherby Subdivision, that petitioner did not submit evidence as to the impact of the Netherby Subdivision on neighborhood schools, and that the "Netherby Subdivision does not protect the Lakeview Neighborhood from non-compatible encroachment."

When a subdivision ordinance requires several criteria for approval of a plan, failure to meet one requirement is a sufficient basis to deny approval. *Howard v. City of Kinston*, 148 N.C. App. 238, 245-46, 558 S.E.2d 221, 227 (2002) ("If even one of the reasons articulated by the [Town] for denial of the subdivision permit is supported by valid enabling legislation and competent evidence on the record, the [Town's] decision must be affirmed.") (citation omitted). In order to determine whether petitioner failed to meet any of the requirements, it is necessary to examine each one.

A. School Impact

Petitioner contends the Town Council's denial of the application based on the impact on local schools was not supported by substantial and competent evidence. We agree.

The ordinance expressly requires that subdivision plans conform with specific policy or plans for schools. Section 6.150(1) provides:

"All subdivisions of land approved under these regulations should be consistent with the most recently adopted public plans and policies for the area in which it is located. This includes general policy regarding development objectives for the area as well as specific policy or plans for public facilities such as . . . schools . . . ."

The Town Council found that "[i]t is the policy of the Town of Pineville to have its children attend neighborhood elementary schools." This policy is not described in the General Requirements ordinance, nor is it outlined in the Future Land Use Plan.[1] The only indication in the record of such a policy is in the form of a letter from a member of the School Building Solutions Committee dated 1 August 2006, and his testimony before the Town Council that same day, noting that Charlotte-Mecklenburg Schools "wants Pineville's students to have neighborhood schools. . . . That's what this town wants, that's what the parents want . . . ." At the hearing, the Town Council received information that Pineville Elementary was currently over capacity and that

> [t]he staff feels that with the addition of a hundred and two lots—there is an equation that developers use to determine how many students will be in addition to existing neighborhoods. Currently, staff does not have that information of what it would be, but we just wanted to present that information to let you know there are other concerns . . . .

Notwithstanding whether this letter sufficiently described the "most recently adopted public plans and policies for the area," this letter was not available to petitioner until the day of the hearing. The timeliness of the letter did not provide an adequate guiding standard for petitioner to follow. *See* N.C. Gen. Stat. § 160A-371 (2007).

Assuming *arguendo* such a policy was on file, since Pineville Elementary was considered over capacity at the time of the application, concern about children attending neighborhood schools would exist regardless of petitioner's proposed subdivision. *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 219-20, 261 S.E.2d 882, 888 (1980) (Town's denial of application based on finding that fire fighting facilities would be outstripped is invalid since that problem would exist regardless of the proposed development).

Respondent also found that petitioner did not present evidence of the proposed subdivision's impact on schools. While that finding is

1. The Town's Future Land Use Plan ("Land Use Plan") specifies goals and objectives for "future land use development patterns in the Town."

supported by the record, the subdivision ordinance did not expressly require a school impact study. The Town Council is without authority to "deny a permit on grounds not expressly stated in the ordinance." *Woodhouse*, 299 N.C. at 218, 261 S.E.2d at 887 (citation omitted). We conclude respondent's finding that petitioner's application did not conform with section 6.150 on the basis of school impact is not supported by substantial and competent evidence.

B. Traffic Concerns

[3] Respondent found that "the design of the Netherby Subdivision does not encourage a safer nor easier flow of traffic." One goal and objective of the Land Use Plan is for subdivisions to be "designed in such a way to encourage a safer, easier flow of traffic." However, the finding that the subdivision does not encourage a safer flow of traffic is not supported in the record. Testimony presented to the Town Council indicates the thirty percent increase in traffic on Lakeview Drive would not impact the safety of the road. Don Spence, a consultant with Kublins Transportation Group, was retained by members of the Planning Board, Kevin Icard and Mike Rose, to examine the traffic conditions surrounding the area, and to measure the potential impact of traffic on the Lakeview Neighborhood. Spence testified that subdivisions consisting of a hundred lots "can produce approximately one thousand trips." Spence concluded that the "existing light traffic conditions combined with trip generation anticipated by the construction of Netherby at Regency Park will not exceed minimum traffic capacity standards." Spence testified that based on traffic volume, the additional trips would not create any "undue safety problems." Although the thirty percent increase was described as "significant," that standing alone is not sufficient to find that the Netherby Subdivision does not protect and enhance the stability, environment, health and character of the neighboring area.

The Town Council heard testimony from residents of Lakeview Neighborhood, stating that noise from the new subdivision would disturb the peace of the current neighborhood and cars must slow down to pass each other on the road, so the increase in traffic would not be safe. The residents did not rebut Spence's testimony with mathematical studies or any other factual basis to establish that the increase in traffic would adversely affect the community. *See Cumulus Broadcasting, LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 430, 638 S.E.2d 12, 17 (2006) (witness testimony in opposition to the granting of a permit relying solely upon their personal knowledge and observations is not enough to rebut quantitative data); *compare*

Howard, 148 N.C. App. at 246-47, 558 S.E.2d at 227-28 (witness testimony that current traffic conditions result in near accidents involving children based on personal knowledge and observation supported a finding that an increase in traffic endangered health and safety of the neighborhood where expert testimony quantitatively confirmed witness' concerns); *see also Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530 (internal quotation marks omitted) (citation omitted) ("[T]he expression of generalized fears does not constitute a competent basis for denial of a permit.").

Here, a Lakeview resident testified there is currently "no concern of safety of traffic"; therefore, any conclusion that an increase in traffic would cause safety concerns is speculative and generalized in light of Spence's report showing that the increase in traffic would not create any safety problems. In addition, the residents' concerns seemed to be more about potential noise than about safety. Denial of a permit "may not be founded upon conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested." *Woodhouse*, 299 N.C. at 220, 261 S.E.2d at 888 (citation and quotation omitted).

[4] Respondent contends the increase in traffic affects conformity with the existing development. Section 6.150(2) provides: "All proposed subdivisions should be planned so as to facilitate the most advantageous development of the entire neighboring area. In areas with existing development, new subdivisions shall be planned so as to protect and enhance the stability, environment, health and character of the neighboring area . . . ."

"The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property." *Guilford Fin. Servs.*, 150 N.C. App. at 15, 563 S.E.2d at 36 (citation omitted). N.C. Gen. Stat. § 160A-371 provides that "[w]henever [a subdivision] ordinance includes criteria for decision that require application of judgment, those criteria must provide adequate guiding standards for the entity charged with plat approval."

The criteria characterized as the "most advantageous development" is vague. One goal and objective of respondent's Land Use Plan is to encourage development of single family homes in the Town of Pineville, "[t]he low percentage of single family homes . . . limits the growth potential of the Town." Petitioner's subdivision plan provides for single family homes; therefore, it would appear the Netherby Subdivision would be an advantageous development.

C. Conformity and Consistency

[5] Respondent contends the Netherby Subdivision does not comport with the existing plan and policies for subdivisions outlined in the Land Use Plan. We disagree.

The Land Use Plan identifies five goals in improving residential development in Pineville:

> 1. To encourage and support a well-planned, diverse housing environment offering a mix of housing densities and styles.
>
> 2. To develop key strategies for encouraging larger sized single-family detached housing. Identify areas appropriate for this type development.
>
> 3. To strengthen existing neighborhoods through quality infill development where appropriate, and to identify improvements to infrastructure to enhance the neighborhood setting.
>
> 4. To protect existing neighborhoods from non-compatible encroachment.
>
> 5. To encourage new and innovative ideas that will provide quality housing while still working with the constraints of land. Smaller lot sizes with improved open space are examples that utilize moderate densities.

The minimum size of a lot in the Netherby Subdivision is 12,000 square feet. One of the goals of the Land Use Plan is to encourage smaller lot sizes and this is a lower size requirement than the existing lots in the Lakeview Neighborhood. The Netherby Subdivision also allows connections to a proposed greenway and recreation areas. The smaller lot sizes, along with improved open space, is consistent with the goals of the Land Use Plan. In addition, the difference in lot sizes would appear to comport with the goal for a "diverse housing environment" with a mix of "housing densities and styles." The size of the proposed homes would be between 2400 and 3000 square feet, which comports with the Land Use Plan's goal to encourage mid/large size homes greater than 1500 square feet. The Board's decision to deny the application on the basis of incompatibility with the existing neighborhood and non-conformity with existing plans and policies is not supported by competent evidence.

We conclude petitioner complied with the general and technical requirements of the Pineville Ordinance. Thus, the superior court's reversal of respondent's decision was not in error.

IV. Remand

[6] Both petitioner and respondent argue the trial court's order to remand for a new hearing was in error. We disagree.

Respondent argues Pineville is under no obligation to provide petitioner with specific criteria to be used to determine whether the subdivision plan met the requirements of its ordinance. Petitioner contends because the technical requirements were met, it is *prima facie* entitled to a subdivision permit without remand.

As a preliminary matter, we note that petitioner, as an appellant, did not state the standard of review in its appellate brief as required by the North Carolina Rules of Appellate Procedure, Rule 28(b)(6) (2007): "The argument shall contain a concise statement of the applicable standard(s) of review for each question presented . . . ." However, we decline to dismiss petitioner's appeal based on this error. *See* N.C.R. App. P. 2 (2007).

The task of the appellate court in reviewing a decision made by a town board sitting as a quasi-judicial body includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). N.C. Gen. Stat. § 160A-371 requires that "[w]henever [a subdivision] ordinance includes criteria for decision that require application of judgment, those criteria must provide adequate guiding standards for the entity charged with plat approval." Town boards must employ "specific statutory criteria which are relevant." *Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887. The trial court remanded for clarification of subjective criteria in the town ordinance which is consistent with insuring "procedures specified by law in both statute and ordinance are followed." *Concrete Co.*, 299 N.C. at

626, 265 S.E.2d at 383. This is a reasonable action for a trial court to take and we conclude there was no error.

V. Conclusion

We conclude respondent's denial of petitioner's subdivision application was not supported by substantial and competent evidence and the trial court did not err in remanding for clarification of respondent's requirements.

Affirmed.

Judges McCULLOUGH and STEPHENS concur.

SUSAN CARROLL HARRIS, Plaintiff v. LESLIE BAILEY HARRIS, JR., Defendant

No. COA07-228

(Filed 5 February 2008)

1. Divorce— alimony—modification—changed circumstances—cessation of child support—fairness to parties

The trial court did not abuse its discretion in an alimony case by granting plaintiff wife's motion to increase the award based on its consideration of termination of child support payments as a factor in deciding whether a modification of the alimony award was warranted because: (1) although the cessation of child support payments does not always provide adequate grounds to warrant a modification of an alimony award, given the limited circumstances of this case and in the interest of fairness to the parties involved, the trial court could consider it; (2) plaintiff wife's reasonable housing expenses increased significantly by doubling since she continued to live in the same residence and has the same total housing costs, but now none of those expenses are attributable to a minor child; and (3) there was a substantial change in circumstances concerning plaintiff's financial need.

2. Divorce— alimony—modification—findings of fact—income and reasonable expenses

The trial court did not abuse its discretion in an alimony case by granting plaintiff wife's motion to increase the award based on its finding of fact as to plaintiff wife's income and reasonable

expenses even though defendant contends the court improperly considered household expenses that included food consumed by his adult daughter, plaintiff's voluntary tithes to her church, and tax consequences based upon an arbitrary 25% tax rate, because: (1) it is the function of trial judges in trials without a jury to weigh and determine the credibility of witnesses, and the trial court found plaintiff's sworn testimony that her monthly wages averaged $1,315 to be credible despite inconsistencies in the evidence; (2) in determining plaintiff's financial need, the trial court only included in its calculation those expenses that had previously been reduced in the 2002 order for postseparation support such as the house payment, household maintenance and repair, electricity, and cable; (3) the trial court did not find the amount for plaintiff's monthly food costs had changed since the original order, and thus, defendant's argument that this figure now accounted for food consumed by his adult daughter was without merit; (4) defendant failed to preserve the issue of plaintiff's voluntary tithes since the trial court determined in its original 2002 order that these were reasonable expenses, and defendant did not timely appeal that order as required by N.C. R. App. P. 3(c) and 10(b); and (5) the trial court assumed a 25% tax rate in the original order, and no evidence was presented as to a change in such tax rate.

3. Divorce— alimony—modification—ability to pay—parties' relative assets and liabilities

The trial court did not abuse its discretion in an alimony case by denying defendant husband's motion to decrease the award because: (1) the trial court considered defendant's ability to pay alimony and made findings as to the parties' relative assets and liabilities; (2) while the order did not contain an itemized list of the court's findings as to defendant's current reasonable expenses and liabilities, it expressly stated that the trial court found no significant change in the parties' assets and liabilities except as recited in the order, thus reincorporating its 2002 findings as current findings of defendant's reasonable expenses and liabilities; (3) the trial court's consideration of income received by defendant's new spouse was properly restricted to weighing the extent to which it reduced defendant's reasonable expenses and increased his ability to pay; (4) although there was no rational basis to support the finding that defendant voluntarily left his prior job and that any decrease in income was the result of his

voluntary choices, it was harmless error when the court made other sufficient findings to support its decision not to decrease the alimony award; and (5) the fact that defendant's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance if he is still able to make the payments as originally ordered and the other facts of the case make it proper to continue the payments.

Appeal by defendant from order entered 23 October 2006 by Judge James M. Honeycutt in Alexander County District Court. Heard in the Court of Appeals 10 October 2007.

Larissa J. Erkman for plaintiff appellee.

Katherine Freeman for defendant appellant.

McCULLOUGH, Judge.

This is a family law dispute involving modification of permanent alimony. Plaintiff Susan Carroll Harris ("plaintiff-wife"), and defendant Leslie Bailey Harris ("defendant-husband"), were married on 10 June 1973 and divorced on 12 February 2003. The parties have two children born of the marriage; however, at the time of the divorce, only one child, Sarah Harris ("Sarah") was a minor child.

On 5 June 2002, the Alexander County District Court ordered defendant-husband to pay plaintiff-wife post separation support ("PSS") in the amount of $1,122.00 per month. At the time of the order, defendant-husband worked for a copy service company full-time and also worked part-time for H&R Block and for his father's tax preparation business, earning a gross monthly income of $5,083.00. Plaintiff-wife was self-employed cleaning houses, earning a gross monthly income of $1,250.00. The parties stipulated that defendant-husband is a supporting spouse, as defined by N.C. Gen. Stat. § 50.16.1A(5) (2005); that plaintiff-wife is a dependent spouse, as defined by N.C. Gen. Stat. § 50.16.1A(2); and that prior to the date of separation, defendant-husband committed acts of marital misconduct, as defined by N.C. Gen. Stat. § 50.16.1A(3) . The parties further stipulated that defendant-husband would pay $880.00 per month for the minor child.

The trial court made specific findings of fact as to plaintiff-wife's reasonable monthly expenses, which were determined to total

$1,778.72. In pertinent part, the trial court found plaintiff-wife's reasonable monthly expenses included $141.66 for food at home, $60 for food away from home, and $120.00 for church tithes. In calculating plaintiff-wife's cost of housing, the trial court attributed a portion of her total housing costs to the minor child. Accordingly, the trial court found plaintiff-wife's reasonable expenses to include only one-half of the house payment, $389.73; one-half of the cost of maintenance and repair of the house, $44.50; one-half of the cost of electricity, $94.00; and one-half of the cost of cable, $20.

Defendant-husband was fired from his place of employment at Copy Service & Supply Company on 21 August 2002. By order dated 8 November 2002, defendant-husband's child support and PSS obligations were reduced to $690.00 and $879.00 per month, respectively. Subsequent to that order, defendant-husband obtained employment at COMDOC Business, where he earned a salary of $45,000.00 per year. On 12 February 2003, defendant-husband was ordered to pay $1,100.00 in permanent alimony and $744.47 in child support. Defendant-husband was again fired from his place of employment on 12 March 2003, and the parties agreed to temporarily reduce his alimony and child support obligations to $879.00 and $690.00, respectively. By consent order entered 27 October 2004, defendant-husband's alimony and child support obligations were increased to $1,100.00 and $744.47, respectively.

On 11 May 2006, plaintiff-wife moved to increase defendant-husband's alimony obligation on the basis that because Sarah would be turning eighteen and graduating from high school, plaintiff-wife's reasonable expenses, which were calculated in light of defendant-husband's child support obligation, would be increasing. Defendant-husband, likewise, moved to decrease his alimony obligation on the basis that defendant-husband has experienced a significant involuntary decrease in his income. By order filed 23 October 2006, the trial judge granted plaintiff-wife's motion, increasing defendant-husband's alimony obligation to $1,644.00, denied defendant-husband's motion to decrease alimony, and ordered that defendant-husband's child support obligation be terminated as of 1 June 2006.

On appeal, defendant-husband contends that the trial court erred by (1) granting plaintiff-wife's motion to increase the alimony award; and (2) denying defendant-husband's motion to decrease the alimony award.

I. Motion to Increase Alimony

Defendant-husband contends that the trial court erred in two respects when it granted plaintiff-wife's motion for an increase in alimony: (1) defendant-husband argues that the trial court improperly considered termination of child support payments as a factor in deciding whether a modification of the alimony award was warranted; and (2) defendant-husband argues that the trial court's findings of fact as to plaintiff-wife's income and reasonable expenses are not supported by competent evidence of record.

A. Termination of Child Support

[1] Defendant-husband first contends that the trial court improperly considered the termination of his child support obligation as a factor in deciding whether a modification of the alimony award was warranted. First, we emphasize that (1) it is the policy of our state that awards for alimony and child support be separately stated, *see* N.C. Gen. Stat. § 50-16.7(a) (2005); and (2) absent special exceptions, unlike alimony payments, payments ordered for the support of a child must terminate when the child turns eighteen, *see* N.C. Gen. Stat. § 50-13.4(c) (2005). We do not seek to blur the intended distinction between alimony and child support, and accordingly, we do not hold that the cessation of child support payments will always provide adequate grounds to warrant a modification of an alimony award; however, given the limited circumstances of this case, in the interest of fairness to the parties involved, we conclude that, here, the trial court did not err in considering the effect of the cessation of child support in modifying the alimony award.

" 'The "overriding principle" in cases determining the correctness of alimony is "fairness to all parties." ' " *Fink v. Fink*, 120 N.C. App. 412, 418, 462 S.E.2d 844, 850 (1995) (quoting *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986) (quoting *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976)), *disc. review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). Decisions regarding the amount of alimony ordered are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).

Pursuant to N.C. Gen. Stat. § 50-16.9, an order for alimony may be modified upon a showing of changed circumstances by either party. N.C. Gen. Stat. § 50-16.9(a) (2005). "As a general rule, the changed cir-

cumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). "To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under [now N.C. Gen. Stat. § 50-16.3A]." *Id.* " 'The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.' " *Vadala v. Vadala*, 145 N.C. App. 478, 479, 550 S.E.2d 536, 538 (2001) (quoting *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986)).

In *Fink*, we held that under former N.C. Gen. Stat. § 50-16.5, "custodial responsibilities constitute a 'condition' to be considered by the trial court in its determination of dependency so as to effect as equitable an adjustment as possible, with due regard to all affected interests." *Fink*, 120 N.C. App. at 421, 462 S.E.2d at 851. Following *Fink*, in 1995, the General Assembly repealed N.C. Gen. Stat. § 50-16.5 and enacted N.C. Gen. Stat. § 50-16.3A, essentially codifying our *Fink* decision by mandating that trial courts consider the expenses and financial obligations related to serving as a custodian of a minor child when setting the amount and duration of an alimony award. *See* N.C. Gen. Stat. § 50-16.3A(b)(7) (2005); *see also* Nancy E. LeCroy, *SURVEY OF DEVELOPMENTS IN NORTH CAROLINA AND THE FOURTH CIRCUIT, 1995: FAMILY LAW: Giving Credit Where Credit Is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements*, 74 N.C.L. Rev. 2128 (1996) (discussing the legislative history of N.C. Gen. Stat. § 50-16.3A).

Here, in determining whether to modify the alimony award, the trial court explicitly found that in setting the amount of the original PSS award, the trial court considered N.C. Gen. Stat. § 50-16.3A(b)(7), "[t]he extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child," and N.C. Gen. Stat. § 50-16.3A(b)(10), "[t]he relative assets and liabilities of the spouses . . . including legal obligations of support[.]" The trial court stated in its findings of facts:

> (3) . . . Because the court considered child support paid and received and its effect on expenses and ability to pay originally in PSS and alimony, the court can and should consider the effect of

> the elimination of child support on Plaintiff's expenses and Defendant's ability to pay.

The record supports this conclusion, as the original 5 June 2002 PSS order expressly states, "[a] portion of the child support which will be received by the Plaintiff will pay for shelter for the child and the Court will therefore attribute to the wife in determining her reasonable monthly expenses one-half of her expense for the house payment, maintenance, electricity, and water."[1] Accordingly, the original PSS order attributes to plaintiff-wife's reasonable expenses only one-half of the house payment, one-half of the cost of maintenance and repair of the house, one-half of the cost of electricity, and one-half of the cost of cable.

Because plaintiff-wife continues to live in the same residence and has the same total housing costs, but now none of these expenses are attributable to a minor child, the trial court found that plaintiff-wife's reasonable housing expenses have increased significantly. The court determined that while plaintiff-wife's monthly wages have only increased from $1,250.00 to $1,315.00, her reasonable expenses now include, not one-half, but 100% of the housing costs. The trial court found that plaintiff-wife's reasonable expenses have increased by $548.23 per month and that plaintiff-wife has to borrow money by way of cash advances to meet her expenses. Therefore, the trial court concluded, in its discretion, that the change in plaintiff-wife's financial need was sufficient to warrant a modification of the alimony order.

Defendant-husband argues that because the statutorily mandated end of child support was anticipated by the parties and by the court at the time that the permanent alimony order was entered, it does not constitute a substantial change in circumstances sufficient to warrant a modification of the award. In support of this argument, defendant-husband relies on our decision in *Britt v. Britt*, in which we stated:

> "Where the change in the circumstances is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree. In accord with the view it is said that minor fluctuations in income are a common occurrence and the likelihood

1. The 2002 PSS order allocates $48.00 for the cost of water, sewer, and trash; despite the court's express intent to attribute a portion of the cost of water to the minor child, it does not seem that any portion of this expense was actually allocated to the minor child.

that they would occur must have been considered by the court when it entered a decree for alimony."

Britt v. Britt, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980) (citation omitted).

First, we find the facts before us distinguishable from *Britt*. In *Britt*, we noted that the only fact "remotely supporting" the order modifying the alimony award was a change in the income of the parties. *Britt*, 49 N.C. App. at 471, 271 S.E.2d at 927. Here, the trial court found not merely a loss of child support income, but a substantial increase in plaintiff-wife's reasonable expenses. *See Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966) (holding that a substantial change in the dependent spouse's needs would warrant a modification of an alimony award). Next, we note that while it was foreseeable that child support payments would terminate upon Sarah reaching the age of 18, it was not necessarily foreseeable that plaintiff-wife's living expenses would be double what they were at the time that the original PSS award was entered; here, the trial court found it reasonable that plaintiff-wife continue to live in the same house in which she had been living. However, if plaintiff-wife had moved from the family house to a less expensive residence, her housing expenses might not have increased substantially enough to warrant a modification of the award. Thus, the extent to which plaintiff-wife's reasonable expenses have changed was not necessarily foreseeable at the time that the 2002 PSS order was entered. Finally, even in *Britt*, we recognized that " 'the question of the correct amount of alimony . . . is a question of fairness to all parties.' " *Britt*, 49 N.C. App. at 474, 271 S.E.2d at 928 (citation omitted).

The trial court found that because plaintiff-wife's reasonable housing expenses were calculated in light of defendant-husband's child support obligation, without that obligation, her costs have doubled. Meanwhile, the court found that defendant-husband's ability to pay has increased. The court concluded that under these circumstances, an increase in the alimony award was fair. Given the facts before us, we find this conclusion to be within the court's discretion. This assignment of error is overruled.

B. Findings as to Plaintiff-Wife's Income and Reasonable Expenses

[2] Defendant-husband next contends that the trial court committed reversible error in determining plaintiff-wife's income and reasonable expenses. We disagree.

First, defendant-husband argues that the court's finding as to plaintiff-wife's income is not based on credible evidence, as plaintiff-wife's testimony contradicted her bank records and affidavit of financial standing. "It is the function of the trial judge, in trials without a jury, to weigh and determine the credibility of a witness." *Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979). Despite inconsistencies in the evidence, the trial court apparently found plaintiff-wife's sworn testimony that her monthly wages averaged $1,315.00 to be credible; therefore, we will not hold to the contrary.

Next, defendant-husband contends that in calculating plaintiff-wife's reasonable expenses, the trial court erred by accepting as reasonable plaintiff-wife's household expenses that included food consumed by his adult daughter, Sarah, plaintiff-wife's voluntary tithes to her church, and tax consequences based upon an arbitrary 25% tax rate.

As previously discussed, "[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge[.]" *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982), *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). "Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999). After reviewing the order at issue, it is clear that the trial judge found that none of plaintiff-wife's reasonable expenses had changed significantly since 2002 except for those in which some portion of the cost had been attributed to the parties' then minor child, Sarah. The Order expressly states: "Converting to 100% the expenses that the undersigned had reduced for PSS, Plaintiff is in need of at least the $408.57 that she is not now receiving."[2] Thus, in determining plaintiff-wife's financial need, the trial judge only included in his calculation those expenses that had previously been reduced, such as the house payment, household maintenance and repair, electricity, and cable.

Plaintiff-wife's food costs were not reduced in the 2002 order, and therefore, the trial court found that these costs had not significantly increased since then. The 2002 order contains a finding that plaintiff-

2. The trial court determined that plaintiff-wife had a net decrease of $408.57 in income by subtracting plaintiff-wife's prior child support obligation of $335.85 from the $744.41 child support payment that she had been receiving from defendant-husband.

wife's total monthly cost of food was $201.66, which is based on the amount that she attributed to only herself on her 2002 Affidavit of Financial Standing. Since the trial court did not find this amount to have changed since the original order, defendant-husband's argument that this figure now accounts for food consumed by his adult daughter, Sarah, is without merit.

We find defendant-husband's remaining contentions to be meritless as well. Because the trial court determined that plaintiff-wife's voluntary tithes were reasonable expenses in its original 2002 PSS order, and defendant-husband did not timely appeal that order, pursuant to N.C. App. P. Rule 3(c) and 10(b), he has not preserved this issue for appellate review. Likewise, the trial court assumed a 25% tax rate in the original order. The trial court found that plaintiff-wife's income has not changed significantly since that order, and no evidence was presented as to a change in such tax rate. We conclude that, under the circumstances, the trial court did not abuse its discretion in assuming the same tax rate in calculating plaintiff-wife's current financial need.

II. Motion to Decrease Alimony Award

[3] Now, we address defendant-husband's contention that the trial court erred by denying his motion to decrease the alimony award.

First, defendant-husband contends that the trial court erred by failing to make findings of fact as to defendant-husband's reasonable expenses in determining his actual ability to pay. We disagree.

As previously discussed, the relative assets and liabilities of the spouses is a factor listed under N.C. Gen. Stat. § 50-16.3A and was considered by the trial court in determining the original alimony award; thus, we agree with defendant-husband that the trial court was required to consider and make findings as to this factor.

Here, the court clearly considered defendant-husband's actual ability to pay alimony and made findings as to the parties' relative assets and liabilities. While the order does not contain an itemized list of the court's findings as to defendant-husband's current reasonable expenses and liabilities, the order expressly states that the trial court found "no significant change in [the parties'] assets and liabilities except as recited [in the order]." Thus, the order reincorporates its 2002 findings as current findings of defendant-husband's reasonable expenses and liabilities to the extent that such expenses are not otherwise mentioned. The trial court expressly found that defendant-

husband has been able to regularly pay his PSS, alimony, and child support payments; that his income has not changed significantly; and that his reasonable expenses have decreased by $1,007.53 due to the termination of his child support obligation as well as the fact that his new wife covers his daughter's health insurance premiums. We find that there is competent evidence in the record to support these findings. Therefore, this argument is without merit.

Next, defendant-husband contends that the trial court improperly considered his new wife's income in determining his ability to pay alimony. We disagree.

We have held that where a party's new spouse shares responsibility for the party's expenses and needs, it is proper for the court to consider income received by the new spouse in weighing the party's " '*necessary* and reasonable expenses and debts against his financial ability to pay[.]' " *Broughton v. Broughton*, 58 N.C. App. at 786, 294 S.E.2d at 778; *see also Wyatt v. Wyatt*, 35 N.C. App. 650, 651-52, 242 S.E.2d 180, 181 (1978). Here, as in *Broughton*, defendant-husband's present wife is a member of his household and shares responsibility for defendant-husband's expenses, including his daughter's health insurance premiums. The record reveals that the trial court's consideration was properly restricted to weighing the extent to which defendant-husband's present wife's income reduced his reasonable expenses and increased his ability to pay. Accordingly, this argument is without merit.

Finally, defendant-husband contends that the trial court abused its discretion in finding that defendant-husband voluntarily left his prior job and that any decrease in income is the result of his voluntary choices. We agree that the record contains no rational basis to support these findings, as prior court orders found that defendant-husband was involuntarily terminated from such employment and defendant-husband testified that his current employer reprimanded him for working a part-time job last year; however, we find this error to be harmless, as the court made other findings sufficient to support its decision not to decrease the alimony award.

" 'The fact that the husband's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance.' " *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927 (citation omitted); *see also Medlin v. Medlin*, 64 N.C. App. 600, 602-03, 307 S.E.2d 591, 593 (1983) (holding that a husband's mere evidence of a decrease in income was insufficient to warrant a modifi-

cation of an alimony award). We have held that despite a substantial decrease in income, " '[i]f the husband is able to make the payments as originally ordered . . . and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree.' " *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927 (citation omitted). Here, the income generated from defendant-husband's seasonal part-time work is minimal; and as previously discussed, the trial court found that defendant-husband has had a monthly decrease in cash outflow of $1,007.53 and that defendant-husband has been able to make his alimony and child support payments as originally ordered. Therefore, we find this error to be harmless.

For the foregoing reasons, we conclude that the trial court did not err in denying defendant-husband's motion to decrease the alimony award nor in granting plaintiff-wife's motion to increase the alimony award.

Affirmed.

Judges CALABRIA and STEPHENS concur.

JOANNE PIERCE, PLAINTIFF-APPELLEE v. JAMES PIERCE, DEFENDANT-APPELLANT

No. COA07-132

(Filed 5 February 2008)

Divorce— alimony—modification—substantial change of circumstances

The trial court did not err by modifying a previous alimony order because: (1) just as the trial court found plaintiff's listed shared family expenses to be excessive, the trial court had the right to determine that plaintiff's listed individual expenses were inadequate; (2) the trial court made numerous findings of fact demonstrating that there had been a substantial change of circumstances since the entry of the previous alimony judgment; (3) while it appeared from the trial court's findings of fact that plaintiff's expenses had decreased since the original alimony judgment, plaintiff still had a considerable shortfall between her income and her expenses; and (4) the trial court found that defendant's financial condition had improved considerably since

the original alimony judgment and that plaintiff was more than able to pay plaintiff's monthly shortfall of $1,660.

Judge TYSON dissenting.

Appeal by Defendant from order entered 27 July 2006 by Judge Jane V. Harper in District Court, Mecklenburg County. Heard in the Court of Appeals 10 October 2007.

Shapack & Shapack, by Richard B. Johnson, for Defendant-Appellant.

No brief filed by Plaintiff-Appellee.

McGEE, Judge.

Joanne Pierce (Plaintiff) and James Pierce (Defendant) were married on 2 July 1960 and separated on or about 30 September 2002. Plaintiff filed a complaint on 29 January 2004 for postseparation support, alimony, and equitable distribution. Defendant filed an answer and counterclaim for equitable distribution on 4 February 2004. The trial court entered an order for postseparation support on 6 April 2004.

The trial court entered a judgment for alimony and equitable distribution on 18 March 2005. The trial court divided the marital property and ordered Defendant to pay Plaintiff alimony in the amount of $700.00 per month.

Plaintiff filed a motion in the cause for a modification of alimony on 3 April 2006. The trial court entered an order modifying the previous alimony judgment on 27 July 2006. Defendant appeals.

Defendant argues the trial court erred by modifying the previous alimony judgment. N.C. Gen. Stat. § 50-16.9(a) (2007) provides, in pertinent part: "An order of a court of this State for alimony . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." In general, the change of circumstances required for modification of an alimony order "must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). The same factors used in making the initial alimony award should be used by the trial court when hearing a motion for modification. *Id.* "[T]he 'overriding principle' in cases determining the correctness of alimony is

'fairness to all parties.' " *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986) (quoting *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976)).

In alimony cases where a trial court sits without a jury, the trial court must "find the facts specially and state separately its conclusions of law thereon[.]" N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2007). The trial court must find "specific ultimate facts . . . sufficient for [an] appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977).

Defendant argues the following findings of fact were unsupported by the evidence:

> 24. That . . . Plaintiff's reasonable monthly "shared" expenses are found to be $1,200[.00] for housing and utilities based on the left side of Part B(1) of the Affidavit of Financial Standing. This amount is, of course, speculative, but by comparison with Defendant's expenses on that side, $999[.00], and shared with Dee Kennemore, it seems reasonable. Plaintiff has $860[.00] expenses for items on the right side of the same page (home, food, and supplies, found to be $350[.00] in 2004, are found the same now; gas, found to be $50[.00] in 2004, is found to be $75[.00], given [Plaintiff's] unemployment.) These monthly shared expenses total $2,060.00 while in 2004 these monthly shared expenses totaled $2,680.00[.]
>
> 25. That . . . Plaintiff's monthly reasonable expenses [are found] to be $300[.00], even though she listed $45[.00] on her Affidavit of Financial Standing. These same expenses were found to be $600[.00] per month in 2004.

However, these findings were supported by evidence presented to the trial court. Plaintiff listed the following expenses on her 3 April 2006 financial affidavit in the left column under shared family expense: $1,545.23 for house payment/rent; $157.00 for electricity; $118.00 for heat; $48.00 for water; and $50.00 for cable television. These expenses totaled $1,918.23. However, as demonstrated by another finding not challenged by Defendant, the trial court deemed those expenses excessive: "[T]he Court anticipates . . . Plaintiff's new mortgage expense will be substantially less than [the] $1545[.00] a month listed on her April 2006 Affidavit of Financial Standing. If that

is not the case, the Court finds there was no point in selling her house." Because the trial court deemed the listed expenses excessive, the trial court reduced the expenses to $1,200.00. The trial court recognized that $1,200.00 was speculative because Plaintiff had not yet purchased a new home and did not know what her new mortgage payment would be. However, the trial court found the amount reasonable when compared with Defendant's shared expenses.

In finding twenty-four, the trial court also found that Plaintiff had $860.00 in expenses on her financial affidavit for items in the right column under shared family expense. Plaintiff listed the following expenses in that column: $45.00 for telephone(s)/pager; $500.00 for home food and supplies; $390.00 for car payment; and $150.00 for gasoline. These expenses totaled $1,085.00. However, the trial court again determined that Plaintiff's listed expenses were excessive. The trial court found Plaintiff's expenses for home food and supplies to be only $350.00 and found Plaintiff's expense for gasoline to be only $75.00. When those amounts are substituted for Plaintiff's amounts in the right column, the total is $860.00, as found by the trial court. Also, when the amounts found by the trial court from the left column are added to the amounts from the right column, the total is $2,060.00, as found by the trial court. This amount is less than Plaintiff's expenses in 2004, which totaled $2,680.00. Accordingly, finding of fact twenty-four was supported by the evidence.

Defendant also challenges finding of fact twenty-five. However, this finding was also supported. In Plaintiff's financial affidavit filed 20 October 2004, Plaintiff listed $993.00 in individual expenses, but in the trial court's 18 March 2005 judgment for alimony and equitable distribution, the trial court found that Plaintiff's "individual expenses [were] reduced to $600.00." Therefore, the trial court's finding that "[t]hese same expenses were found to be $600[.00] per month in 2004[]" was supported. In finding of fact twenty-five, the trial court also increased Plaintiff's individual expenses to $300.00 even though Plaintiff had only listed $44.75 on her 3 April 2006 financial affidavit. Given that these same expenses were found to be $600.00 in 2004, it is reasonable that the trial court increased the expenses from $44.75 to $300.00. Just as the trial court found Plaintiff's listed shared family expenses to be excessive, the trial court had the right to determine that Plaintiff's listed individual expenses were inadequate. Even with the trial court's adjustment, Plaintiff's individual expenses were half of what they were in 2004. Accordingly, this finding of fact was supported.

Defendant also challenges finding of fact three: "3. That . . . Plaintiff's reasonable needs and expenses have changed since the entry of the Order of Alimony and Plaintiff's resources are still not adequate to meet these needs and expenses." Defendant cites finding of fact twenty-six, in which the trial court found that "[Plaintiff's] total expenses are $2,663[.00] per month, leaving a shortfall of $1,660[.00] per month without Alimony. In 2004 her total monthly expenses equaled $3,460.00, including debt service, leaving a shortfall of $2,449.00 per month without alimony." Defendant argues that Plaintiff's reasonable needs and expenses actually decreased and, therefore, finding three was not supported. In related arguments, Defendant contends the trial court erred by finding changed circumstances warranting a modification of the previous alimony judgment, and further argues that the trial court's findings of fact do not support the trial court's conclusion that Plaintiff was entitled to a modification of the previous alimony judgment.

In the present case, despite Defendant's contentions, the trial court made numerous findings of fact demonstrating that there had been a substantial change of circumstances since the entry of the previous alimony judgment. The trial court made the following unchallenged findings of fact related to Plaintiff's financial situation:

> 9. That the court encouraged . . . Plaintiff to invest her Equitable Distribution funds of about $36,000[.00], but noted then and again now that interest income from those funds would not have generated much income. . . . Plaintiff was in no position to risk those funds in an investment which might (or might not) have generated growth, so—as predicted—. . . Plaintiff used those funds to pay bills. With . . . Plaintiff's monthly shortfall of $2.268[.00], plus debt service of $180[.00], the funds would have been exhausted in 15 months, or the end of January, 2006.
>
> 10. That . . . Plaintiff now has credit card debt of over $9,000[.00]; in 2004 her credit card debt was about $6,000[.00].
>
> 11. That the Court agrees that spending of . . . Plaintiff's funds was expected, but they are now gone, which is a change from 2004.
>
> 12. That the increase in . . . Plaintiff's credit card debt is a change from 2004.
>
> . . .

15. That the Court finds . . . Plaintiff's situation has worsened.

The trial court also found that since the filing of the original alimony judgment, Defendant's situation had improved and Defendant was now able to pay Plaintiff's entire monthly shortfall:

16. That the Court finds that . . . Defendant's situation has improved.

17. That in October 2004, . . . Defendant was living alone and he now lives with Dee Kennemore. . . . Defendant lives in Dee Kennemore's home and pays some of the household expenses.

18. That in October 2004, . . . Defendant's reasonable expenses were found to be $2,615[.00] a month. . . . Defendant's current claimed expenses total $3,516[.00], plus $500[.00] debt service (debt balance of $2,400[.00]).

19. That in October 2004, . . . Defendant was responsible for . . . Plaintiff's Visa Bill of $10,546[.00], which he has reduced to $1,000[.00].

20. That . . . Defendant's monthly expenses he claims have increased are mostly discretionary: entertainment, up from $50[.00] to $250[.00]; meals out including lunch, up from $300[.00] to $400[.00]; car payment up $40[.00], and home food up $50[.00]. Gas has increased $175[.00].

21. That while . . . Defendant's claimed expenses have increased about 34%, his net income has increased by 77%. In October 2004, . . . Defendant had $845[.00] a month available for Alimony without consideration of debt service. Now he has at least $2,118[.00], with no reduction for any of his claimed expenses. Understanding that his increased income cannot be the sole basis for increasing alimony, still, it is considered along with the other Findings of Fact.

22. That the Court finds it noteworthy that Defendant earned well over $100,000[.00] in 2003, his last year with Pitney Bowes. His 2004 income, on which alimony was based, was considerably lower than that (gross of $4,042[.00] a month.)

23. While Defendant is about 69 years old and anticipates less income this year than last year, currently he is earning as he did in better days. The Court realizes that could change at any time.

. . .

27. That . . . Defendant continues to have the means and ability to provide support to . . . Plaintiff.

28. That at present . . . Defendant is more than able to pay . . . Plaintiff's monthly shortfall of $1,660[.00].

While it appears from the trial court's findings of fact that Plaintiff's expenses had decreased since the original alimony judgment, Plaintiff still had a considerable shortfall between her income and her expenses. Moreover, Plaintiff's overall financial situation had worsened. Specifically, Plaintiff had spent her equitable distribution funds to pay bills. While the trial court had encouraged Plaintiff to invest those funds, the trial court found that "interest income from those funds would not have generated much income." The trial court further found that "Plaintiff was in no position to risk those funds in an investment which might (or might not) have generated growth, so—as predicted—. . . Plaintiff used those funds to pay bills." Plaintiff's overall financial situation also worsened because Plaintiff's credit card debt increased by $3,000.00.

Furthermore, based upon the trial court's findings, Defendant's financial condition had improved considerably since the original alimony judgment. At the time of the original alimony judgment, Defendant was unable to pay the entire amount of Plaintiff's shortfall, but at the time of the modification, the trial court found that: "Defendant [was] more than able to pay . . . Plaintiff's monthly shortfall of $1,660[.00]." These findings of fact clearly relate to Plaintiff's financial needs and to Defendant's ability to pay. *See Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. We hold that the findings of fact demonstrate a substantial change of circumstances warranting a modification of alimony. We therefore hold that the trial court's findings of fact support its conclusions of law, and we affirm the trial court's order.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion holds that the trial court's findings of fact demonstrated a substantial change in circumstances to warrant a

modification of the parties' original alimony order. I disagree and vote to reverse the trial court's order. I respectfully dissent.

I. Standard of Review

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). The trial court's findings of fact are reviewed in order to determine whether competent evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Marks v. Marks*, 316 N.C. 447, 461, 342 S.E.2d 859, 867 (1986). "[I]f there is no competent evidence to support a finding of fact, an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987) (citation omitted).

II. Modification of an Alimony Order

Defendant argues the trial court erred by modifying and increasing his alimony obligation. I agree.

A. Substantial Change in Circumstances

An order for alimony may be modified at any time upon filing a motion in the cause and showing a change in circumstances by either party or anyone interested. N.C. Gen. Stat. § 50-16.9 (a) (2005). "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). "The change in circumstances must be substantial with a final decision based on a comparison of the facts existing at the original order and when the modification is sought." *Broughton v. Broughton*, 58 N.C. App. 778, 781, 294 S.E.2d 772, 775, *disc. rev. denied*, 307 N.C. 269, 299 S.E.2d 214 (1982). The burden of proof is on the moving party to show that the original award is inadequate or unduly burdensome. *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (citation omitted). "[T]he question of the correct amount of alimony . . . is a question of fairness to all parties." *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976).

B. Findings of Fact

Defendant argues the trial court's findings of fact are not supported by competent evidence and the findings of fact do not support the trial court's conclusion that plaintiff was entitled to a modification of the initial alimony award. I agree.

1. Plaintiff's Financial Needs

Defendant specifically challenges the trial court's findings of fact numbered 3, 24, 25, and 26. These findings state:

> 3. That the Plaintiff's reasonable needs and expenses have changed since the entry of the Order of Alimony and Plaintiff's resources are still not adequate to meet these needs and expenses.
>
> . . . .
>
> 24. That the Plaintiff's reasonable monthly "shared" expenses are found to be $1,200 for housing and utilities based on the left side of Part B(1) of the Affidavit of Financial Standing. This amount is, of course, speculative, but by comparison with Defendant's expenses on that side, $999, and shared with Dee Kennemore, it seems reasonable. Plaintiff has $860 [sic] expenses for items on the right side of the same page (home, food, and supplies, found to be $350 in 2004, are found the same now; gas, found to be $50 in 2004, is found to be $75, given her unemployment.) These monthly shared expenses total $2,060.00 while in 2004 these monthly shared expenses totaled $2,680.00[.]
>
> 25. That the Plaintiff's monthly reasonable expenses to be $300, even though she listed $45 on her Affidavit of Financial Standing. These same expenses were found to be $600 per month in 2004.
>
> 26. That with the Plaintiff's debt service of $303 a month, her total expenses are $2,663 per month, leaving a shortfall of $1,660 per month without Alimony. In 2004 her total monthly expenses equaled $3,460.00, including debt service, leaving a shortfall of $2,449.00 per month without alimony.

It is undisputed that plaintiff's monthly expenses decreased from $3,460.00 per month in 2004 to $2,663.00 per month at the time of modification. The majority's opinion acknowledges plaintiff's decrease in expenses, but nevertheless holds that plaintiff's financial situation had worsened at the time of the hearing based on evidence

that plaintiff had: (1) depleted her equitable distribution funds; and (2) increased her credit card debt by $3,000.00.

In the original alimony order, the trial court found "[plaintiff] has spent for her [sic] more expensive home and car than she could afford in an attempt to maintain that standard of living." Plaintiff's inflated financial spending cannot support a finding of a substantial change in circumstances. *See Harris v. Harris*, 258 N.C. 121, 126, 128 S.E.2d 123, 127 (1962) (holding a defendant's financial irresponsibility is not a basis to reduce his alimony obligation.). The trial court's calculations reveal that plaintiff's expenses in fact decreased since the original alimony order was entered and the original alimony order shows that plaintiff's fiscal irresponsibility accounts for the depletion of her funds and the increase in her debt. The trial court's findings of fact regarding plaintiff's financial needs do not support its conclusion of law that plaintiff is entitled to a modification of the original alimony award.

2. Defendant's Ability to Pay

The trial court also made several findings of fact regarding defendant's ability to pay plaintiff's shortfall in expenses. The trial court found: (1) defendant's financial situation improved; (2) defendant shared some of his household expenses with a roommate; (3) defendant reduced plaintiff's Visa bill from $10,546.00 to $1,000.00; (4) defendant's net income increased 77%; and (5) defendant was able to pay plaintiff's monthly shortfall in expenses.

This Court has stated that "fluctuations in income alone do not comprise changed circumstances capable of requiring modification of an alimony award." *Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927. The speculative and uncertain nature of the defendant's income was recognized by the trial court's finding of fact numbered 23: "[w]hile Defendant is about 69 years old and anticipates less income this year than last year, currently he is earning as he did in better days. The Court realizes that could change at any time." The trial court's finding that defendant's fluctuating income increased over the course of one year, standing alone, does not support the conclusion of law that the plaintiff is entitled to a modification of the original alimony award based upon changed circumstances.

III. Conclusion

"[T]he changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent

spouse or the supporting spouse's ability to pay." *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. Plaintiff is not entitled to a modification of the original alimony order when the undisputed evidence presented shows: (1) plaintiff's expenses have decreased and (2) the depletion of the equitable distribution funds and increase in her debt were solely due to plaintiff's fiscal irresponsibility.

The only notable change in circumstances was a one year fluctuation in defendant's income, which cannot be the sole basis for a finding of changed circumstances. *See Britt*, 49 N.C. App. at 472, 271 S.E.2d at 927. The trial court's findings of fact do not support its conclusions of law. The trial court's order modifying the original alimony order should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. ALFONZA DAWNTA COLTRANE, AKA ALFENZA DAWNTA COLTRANE, AKA ALFONZ DWANTE COLTRANE

No. COA07-486

(Filed 5 February 2008)

1. Indictment and Information— amendment—date of offense—not a substantial alteration

Alteration of an indictment for possession of a firearm by a felon to change the date of the offense did not substantially alter the charge, as the date of the offense is not a substantial element of the charge.

2. Indictment and Information— amendment—possession of firearm by felon—county of underlying offense

The trial court did not err by allowing the State to amend an indictment for possession of a firearm by a felon by changing the county of the underlying felony conviction. The indictment sufficiently notified defendant of the prior felony conviction.

3. Firearms and Other Weapons— possession by felon—new offense

The possession of a firearm by a felon statute creates a new substantive offense, even though it is directed at recidivism. N.C.G.S. § 14-415.1.

4. Constitutional Law— possession of firearm by felon—not double jeopardy

A conviction for possession of a firearm by a felon was not double jeopardy. While the prior conviction is a part of the new offense, the punishment is for the new element of possessing a firearm.

5. Motor Vehicles— driving with revoked license—notice of revocation

The evidence was sufficient for a charge of driving with a revoked license where the notice of revocation did not go to the address shown for defendant in DMV records. However, pursuant to a prior Court of Appeals opinion, the State raised prima facie evidence of receipt and defendant did not rebut the presumption, so that the evidence was sufficient.

6. Appeal and Error— appealability—anticipatory judgment—not considered

An argument that the Court of Appeals should remand defendant's case for resentencing if the Supreme Court vacates his prior convictions was not ripe for review and was not properly before the Court of Appeals.

Appeal by defendant from judgment entered 8 November 2006 by Judge Jerry Cash Martin in Randolph County Superior Court. Heard in the Court of Appeals 26 November 2007.

Roy Cooper, Attorney General, by John P. Barkley, Assistant Attorney General, for the State.

Anne Bleyman, for defendant-appellant.

MARTIN, Chief Judge.

Alfonza Dawnta Coltrane ("defendant") appeals from judgments entered upon jury verdicts in 05 CRS 052926-27 finding him guilty of one count of driving while license revoked pursuant to N.C.G.S. § 20-28(a), one count of resisting a public officer pursuant to N.C.G.S. § 14-223, and one count of felonious possession of a firearm by a felon pursuant to N.C.G.S. § 14-415.1. On 8 November 2006, defendant was sentenced to a consolidated term of 20 to 24 months imprisonment to commence at the expiration of sentences which defendant was already obligated to serve.

Defendant's 8 November 2006 convictions arose out of events that occurred on 25 April 2005 in Randolph County. On 10 November

2005, defendant appeared in Randolph County District Court and was found guilty of driving while license revoked pursuant to N.C.G.S. § 20-28(a) and resisting a public officer pursuant to N.C.G.S. § 14-223. Defendant was sentenced to a term of 45 days imprisonment. Defendant gave notice of appeal to Randolph County Superior Court. On 10 April 2006, the Randolph County Grand Jury issued an indictment for the Class G felony of possession of a firearm by a convicted felon, in violation of N.C.G.S. § 14-415.1. On 7-8 November 2006, a jury heard and decided the case against defendant for the charges in 05 CRS 052926-27 of driving while license revoked, resisting a public officer, and felonious possession of a firearm by a felon. Defendant gave notice of appeal to this Court on 8 November 2006 in open court.

The record on appeal contains one hundred one assignments of error. In his brief, however, defendant presented arguments in support of only twenty-four of those assignments of error. The remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(a) (2008) ("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] Defendant first contends that the trial court erred by allowing the State to amend the 10 April 2006 indictment charging him with possession of a firearm by a felon. The State was permitted to amend the indictment to correct: (A) the date of the offense, and (B) the county in which defendant was convicted of the underlying felony. Defendant argues that, because of these errors, the indictment was defective and so the trial court lacked jurisdiction to hear the matter. We disagree.

A.

N.C.G.S. § 15A-923(e) provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2007). "This statute, however, has been construed to mean only that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). "Thus, for example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not 'substantially alter the

charge set forth in the indictment.' " *Id.* (quoting *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 559 (1984)); *see also State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (quoting *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986)) (" 'Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill.' ").

N.C.G.S. § 14-415.1(a) provides, in part: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." N.C. Gen. Stat. § 14-415.1(a) (2007). Thus, the date of the offense is not an essential element of the offense of possession of a firearm by a felon. Therefore, " '[t]he failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon.' " *Locklear*, 117 N.C. App. at 260, 450 S.E.2d at 519 (quoting *Cameron*, 83 N.C. App. at 72, 349 S.E.2d at 329).

In the present case, the 10 April 2006 indictment returned against defendant stated that the alleged offense occurred "on or about the 9th day of December, 2004." The State moved to amend this date to 25 April 2005, which the trial court granted over defendant's objection. Since the date of the offense is not an essential element of possession of a firearm by a felon, amending this date did not "substantially alter the charge set forth in the indictment," *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824 (internal quotation marks omitted), and we find no error.

B.

[2] N.C.G.S. § 14-415.1(c) provides, in part:

> *An indictment which charges the person with violation of this section must set forth* the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, *the identity of the court in which the conviction or plea of guilty took place* and the verdict and judgment rendered therein.

N.C. Gen. Stat. § 14-415.1(c) (emphasis added). However, "[e]ven where a statute requires a particular allegation, the omission of such

an allegation from an indictment is not necessarily fatal to jurisdiction." *State v. Inman*, 174 N.C. App. 567, 569, 621 S.E.2d 306, 308 (2005), *disc. review denied*, 360 N.C. 652, 638 S.E.2d 907 (2006).

In *State v. Lewis*, 162 N.C. App. 277, 590 S.E.2d 318 (2004), this Court held that the State could amend a habitual felon indictment pursuant to N.C.G.S. § 14-7.3 which "correctly stated the type of offense for which defendant was convicted and the date of that offense," but "incorrectly stated the *date and county* of defendant's conviction." *Lewis*, 162 N.C. App. at 284-85, 590 S.E.2d at 324 (emphasis added). N.C.G.S. § 14-7.3 includes language almost identical to that in N.C.G.S. § 14-415.1(c) regarding the "identity of the court," providing:

> *An indictment* which charges a person with being a[] habitual felon *must set forth* the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and *the identity of the court wherein said pleas or convictions took place.*

N.C. Gen. Stat. § 14-7.3 (2007) (emphasis added). Again, N.C.G.S. § 14-415.1(c) provides, in part, that the indictment charging the offense of possession of a firearm by a felon "must set forth . . . the identity of the court in which the conviction or plea of guilty took place." N.C. Gen. Stat. § 14-415.1(c). In *Lewis*, this Court concluded that "[t]he indictment at issue sufficiently notified defendant of the particular conviction that was being used to support his status as a[] habitual felon," in spite of errors in both the date and county of defendant's prior conviction. *See Lewis*, 162 N.C. App. at 285, 590 S.E.2d at 324. Although, unlike the present case, defendant in *Lewis* also "previously stipulated to [his prior] conviction and did not argue he lacked notice of the hearing at trial," we do not believe that this Court's conclusion in *Lewis* was contingent upon defendant's stipulation. *See id.*

In the present case, the 10 April 2006 indictment stated that defendant's underlying felony conviction occurred "in Montgomery County Superior Court." The State moved to amend this designation to Guilford County Superior Court, which the trial court granted over defendant's objection. The indictment correctly identified all of the other allegations required pursuant to N.C.G.S. § 14-415.1(c) regarding defendant's prior felony conviction, including: (1) the date on

which defendant's prior felony was committed ("on or about October 31, 2003"); (2) the type of offense for which defendant was convicted ("fleeing to elude arrest, a felony"); (3) the penalty for that offense ("sentenced to a term of 14-17 months (consolidated with another sentence), suspended, with 36 months probation"); (4) the date of defendant's prior conviction ("on or about June 8, 2004"); and (5) the verdict rendered ("found guilty"). At the time of the 10 April 2006 indictment, defendant had prior convictions for the felony of fleeing to elude arrest in Guilford County (03 CRS 102696) and Randolph County (04 CRS 058421) entered on 8 June 2004 and 1 February 2006, respectively, but had no record of any convictions for any offenses in Montgomery County.

Just as this Court held in *Lewis* that an indictment which "incorrectly stated the date and county of defendant's conviction" sufficiently notified defendant of the prior conviction referenced therein, *see id.* at 284, 590 S.E.2d at 324, we conclude that the 10 April 2006 indictment in the present case sufficiently notified defendant that the prior felony conviction referenced was his 8 June 2004 conviction for fleeing to elude arrest, which occurred in Guilford County. Since the State's amendment to the identity of the court in the indictment neither frustrated the purpose of the indictment " 'to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused,' " *Brinson*, 337 N.C. at 768, 448 S.E.2d at 824 (quoting *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984)), nor "substantially alter[ed] the charge set forth in the indictment," *id.* at 767, 448 S.E.2d at 824 (internal quotation marks omitted), we find no error.

II.

[3] Defendant next contends that his 8 November 2006 conviction for possession of a firearm by a felon pursuant to N.C.G.S. § 14-415.1 must be vacated because possession of a firearm by a felon is "not a crime." Defendant argues that possession of a firearm by a felon is a recidivist offense, and urges this Court to follow defendant's argument in *State v. Wood*, 185 N.C. App. 227, 647 S.E.2d 679 (2007), *disc. review denied*, 361 N.C. 703, —— S.E.2d —— (2007). We disagree.

After defendant's brief was filed in the present case, this Court concluded in *Wood* that, "[w]hile N.C.[G.S.] § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates a new substantive offense." *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687; *see also State v. Bowden*, 177 N.C. App. 718, 725, 630

S.E.2d 208, 213 (2006) ("The mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense."). N.C.G.S. § 14-415.1 "creates a substantive offense to which the Sixth Amendment right to a jury trial applies, and not a sentencing requirement aimed at reducing recidivism." *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687. Therefore, we overrule defendant's assignment of error.

III.

[4] Defendant also contends that his conviction for possession of a firearm by a felon subjects him to double jeopardy for his 8 June 2004 felony conviction of fleeing to elude arrest. We disagree.

"The Double Jeopardy Clause of the Fifth Amendment states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' " *State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005) (quoting U.S. Const. amend. V; *see also* N.C. Const. art. I, § 19). "The Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Id.*

"[U]nder N.C.[G.S.] § 14-415.1, it is the prior *conviction* that is an element which must be proved by the State." *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687; *see also State v. Jeffers*, 48 N.C. App. 663, 666, 269 S.E.2d 731, 733-34 (1980) ("A previous conviction for one of a group of enumerated felonies is an essential element of the offense of possession of a firearm by a felon, and thus in the absence of a prior conviction, there is no offense at all."), *cert. denied*, 301 N.C. 724, 276 S.E.2d 285 (1981). However, "[w]hile proving the prior conviction will necessarily establish that defendant was guilty of committing the prior crime, N.C.[G.S.] § 14-415.1 does not impose any punishment solely for defendant's commission of the prior crime, but instead requires the State further prove the additional element of possession of a firearm." *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687. "Thus the prior *conviction* constitutes a part of an entirely new offense." *Id.* "Therefore, defendant's prior conviction . . . is not an 'offense' within the meaning of the Double Jeopardy Clause when construed with his conviction of possession of a firearm by a felon." *Id.*

In the present case, when defendant "possessed a firearm in violation of [N.C.G.S. § 14-415.1], *he was again convicted and pun-*

ished—not a second time for the . . . [8 June 2004 felony conviction of fleeing to elude arrest], *but for the first time for this new offense* under § 14-415.1(a)." *State v. Crump*, 178 N.C. App. 717, 722, 632 S.E.2d 233, 236 (2006) (emphasis added), *disc. review denied*, 361 N.C. 431, 648 S.E.2d 851 (2007); *see also Wood*, 185 N.C. App. at 236, 647 S.E.2d at 687 ("Defendant was not prosecuted nor punished again for the underlying . . . [felony] conviction . . .; rather he was convicted and punished for his subsequent act of unlawfully possessing a firearm as a convicted felon."). Therefore, we again overrule defendant's assignment of error.

IV.

[5] Defendant next asserts as error the trial court's denial of his motion to dismiss the charge in 05 CRS 052926 of driving while license revoked due to the insufficiency of the evidence.

Our standard of review of a trial court's ruling on a motion to dismiss is well established. " 'When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime.' " *State v. Tedder*, 169 N.C. App. 446, 450, 610 S.E.2d 774, 777 (2005) (quoting *State v. Smith*, 357 N.C. 604, 615-16, 588 S.E.2d 453, 461 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004)). " 'Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* The trial court "must [then] view the evidence in the light most favorable to the [S]tate, giving the [S]tate the benefit of every reasonable inference that might be drawn therefrom." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987) (citing *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977)).

N.C.G.S. § 20-28(a) provides, in part, that "any person whose driver[']s license has been revoked who drives any motor vehicle upon the highways of the State while the license is revoked is guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 20-28(a) (2007). "To convict a person of the crime of driving with a revoked license, the State must prove beyond a reasonable doubt that defendant was on notice that his driver's license was revoked." *State v. Funchess*, 141 N.C. App. 302, 311, 540 S.E.2d 435, 440 (2000); *see also State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991) ("To sustain the charge against [defendant for driving while license revoked,] the State had to prove that (1) [defendant] operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended

or revoked, and (4) *had knowledge of the suspension or revocation.*") (emphasis added).

N.C.G.S. § 20-48(a) provides, in part:

> Whenever the Division [of Motor Vehicles] is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, *such notice shall be* given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, *addressed to such person at his address as shown by the records of the Division*. . . . A copy of the Division's records sent under the authority of this section is admissible as evidence in any court or administrative agency and is sufficient evidence to discharge the burden of the person presenting the record that notice was sent to the person named in the record, at the address indicated in the record, and for the purpose indicated in the record.

N.C. Gen. Stat. § 20-48(a) (2007). Thus, the State satisfies its burden that defendant had knowledge his license was revoked "when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge." *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E.2d 524, 526 (1976).

In the present case, the State presented evidence of eighteen official notice letters sent from the North Carolina Division of Motor Vehicles ("DMV") to defendant between the years of 2001 and 2006, all of which were included in the record on appeal. Each of the letters was addressed to defendant by name and sent to a post office box in Liberty, North Carolina. However, the certified report of defendant's driver's license record indicates defendant's address as 7922 County Line Road in Liberty, North Carolina, and does not list any other address for defendant. In other words, the "address as shown by the records of the [DMV]" does not appear to be the address to which the notice of defendant's license revocation was sent in the present case.

However, in *State v. Coltrane*, 184 N.C. App. 140, 645 S.E.2d 793 (2007), *appeal docketed*, No. 348A07 (N.C. July 21, 2007), this defendant similarly argued to this Court that the trial court erred by denying his motion to dismiss the charge of driving while license suspended

in 04 CRS 58421 due to the insufficiency of the evidence. *See Coltrane*, 184 N.C. App. at 144, 645 S.E.2d at 795. In that matter, this Court found that the State produced a certified document from an employee of the DMV stating that the employee "deposited notice of suspension in the United States mail in a postage paid envelope, addressed to the address . . . shown by the records of the Division as defendant's address." *Id.* (omission in original) (internal quotation marks omitted). Defendant argued then, as he does now, that the DMV sent the revocation notice to an address different from the address "shown by the records of the [DMV]." *See id.* However, this Court found that the State "raised *prima facie* presumption of receipt, and defendant was obligated to rebut the presumption." *Id.* Since defendant there, as here, "chose not to present any evidence at trial[, this Court concluded that] . . . the presumption was clearly not rebutted," and held that "the State met its burden of producing substantial evidence on each element of the crime." *Id.* (internal quotation marks omitted).

"[A] well-established rule of appellate law . . . [provides that,] '[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.' " *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) (quoting *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). "While . . . a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court." *Id.* at 487, 598 S.E.2d at 134.

Coltrane COA06-895 included a dissenting opinion, thus giving defendant an appeal of right to the Supreme Court. *See* N.C. Gen. Stat. § 7A-30 (2007) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent."). Defendant filed his notice of appeal in *Coltrane COA06-895* to the Supreme Court on 21 July 2007. Since defendant's appeal in that case is still pending, the panel in the present case remains bound by the decision of this Court under *Coltrane COA06-895* on the issue of whether sufficient evidence was presented by the State to prove the essential elements of driving while license revoked.

V.

[6] Finally, defendant requests that the present case be remanded for resentencing *if* the North Carolina Supreme Court vacates his two prior Class H convictions for felony speeding to elude arrest in Randolph County on 1 February 2006 (04 CRS 058421) and 12 April 2006 (02 CRS 058478), each currently under appeal in the Supreme Court and docketed as 348A07 and 428P07, respectively.

" '[T]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.' " *In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (quoting *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960)) (omission in original). Defendant's assignment of error is "not a question ripe for review because it will arise, if at all, only if" defendant's convictions are overturned by the Supreme Court sometime in the future. *See Simmons v. C.W. Myers Trading Post, Inc.*, 307 N.C. 122, 123, 296 S.E.2d 294, 295 (1982) (per curiam). Therefore, defendant's arguments are not properly before us and we may not consider them.

No error.

Judges McGEE and STEPHENS concur.

STATE OF NORTH CAROLINA v. THOMAS HOWARD DUNCAN

No. COA07-85

(Filed 5 February 2008)

Constitutional Law— effective assistance of counsel—failure to offer evidence of defendant's state of mind—failure to request instruction on diminished capacity

Defendant was denied his constitutional right to effective assistance of counsel in a first-degree murder case based on his counsel's failure to offer any evidence as to defendant's state of mind at the time of the crime and his failure to request an instruction on diminished capacity, and the case is remanded for a new trial, because: (1) although it was exceedingly unlikely that de-

fendant would be found not guilty of murder in the face of the overwhelming evidence against him, there was a reasonable probability that evidence of defendant's state of mind might have led the jury to conclude that defendant's intoxication and mental problems were severe enough to negate the specific intent necessary for first-degree murder; and (2) there was no strategic motive behind trial counsel's deficient performance.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 28 June 2006 by Judge Gary E. Trawick in Superior Court, Brunswick County. Heard in the Court of Appeals 11 September 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Center for Death Penalty Litigation, by Lisa Miles, for defendant-appellant.

WYNN, Judge.

When reviewing a claim for ineffective assistance of counsel, this Court considers whether the counsel's performance was deficient, and whether the "deficient performance prejudiced the defense."[1] Here, Defendant Thomas Howard Duncan contends his trial counsel failed to offer any evidence as to Defendant's state of mind at the time of the crime. Although it is exceedingly unlikely that, in the face of the overwhelming evidence against him, Defendant might have been found not guilty of the murder, we find that there is a reasonable probability that evidence to Defendant's state of mind might have led the jury to conclude that Defendant's intoxication and mental problems were severe enough to negate the specific intent necessary for first-degree murder. Accordingly, we remand for a new trial.

At trial, the State presented evidence that tended to show that on 20 June 2005, Defendant spent the day at home with his wife, Cathleen Duncan, as she kept their three-year-old grandson while their son and daughter-in-law, David and Jonetta Duncan, were at work. David and Jonetta had been married for ten or twelve years but had been separated for about two years at the time of the incident in question. At approximately 1:30 p.m. that day, David telephoned

1. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Defendant and Cathleen to let them know that Jonetta would be picking up their child later that afternoon after work.

When Jonetta arrived at Defendant's house around 5:00 p.m., Cathleen let her inside, where Defendant was sitting in the front room in a rocking chair. When Jonetta repeatedly greeted Defendant, he initially made no reply and then "called her trash and stuff." As Cathleen got the child ready to go, Defendant again called Jonetta "trash," to which she responded, "well, we love you too, Howard." Cathleen and Jonetta began walking down the hall toward the back door for Jonetta to leave, when Defendant said, "you're crazy," and Cathleen testified that "[Jonetta] sa[id], you're crazy, too, or something like." Cathleen recalled that Defendant then replied, "oh, no, you didn't call me crazy" and "jumped up and got by me and got to the back door." At that point, Cathleen was still in the hall while Jonetta and Defendant were on the back porch. Cathleen stated that she heard a noise that sounded like a slap but did not see what actually happened; she then heard Jonetta say, "oh, no, you didn't" and looked up to see Defendant with a gun.

Cathleen testified that she tried without success to take the gun from Defendant and then "grabbed the baby and ran and got the phone . . . [to call] 911." While running to get the phone, she heard five or six gunshots; she was talking to 911 emergency personnel when Defendant "came in and . . . [said], I've done it, I've killed her, I done it, I'm gone." Defendant washed his hands in the sink in the kitchen and put the gun away, and Cathleen took the gun and hid it. Cathleen also stated that, during that time, Defendant got a kitchen knife out of a drawer, showed it to her, and said, "this is what she came over to get me with." Cathleen then went outside to wait for the police and emergency personnel to arrive.

When Deputy James Sheehan of the Brunswick County Sheriff's Department arrived at the house, Cathleen began to tell him what was going on, and he observed the body of Jonetta on the porch. As he approached the porch, he saw Defendant "staring out the window" at him, and he began giving Defendant verbal commands to show his hands. According to Deputy Sheehan, Defendant "wouldn't move, he just sat there and stared . . . . saying nothing back, . . . just looking at [Deputy Sheehan] though the window." After Deputy Sheehan repeatedly instructed Defendant to come outside, Defendant did leave the house, and Deputy Sheehan placed him in custody.

On cross examination, Cathleen Duncan testified that Defendant had been drinking on the day of the incident; at the time he shot Jonetta, he had consumed a pint of Wild Irish Rose wine and approximately sixty ounces of beer. Cathleen stated that Defendant had the wine between ten o'clock that morning and 1:30 p.m., when David called to say Jonetta would be picking up their son, and that he had the beer between the 1:30 phone call and five o'clock, when Jonetta arrived. Although that amount was "about the same" as what Defendant normally drank, Cathleen also noted that he drank "not quite everyday, but off and on." According to Cathleen, on the day of the shooting Defendant was taking Amitriptyline for depression, a drug that is not supposed to be mixed with alcohol. Cathleen asserted that Defendant "just didn't look right" to her on the day of the shooting, and confirmed that he was on disability for a nerve condition and had previously been hospitalized for nerves and depression.

Following closing arguments, the trial court denied defense counsel's request for an instruction on self-defense and instructed the jury only on first-degree murder, second-degree murder, and voluntary manslaughter. During deliberations, the jury asked to have the instructions as to first-degree murder, second-degree murder, and voluntary manslaughter read to them again. The jury subsequently returned a verdict finding Defendant guilty of first-degree murder, and the trial court sentenced him to life in prison without possibility of parole.

Defendant now appeals, arguing that (I) he was denied his constitutional right to effective assistance of counsel; (II) the trial court committed plain error by failing to instruct the jury on diminished capacity; and (III) the trial court committed plain error by permitting a juror to examine the gun used and by commenting on the significance of that examination.

Defendant contends that he was denied his state and federal constitutional rights to effective assistance of counsel by his trial counsel's failure to present promised evidence of Defendant's state of mind at the time of the shooting, and by his trial counsel's failure to request a diminished capacity instruction to the jury. According to Defendant, the evidence showed that he did not have the mental capacity to form the specific intent necessary to be guilty of first-degree murder, yet his trial counsel failed either to argue this point to the jury or to request a jury instruction as to how his diminished capacity might have affected his ability to form the specific intent to

commit murder. Although we leave for a jury to determine whether the State's evidence does, in fact, show beyond a reasonable doubt that Defendant had the capacity to form the requisite intent, we agree that defense counsel's failure to request an instruction on diminished capacity constituted ineffective assistance of counsel serious enough to warrant a new trial.

To determine whether a criminal defendant received ineffective assistance of counsel, we follow the two-part test established by our state and federal Supreme Courts:

> 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) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

It is not enough for a defendant to show only that the "errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test[.]" *Strickland*, 466 U.S. at 693, 80 L. Ed. 2d at 697 (citation omitted). Rather, error does not warrant reversal " 'unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.' " *State v. Cummings*, 174 N.C. App. 772, 777, 622 S.E.2d 183, 186 (2005) (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248), *disc. review denied*, 361 N.C. 172, 641 S.E.2d 306 (2006), *cert. denied*, 127 S. Ct. 2441, 167 L. Ed. 2d 1140 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

In the instant case, there was never any dispute that Defendant shot and killed Jonetta Duncan. Rather, the only issue in question at trial was the degree of Defendant's culpability for her death, which turned entirely on his state of mind at the time of the murder. As such, Defendant's trial counsel made the following assertions in his opening arguments to the jury:

> [Defendant's] wife is gonna testify and [Defendant] is gonna testify—expected to testify. It will be your job to sort out what the facts are. But [Defendant] will testify and he will tell you what was going through his mind at the time of the shooting. He'll tell you that he felt it necessary to shoot her as she was coming upon—coming upon him. However, at the close of the evidence the one thing that will be clear is that there was no premeditation and there was no deliberation, there was no malice.

Nevertheless, Defendant did not testify in his own defense; instead, only three witnesses, all of them for the State—Cathleen Duncan, Deputy Sheehan, and a crime scene investigator—testified at trial. Defense counsel did attempt to question Cathleen on cross examination as to a possible motive of self-defense related to an earlier assault against Defendant's son, which Defendant allegedly believed was orchestrated by Jonetta, but the testimony was excluded as having no basis. The only other testimony elicited by defense counsel as to Defendant's state of mind at the time of the shooting related to the amount of alcohol Defendant had consumed and the antidepressant he was taking. Defense counsel offered no expert witness to explain how the alcohol or drugs might have affected Defendant's ability to form the specific intent to kill Jonetta, or any other testimony about Defendant's anxiety, depression, or time spent in a mental health facility.

Defendant's trial counsel did make a motion to dismiss the charge of first-degree murder due to insufficient evidence as to premeditation and deliberation, arguing that there were no threats made and the shots were fired in quick succession, with no hesitation; that motion was denied. In his closing argument to the jury, counsel likewise discussed the need for the State to prove premeditation and deliberation in order to sustain a charge of first-degree murder, also noting that the difference between that charge and the lesser-included offenses was "what's going on in [Defendant's] mind." As for Defendant's drinking and medication, trial counsel referred to those facts and said, "Now, these aren't being offered as excuses, okay, but these are relevant to whether or not [Defendant] premeditated and deliberated." Later in his closing argument, he referred to Defendant's "warped, drugged, alcohol induced state" at the time of the killing. Nevertheless, defense counsel made no request to the trial court for a jury instruction on diminished capacity.

The North Carolina pattern jury instruction for diminished capacity reads as follows:

> You may find there is evidence to show that the defendant was [intoxicated] [drugged] [lacked mental capacity] at the time of the acts alleged in this case.
>
> Generally, [voluntary intoxication] [a voluntary drugged condition] is not a legal excuse for crime.
>
> However, if you find that the defendant [was intoxicated] [was drugged] [lacked mental capacity], you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find, beyond a reasonable doubt, that he killed the deceased with malice and in the execution of an actual, specific intent to kill, formed after premeditation and deliberation. If as a result of [intoxication] [a drugged condition] [lack of mental capacity] the defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, he is not guilty of first degree murder.
>
> Therefore, I charge that if, upon considering the evidence with respect to the defendant's [intoxication] [drugged condition] [lack of mental capacity], you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder, you will not return a verdict of guilty of first degree murder.

N.C.P.I.—Crim. 305.11, Voluntary Intoxication, Lack of Mental Capacity—Premeditated and Deliberate First Degree Murder. Generally, such an instruction is warranted when "the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing." *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989).

Moreover, if there is evidence from which an inference can be drawn that the defendant committed the act without the requisite criminal intent, then the law with respect to that intent should be explained and applied to the evidence by the trial court. *State v. Walker*, 35 N.C. App. 182, 186, 241 S.E.2d 89, 92 (1978). Diminished capacity may negate the "ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation." *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d

225, 231 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). Notably, "[t]he ability to choose is not necessarily inconsistent with a diminished capacity defense in that the mere decision to commit an act does not satisfy the test for specific intent." *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004); *see also State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992) (holding that "the State must show more than an intentional act by the defendant" in order to prove specific intent).

Here, the record reflects a "reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different[.]" *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Although it is exceedingly unlikely that, in the face of the overwhelming evidence against him, Defendant might have been found not guilty of the murder of Jonetta, there is a reasonable possibility that a diminished capacity instruction—or any evidence or testimony as to Defendant's state of mind, as promised by trial counsel in his opening statement—might have led the jury to conclude that his intoxication and mental problems were severe enough to negate the specific intent necessary for first-degree murder.

Indeed, the State addressed the question of premeditation and deliberation in its closing arguments by essentially arguing that Defendant's intent could be shown from what he actually did, namely, hitting Jonetta with five of six shots fired, despite the alcohol he has consumed, as well as by his actions of washing his hands and getting a kitchen knife immediately afterwards. Had the jury been instructed as to the possible effect of intoxication on the ability to form intent, there is a reasonable possibility that Defendant might have been convicted of a lesser-included offense, either second-degree murder or voluntary manslaughter.

Although "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear[,]" *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 550 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002), we can discern no strategic motive behind trial counsel's deficient performance in the instant case. Rather, although he attempted to argue that the State had failed to prove premeditation and deliberation beyond a reasonable doubt, he failed to make any argument to the jury as to intoxication or diminished capacity, suggesting that he was unaware of the possibility of this affirmative defense or jury instruction. Defense counsel promised in his opening statement to the jury that he would offer evidence

as to Defendant's state of mind, but he failed to do so, undercutting any possible defense that Defendant could offer to the serious charges against him. In such circumstances, we find that Defendant was denied his constitutional right to effective assistance of counsel and remand for a new trial.

Though we dispositively find Defendant's argument as to ineffective assistance of counsel to be persuasive, we have further examined Defendant's remaining issues and find them to be without merit.

New trial.

Judge JACKSON concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, concurring in part and dissenting in part.

I concur with the majority inasmuch as they conclude that defendant's assignments of error not relating to the ineffective assistance of counsel claim are without merit, but I would dismiss the ineffective assistance of counsel claim without prejudice, allowing defendant to reassert the claim during a subsequent motion for appropriate relief proceeding.

This Court has held that an "ineffective assistance of counsel claim may be brought on direct review 'when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. Pulley*, 180 N.C. App. 54, 69, 636 S.E.2d 231, 242 (2006) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)). However, "[i]f an ineffective assistance of counsel claim is prematurely brought, this Court may dismiss the claim without prejudice, allowing the defendant to reassert the claim during a subsequent motion for appropriate relief proceeding." *Id.*

In *Pulley*, this Court dismissed the defendant's ineffective assistance of counsel claim without prejudice where the alleged trial counsel errors related to trial strategy. *Id.* at 70, 636 S.E.2d at 242-43. The rationale behind such dismissals is clear:

> To defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant

> to trial counsel, as well as defendant's thoughts, concerns, and demeanor. *See* [*State v. Taylor*, 327 N.C. 147, 159-60, 393 S.E.2d 801, 809 (1990)] (Meyer, J., dissenting). "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." *Id.* at 161, 393 S.E.2d at 810 (Meyer, J., dissenting) (citing *Harris v. Commonwealth*, 688 S.W.2d 338 (Ky. Ct. App. 1984), *cert. denied*, 474 U.S. 842, 88 L. Ed. 2d 104 (1985)). Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of the representation. *Id.* (noting that the performance of trial counsel must be analyzed according to the circumstances of each particular case); *see also Strickland v. Washington*, 466 U.S. 668, 693, 80 L. Ed. 2d 674, 697 (1984) (holding that "an act or omission that is unprofessional in one case may be sound or even brilliant [trial strategy] in another"). On remand of this case, the superior court should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). Simply stated, the trial court is in a better position to determine whether a counsel's performance: (1) was deficient so as to deprive defendant of " 'counsel' " guaranteed under the Sixth Amendment; and (2) prejudiced defendant's defense to such an extent that the trial was unfair and the result unreliable. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Here, defendant alleges errors relating to his trial counsel's strategy to pursue a defense based on self-defense and not placing defendant on the stand. Accordingly, under *Pulley*, the proper action would be to dismiss the case without prejudice, allowing defendant to file a motion for appropriate relief with the trial court. Because the trial court is in the best position to review defendant's counsel's performance under *Braswell* in this case, I respectfully dissent from the majority's opinion regarding defendant's ineffective assistance of counsel claim.

IN THE MATTER OF THE ESTATE OF CHRISTOPHER BULLOCK, DECEASED, KENNETH B. PARKER, AND PURYEAR TRANSPORT, INC., PETITIONERS v. C.C. MANGUM COMPANY AND AMERICAN ZURICH INSURANCE COMPANY, RESPONDENTS

No. COA07-146

(Filed 5 February 2008)

1. Workers' Compensation— lien—third-party wrongful death settlement—subrogation

In an action involving a wrongful death settlement and a workers' compensation lien, the trial court improperly concluded that the rights of respondents (the deceased's employer and its insurance company) were subrogated to those of the decedent's minor nephews (whom the Industrial Commission found to be entitled to death benefits). There is no language in N.C.G.S. § 97-10.2 subrogating the rights of an employer to that of the beneficiaries of a workers' compensation award. The trial court's conclusion allows two recoveries, one through the employee's dependents, and one through his estate.

2. Workers' Compensation— lien—reduction—findings

A case involving a wrongful death settlement and a workers' compensation lien was remanded where the trial court did not make the required findings for adjusting a workers' compensation lien.

3. Workers' Compensation— third party wrongful death settlement—written consent of employer

In an action remanded on other grounds, the Court of Appeals did not consider whether a third-party wrongful death settlement should have been set aside for failure to obtain the written consent of the decedent's employer (and workers' compensation defendant).

Appeal by respondents from order entered 31 October 2006 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 10 October 2007.

Davis & Hamrick, L.L.P., by James G. Welsh, Jr., and H. Lee Davis, Jr., for petitioner appellees.

Ogletree Deakins Nash Smoak & Stewart, P.C., by Brian M. Freedman, and Sarah H. Roane, for respondent appellants.

McCULLOUGH, Judge.

On 16 September 2004, Christopher Bullock ("Bullock"), an employee of C.C. Mangum Company ("C.C. Mangum"), was working at a construction site in Raleigh. Kenneth B. Parker ("Parker), an employee of Puryear Transport, Inc. ("Puryear"), was delivering pavers to the site, driving a dump truck owned by Puryear. Bullock signaled to Parker to move his truck to the paving location and began to move barrels out of Parker's way, leaving Parker's line of sight. While backing up to the paving location, Parker inadvertently backed the dump truck over Bullock. Bullock died as a result of injuries sustained in that accident. At the time of the accident, C.C. Mangum was insured by American Zurich Insurance Company ("American Zurich Insurance"). Puryear was insured by Converium Insurance Company ("Converium Insurance").

Bullock was never married and had no biological children. At the time of his death, Bullock resided with his long-time girlfriend, Katherine Davis ("Davis"), and two minors, Michael Rashad Davis and Justin Tyler Davis, who were Katherine Davis's nephews ("minor nephews"). Davis had been living with Bullock since 1984, and her two minor nephews had been living with and were fully supported by the couple since 1997. Bullock did not, however, legally adopt either of the minor nephews. Bullock died intestate, and his only heir at law pursuant to N.C. Gen. Stat. § 29-15 (2005), was his mother, Melissa Hayward. Davis was named as personal representative of Bullock's estate.

After Bullock's death, Bullock's family retained attorney Geoffrey H. Simmons ("Simmons") to bring a wrongful death claim against Parker and Puryear as well as a workers' compensation claim against C.C. Mangum and American Zurich Insurance.

In October of 2004, Simmons notified Puryear's insurance carrier, Converium Insurance, that he represented Bullock's estate in "all matters" arising from Bullock's death. Converium Insurance, through its Third-Party Administrator, National Claims Management, and its adjustor, Allison Laird, began negotiating with Simmons regarding the wrongful death claim. In January 2005, Simmons notified Allison Laird that there was a pending workers' compensation claim against respondents; that he anticipated that it would be resolved by March 2005; and that there would be a dependency hearing as part of this workers' compensation claim. Respondents were not notified of the ongoing negotiations regarding the wrongful death claim.

On 21 April 2005, the North Carolina Industrial Commission issued an Opinion and Award finding that the minor nephews were wholly and fully dependent on Bullock for support and that they were the only persons entitled to receive death benefits under N.C. Gen. Stat. § 97-39 (2005).[1] The Commission awarded death benefits in the amount of $307.16 per week for 400 weeks to each minor nephew, plus burial and medical expenses, an anticipated total amount of $259,587.44.

In May of 2005, without notifying respondents or obtaining their written consent, Simmons settled the wrongful death claim against petitioners for the sum of $95,000.00. On 2 June 2005, counsel for Puryear and Parker delivered the settlement agreement and settlement check to Simmons, which included instructions directing that settlement proceeds were delivered "in trust" and were "not to be negotiated or delivered" to any beneficiaries "until all liens, including . . . worker's compensation, have been fully paid and satisfied or compromised and released." On 3 June 2005, Davis, as personal representative of the estate, and Hayward, as sole beneficiary under the Intestate Succession Act, signed the Settlement Agreement and Release. Simmons disbursed the settlement funds to Hayward pursuant to N.C. Gen. Stat. § 28A-18-2 (2005), which directs that proceeds from wrongful death actions be distributed according to the Intestate Succession Act to a decedent's heirs at law.

Respondents learned of the settlement agreement between Bullock's estate and Parker and Puryear in February 2006. On 17 February 2006, C.C. Mangum's counsel wrote to Laird, seeking reimbursement for the death benefits to be paid to the minor nephews. On 5 June 2006, petitioners filed a motion to approve the settlement and to set aside any existing workers' compensation lien that respondents might have. On 27 August 2006, respondents moved for the court to: (1) deny petitioners' motion; (2) enter a declaratory order finding that respondents do possess a workers' compensation lien on the settlement proceeds received by Hayward; and (3) set aside the settlement agreement.

A hearing was held on 28 August 2006, and by order entered 31 October 2006, the trial court denied respondents' motion to set aside the settlement agreement; respectively, the trial court granted peti-

1. The Industrial Commission determined that Davis was not wholly dependent on Bullock for support, as she had been receiving Social Security disability payments and other governmental assistance.

tioners' motion to approve the settlement agreement and concluded that respondents did not have a valid workers' compensation lien on the settlement proceeds, or in the alternative, the court concluded that if respondents did have a valid workers' compensation lien, such lien should be struck.

On appeal, respondents contend that: (1) the trial court erred in concluding that respondents do not have a lien pursuant to N.C. Gen. Stat. § 97-10.2 against the wrongful death benefits recovered by decedent's estate; (2) the trial court abused its discretion by finding, in the alternative, that if such lien did exist, such lien should be struck pursuant to N.C. Gen. Stat. § 97-10.2(j); and (3) the trial court erred in failing to set aside the settlement agreement.

I. Existence of Lien

[1] Respondents first contend that the trial court erred in concluding that respondents do not have a lien against the wrongful death benefits recovered by decedent's estate. We agree.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003). "The cardinal principle of statutory interpretation is to ensure that legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). "To determine legislative intent, we first look to the language of the statute." *Estate of Wells v. Toms*, 129 N.C. App. 413, 415-16, 500 S.E.2d 105, 107 (1998).

N.C. Gen. Stat. §§ 97-10.2(f)(1) and 28A-18-2 both govern the distribution of damages recovered in a wrongful death action. " '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, Commissioner of Motor Vehicles*, 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)). Here, the right for decedent's estate to bring an action against Parker and Puryear, third-party tortfeasors, is conferred by N.C. Gen. Stat. § 28A-18-2. However, the relative rights between decedent's estate and respondents are governed by N.C. Gen. Stat. § 97-10.2.

N.C. Gen. Stat. § 28A-18-2 authorizes the personal representative of an estate to bring a wrongful death action on behalf of a decedent and governs the distribution of the damages recovered from such action. Section 28A-18-2(a) (2005) provides in pertinent part:

> (a) . . . **The amount recovered** [in a wrongful death action against a third-party tortfeasor] . . . **is not liable to be applied** as assets, **in the payment of debts** or legacies, . . . **but shall be disposed of as provided in the Intestate Succession Act**.

Section 97-10.2 of the Workers' Compensation Act defines the rights and remedies of employees and employers against third-party tortfeasors. *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 87, 484 S.E.2d 566, 568 (1997). Section 97-10.2 was designed to secure prompt, reasonable compensation for an employee and to simultaneously permit an employer who has settled with the employee to recover such amount from a third-party tortfeasor. *Brown v. R.R.*, 204 N.C. 668, 671, 169 S.E. 419, 420 (1933). Our Supreme Court has held that the purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but is also to ensure a limited and determinate liability for employers. *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966). The legislative intent behind the Workers' Compensation Act is not to provide an employee with a windfall of a recovery from both the employer and the third-party tortfeasor. *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569. Likewise, "[the Workers' Compensation Act] does not create two causes of action. . . . The right to bring [an] action for damages for wrongful death is conferred by General Statutes [now § 28A-18-2]. The [Workers' Compensation Act] merely governs the respective rights of the employee's estate, the employer and the insurance carrier to maintain an action for damages against third parties." *Groce v. Rapidair, Inc.*, 305 F. Supp. 1238, 1241 (1969).

N.C. Gen. Stat. § 97-10.2 provides in pertinent part:

> (a) The right to compensation and other benefits under this Article for disability, disfigurement, **or death** shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." **The respective rights and interests of the employee-beneficiary** under this Article, **the employer, and the employer's insurance carrier,** if any, **in respect of the common-law cause of action against such**

third party and the damages recovered **shall be as set forth in this section**.

* * * *

(f)(1) . . . if an award final in nature in favor of the employee has been entered by the Industrial Commission, then **any amount obtained by any person** by settlement with, judgment against, or otherwise **from the third party by reason of such injury or death shall be disbursed** by order of the Industrial Commission for the following purposes and in the following order of priority:

* * * *

c. Third to the **reimbursement of the employer** for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

* * * *

(h) In any . . . settlement with the third party, every party to the claim for compensation **shall have a lien to the extent of his interest under (f)** hereof upon **any payment made by the third party** by reason of such injury . . . and such lien may be enforced against **any person** receiving such funds.

Id. (emphasis added).

Here, the trial court reasoned that because the lien created by § 97-10.2(h) is a subrogation lien, applying general principles of subrogation, respondents are only entitled to step into the shoes of the minor nephews, the beneficiaries of the workers' compensation award, and may only enforce such lien against proceeds to which the minor nephews are entitled. Because the minor nephews are not heirs at law under the Intestate Succession Act and are not entitled to wrongful death proceeds pursuant to N.C. Gen. Stat. § 28A-18-2, the trial court concluded that respondents, likewise, do not have an enforceable lien against such proceeds. We disagree, as it is improper to abrogate an employer's right of reimbursement by creating limits to recovery that the General Assembly has not expressed, implied, or intended. *Radzisz*, 346 N.C. at 89-91, 484 S.E.2d at 568-69.

Before we begin the analysis of § 97-10.2, we note that we have already held that the language of § 28A-18-2(a), which prohibits recoveries from a wrongful death action from being applied to debts of the decedent, is not a bar to an employer's recovery of compensation paid; this is because we have held that the right of reimbursement created by § 97-10.2(f)(1) is not a debt of the decedent, but rather, is a statutory right. *Byers v. Highway Commission*, 3 N.C. App. 139, 147, 164 S.E.2d 535, 541 (1968), *aff'd*, 275 N.C. 229, 166 S.E.2d 649 (1969) (interpreting former N.C. Gen. Stat. § 28-173, which has been recodified as § 28A-18-2). Likewise, our Supreme Court has stated,

> (I)t is **mandatory** under the provisions of the Workmen's Compensation Act that **any recovery against a third party by reason** of an injury to or **death of an employee subject to the Act**, the proceeds received from such settlement with or judgment against the third party, **shall be disbursed according to the provisions of the Workmen's Compensation Act**.

Cox v. Transportation Co., 259 N.C. 38, 43, 129 S.E.2d 589, 592-93 (1963) (emphasis added).

According to the plain language of § 97-10.2(f) and (h), when read *in pari materia*, respondents have a statutory lien against *any* payment made by a third-party tortfeasor arising out of an injury or death of an employee subject to the Act. This lien may be enforced against "*any* person receiving such funds." N.C. Gen. Stat. § 97-10.2(h) (emphasis added). It is a lien for "all amounts paid or to be paid" to the employee, and it is mandatory in nature. *Radzisz*, 346 N.C. at 90, 484 S.E.2d at 569.

Although the General Assembly expressly subrogated the rights of an employer's insurance carrier to that of an employer, *see* N.C. Gen. Stat. § 97-10.2(g), we find no language in section 97-10.2 subrograting the rights of an employer to that of the beneficiaries of the workers' compensation award. If the General Assembly intended to subrogate the employer's rights to that of the beneficiaries of the award, they would have done so expressly as they did in subsection (g). Instead, the extent of an employer's subrogation interest under subsection (f) is measured by compensation paid or to be paid by the employer.

Here, respondents have a statutory workers' compensation lien upon any payment made by third-party tortfeasors, Parker and

Puryear, arising out of Bullock's death. This lien may be enforced against any person receiving third-party settlement proceeds, which includes Bullock's mother, Melissa Hayward, who will be paid from the $95,000.00 settlement. Respondents' lien is for all amounts paid or to be paid to or on behalf of the minor nephews, which is $259,587.44. It was improper for the trial court to conclude that respondents' rights were subrogated to those of the minor nephews where the General Assembly has not expressed, implied, or intended any such limit. This conclusion, which allows for two recoveries, one by the employee through his dependents and another by the employee through his estate, contravenes both the plain language of § 97-10.2(f) as well as the compensatory rather than punitive intent of the Act.

II. Lien Reduction pursuant to N.C. Gen. Stat. § 97-10.2(j)

[2] Respondents next contend that the trial court abused its discretion by finding, in the alternative, that if respondents did have a lien against the settlement proceeds under § 97-10.2(h), such lien should be struck pursuant to § 97-10.2(j). Because we find that the trial court made insufficient findings to provide for meaningful appellate review, we remand.

Pursuant to N.C. Gen. Stat. § 97-10.2(j), once a settlement between an employee and a third-party tortfeasor "has been finalized so that only performance of the agreement is necessary to bind the parties," either party may petition a superior court to determine the subrogation amount.[2] *Ales v. T. A. Loving Co.*, 163 N.C. App. 350, 353, 593 S.E.2d 453, 455 (2004). A trial judge has discretion under this provision to adjust the amount of a workers' compensation lien, even if the result is a double recovery for the plaintiff. *Holden v. Boone*, 153 N.C. App. 254, 257, 569 S.E.2d 711, 713 (2002). However, "the discretion granted [to the Superior Court judge] under G.S. § 97-10.2(j) is

2. Respondents argue that according to our decision in *Ales*, in order for a trial court to have jurisdiction to determine the subrogation amount under subsection (j), the parties must petition the court *after* the settlement is reached, but *before* the settlement proceeds have been distributed. We find that respondents have misconstrued our holding in *Ales*. Although it is true that we have interpreted subsection (j) to require that a party must first reach a final settlement agreement before the trial court has jurisdiction to determine the subrogation amount, we have not interpreted subsection (j) to require that the parties must petition the court *before* the settlement proceeds have been distributed. We find no such requirement in the language of subsection (j); however, we note that in determining the appropriate amount of the workers' compensation lien, the trial court does have discretion under (j) to consider any factors that it deems "just and reasonable," which could include the timeliness of the petition and whether settlement proceeds have been distributed.

not unlimited; 'the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . by findings of fact and conclusions of law sufficient to provide for meaningful appellate review.' " *In re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72 (2000), *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000) (quoting *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990)). N.C. Gen. Stat. § 97-10.2(j) provides, in pertinent part:

> [T]he judge **shall** determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, **and** the amount of cost of the third-party litigation to be shared between the employee and employer. The judge **shall** consider [1] the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, [2] the net recovery to plaintiff, [3] the likelihood of the plaintiff prevailing at trial or on appeal, [4] the need for finality in the litigation, **and** [5] any other factors the court deems just and reasonable[.]

N.C. Gen. Stat. § 97-10.2(j) (emphasis added).

Although we have held that there is no mathematical formula or set list of factors for the trial court to consider in making its determination, *Biddix*, 138 N.C. App. at 502, 530 S.E.2d at 72, it is clear from the use of the words "shall" and "and" in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute. Otherwise, such words are rendered meaningless.

Here, the court made no findings nor is there any indication in the record to show that it considered the following mandated statutory factors: (1) the cost of litigation to be shared between Bullock's estate and respondents, if any; (2) the net recovery to Melissa Hayward, which would require a determination of the amount necessary to adequately compensate her, given that the court found that she was not dependent on Bullock for support nor did she have much contact with him while he was alive, and the amount of attorney's fees and other expenses to be paid from the settlement proceeds; (3) the likelihood of Bullock's estate prevailing at trial or on appeal; and (4) the need for finality in the litigation. The trial court made only the following findings to support its decision to strike respondents' lien: (1) that Melissa Hayward is Bullock's sole surviving heir at law; (2) that Melissa Hayward had little contact with Bullock; (3) that liability for Bullock's death was contested; (4) that the settlement was in the

amount of $95,000.00; and (5) that the prospective workers' compensation benefits totaled $259,567.44, which exceeds the total settlement proceeds. Based upon these findings, we are unable to determine whether the court properly exercised its discretion or if it acted under a misapprehension of law in striking respondents' statutory right to reimbursement from settlement proceeds recovered from Parker and Puryear. Accordingly, we remand for additional findings.

III. Validity of Settlement

[3] Finally, respondents contend that because petitioners settled their third-party claim without the written consent of C.C. Mangum, the trial court erred by refusing to set aside the settlement agreement pursuant to § 97-10.2(h). Even without the written consent of the employer, however, pursuant to § 97-10.2(h)(2), the settlement agreement need not be set aside if either party complies with § 97-10.2(j). Because we remand for additional findings to determine whether the workers' compensation lien was properly reduced to zero under § 97-10.2(j), we need not address this argument at this time.

Accordingly, this order is reversed in part and remanded for additional findings of fact.

Reversed in part, remanded for additional findings.

Judges CALABRIA and STEPHENS concur.

RONNI RENEE HALL, PLAINTIFF v. STEVEN HAROLD HALL, DEFENDANT

No. COA07-624

(Filed 5 February 2008)

1. Child Custody, Support, and Visitation— custody—findings

The trial court did not abuse its discretion in a divorce action by awarding primary physical custody of the children to plaintiff mother. The court is required to order custody to the person who will best promote the interest and welfare of the children and must consider all relevant factors, but need only find those facts which are material. Here, the findings challenged by defendant are supported by competent evidence.

2. Child Support, Custody, and Visitation— custody—best interest of the children

The trial court did not abuse its discretion in a child custody action in determining the best interest of the children. Even if the trial court erred in making challenged findings of fact, the court's conclusion regarding the best interest of the children is supported by sufficient findings of fact.

3. Child Support, Custody, and Visitation— custody—decision-making responsibilities divided—findings required

The trial court erred when determining the custody of the children in a divorce action in its division of decision-making responsibilities. The court made no findings that a split in decision-making was warranted; on remand, the court may allocate decision-making authority between the parties, but must set out specific findings as to why deviation from pure joint legal custody is necessary.

4. Child Support, Custody, and Visitation— custody—parenting coordinator

The trial court in a divorce action did not follow the statutory mandates required before a parenting coordinator may be appointed to decide disputes concerning the children. The findings required by N.C.G.S. § 50-91 must be made.

Appeal by defendant from an order entered 3 August 2006 by Judge Joyce A. Hamilton in Wake County District Court. Heard in the Court of Appeals 28 November 2007.

Wake Family Law Group, by Julianne Booth Rothert and Marc W. Sokol, for plaintiff-appellee.

Kristoff Law Offices, P.A., by Sharon H. Kristoff, for defendant-appellant.

HUNTER, Judge.

On 3 August 2006, an order for custody and divorce from bed and board was entered, awarding Ronni Renee Hall ("plaintiff") and Steven Harold Hall ("defendant") joint legal custody of the minor children. The order granted plaintiff primary physical custody and defendant secondary physical custody. The order further provided that plaintiff shall have decision-making authority regarding all issues affecting the minor children except for sports and extracurricular

activities, which shall be decided jointly between the parties. If the parties are unable to reach a decision regarding sports and extracurricular activities, a parenting coordinator has decision-making authority. From this order, defendant appeals. After careful consideration, we affirm in part and reverse and remand in part.

Plaintiff and defendant were married on 17 May 1990. Two children, Christiana and Steven, were born of the marriage. The trial court found that plaintiff was "nurturing, listens to the children, and is more emotionally attuned to their needs than the [d]efendant." The trial court also found that during the parties' marriage, defendant was insensitive, controlling, and at times, " 'body slammed' " plaintiff.[1]

Prior to April 2004, the trial court found that plaintiff had contact with a married man, Russell Broadway ("Broadway"). When defendant was out of town, Broadway would come over to the parties' marital residence around midnight and stay for fifteen minutes. Plaintiff and Broadway exchanged emails and went on a picnic together. Plaintiff wrote Broadway a poem in which she described him as her " 'favorite guy.' "

In April 2004, defendant discovered the relationship between plaintiff and Broadway. Although defendant did not suspect that plaintiff had committed adultery with Broadway, defendant told plaintiff and others that he would brand a letter " 'A' " on her forehead. Plaintiff admitted that she was not truthful about her contact with Broadway.

Since April 2004, the trial court found that defendant became more involved with the children, working with them on homework, taking them to athletic events, cooking and cleaning for them, and regularly volunteering at their school. Defendant became particularly involved with both children in athletic events, but he has also participated in Indian Princesses and Indian Guides with the children and taught them to ride bicycles.

After attempting to work on their marriage, the parties ultimately separated on 21 September 2005.

Defendant presents two issues for this Court's review: (1) whether the trial court abused its discretion in making its custody

1. Plaintiff described the "body slam[s]" as an altercation in which defendant would invade her physical space as they were passing through a doorway wide enough for two people. Instead of making room for plaintiff, defendant would "body" her out of the way. She also testified that defendant would physically hold her down on the bed so that she could not move when he was angry with her.

decision; and (2) whether the trial court erred in determining decision-making authority over the children's activities.

I.

[1] Defendant first argues that the trial court abused its discretion in awarding primary physical custody to plaintiff. We disagree.

Under N.C. Gen. Stat. § 50-13.2(a) (2005), the trial court is required to order custody of minor children to the person that "will best promote the interest and welfare of the child." The statute also mandates that the trial court "consider all relevant factors . . . and . . . make findings accordingly." *Id.*; *see also In re Cox*, 17 N.C. App. 687, 689, 195 S.E.2d 132, 133 (1973) ("in custody cases[,] the welfare of the child is the 'polar star' by which the [trial] court's decision must be guided"). "[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). This Court has recognized that the trial judge is in the best position to make such a determination as he or she "can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Accordingly, the trial judge is vested with broad discretion in custody cases and will not be overturned absent an abuse of discretion. *In re Cox*, 17 N.C. App. at 689, 195 S.E.2d at 133.

When the trial court finds that both parties are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have primary physical custody, as it did here, such determination will be upheld if it is supported by competent evidence. *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999). A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. *Id.* Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*. *Id.* We address the trial court's findings of fact and challenged conclusion of law in turn.

A.

Defendant argues that certain findings of fact made by the trial court were unsupported by competent evidence. We disagree and address each challenged factual finding in turn.

In relevant part, finding of fact number thirty-six states that plaintiff "left the marital residence [on 21 September 2005,] taking the children with her. Defendant did not see the children for perhaps 6 days after [p]laintiff moved out of the marital home, but was allowed to talk to them." Defendant argues that the undisputed evidence shows that plaintiff told defendant she was taking the children to visit her parents in Georgia, and made no mention of the fact she was leaving defendant and taking the children. Defendant makes only a conclusory argument that this alleged "wrongdoing" was relevant to the best interests of the children. We, as the trial court likely concluded, do not find defendant's factual arguments, even if true, to affect the best interest of the children. This is especially true here, where there were findings of fact, supported by competent evidence, of defendant " 'body slamm[ing]' " plaintiff.

Defendant also argues that finding of fact number five is not supported by competent evidence. For the reasons discussed in footnote two of this opinion, we find defendant's arguments on this issue to be without merit as he has grossly mischaracterized the trial court's finding of fact on that issue.

Defendant next argues that finding of fact number ten, which states that defendant's work schedule was unpredictable while plaintiff generally worked at home and later at night so as to not impact the children, was not supported by competent evidence. Essentially, defendant argues that his work schedule is quite flexible and that he averaged traveling one night per week. Testimony at trial, however, suggested that defendant traveled between two and three nights a week before marital problems arose and that he traveled less after the marital problems. The trial court merely stated that defendant's schedule *was* unpredictable, which, from the testimony presented, was a reasonable finding. Thus, finding of fact number ten was supported by competent evidence.

Defendant's last argument with regard to the trial court's findings of fact, is that findings number sixteen and thirty-four set forth an erroneous timeline of events. We disagree.

In finding of fact sixteen, the trial court concluded that "[s]ince April of 2004, [d]efendant has worked with the children on their homework, taken them to numerous athletic and other activities, cooked and cleaned for them and has regularly volunteered at their school." Finding of fact thirty-four states that after learning about plaintiff's "inappropriate behavior" with another man, defendant

"began to spend more time with the children, and stayed in town" more frequently. Defendant argues that these findings imply that he did not do the things listed in findings sixteen and thirty-four before April 2004. Regardless of the implication, there is competent evidence in the record to support such a finding that defendant became, according to testimony, more "visible" with the children after April 2004. Accordingly, the findings of fact challenged by defendant are supported by competent evidence and defendant's assignments of error as to those findings are rejected.

B.

[2] Defendant's sole argument as to the trial court's conclusions of law is that the trial court erred in making the "best interest[] of the children" determination, as it was not supported by the trial court's findings of fact. We disagree.

Before awarding primary physical custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will be in the best interest of the child. N.C. Gen. Stat. § 50-13.2(a). Such a conclusion must be supported by findings of fact. *In re Poole*, 8 N.C. App. 25, 29, 173 S.E.2d 545, 548 (1970). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). "These findings cannot, however, be mere conclusions." *Hunt v. Hunt*, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993).

In the instant case, defendant argues that some of the trial court's findings of fact were "mere conclusions." Specifically, defendant argues that four of the trial court's findings of fact were not findings of fact, but mere conclusions. Assuming, *arguendo*, that those findings of fact were only conclusions, the record still contains findings of fact, not challenged by defendant or already determined to be supported by competent evidence by this Court, to support the trial court's "best interest" determination.

Specifically, finding of fact number eight states that plaintiff "took the children for haircuts, bought their clothes and school supplies, volunteered at their school and was a room mother, and took the children on play dates." The trial court also found that plaintiff took the children to the doctor and stayed home with them when they were ill. Finally, the trial found as a fact that plaintiff took a six month

leave of absence from her employment to stay with Christiana when she was born and a five month leave when Steven was born.

Contrary to these findings, the trial court found that defendant would only "occasionally take the children to the doctor, would sometimes attend birthday parties and would volunteer at school on occasion." Moreover, "[d]efendant's work schedule was unpredictable and he was regularly out of town one to three nights each week." The trial court also found that "[d]efendant countermanded [p]laintiff on a number of occasions when she . . . was disciplining the children[,]" referred to Christiana as a " 'drama queen,' " and Steven as a " 'Mama's boy.' " Finally, the trial court found that "[d]efendant 'body slammed' the [p]laintiff 20 to 50 times during the marriage[, and] threatened to punch his brother-in-law in the nose." Under N.C. Gen. Stat. § 50-13.2(a), a relevant factor in making a custody determination is "acts of domestic violence between the parties[.]" Under such circumstances, we cannot say that the trial court committed a manifest abuse of discretion in awarding plaintiff primary physical custody of the children.[2] Although defendant argues that the trial court should have made less complimentary findings as to plaintiff, we are not in a position to re-weigh the evidence.

Here, even assuming the trial court erred in making the challenged findings of fact, the trial court's legal conclusion regarding the best interest of the children is supported by sufficient findings of fact. Accordingly, defendant's assignments of error as to this issue are rejected.

II.

[3] Defendant's final argument is that the trial court erred in dividing decision-making responsibilities between the parties after awarding joint legal custody. We agree.

The trial court's order granted joint legal custody to both parties. Plaintiff, however, was to "have decision-making authority

2. Defendant spends a significant portion of his brief devoted to the trial court's finding as to which party was the primary care giver. Defendant argues that the trial court erred in determining that the mother was the primary care giver. Although defendant has not established how such a determination would require a remand, he has also grossly mischaracterized the trial court's finding on that issue. Specifically, the trial court found that during a six month period of time after Christiana's birth, the parties shared care taking responsibilities. The trial court found that when they were not sharing or rotating responsibilities, plaintiff "was the primary caregiver the rest of the time." This is not, as defendant contends, a finding that plaintiff was the primary caregiver of both children at all times.

regarding all issues affecting the minor children except for issues regarding sports and extracurricular activities[.]" Where the parties could not agree on issues related to sports and extracurricular activities, a parent coordinator would "have decision-making authority on these issues."

"Although not defined in the North Carolina General Statutes, our case law employs the term 'legal custody' to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006), *see also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law*, § 13.2b, at 13-16 (5th ed. 2002) (legal custody includes "the rights and obligations associated with making major decisions affecting the child's life"). As a general matter, the trial court has "discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28. In order to exercise its discretion, however, the trial court must make "sufficient findings of fact to show that such a decision was warranted." *Id.*

In *Diehl*, the trial court granted joint legal custody to both parties, but

> the court went on to award "primary decision making authority" on all issues to Ms. Diehl unless "a particular decision will have a substantial financial effect on [Mr. Diehl] . . . ." In the event of a substantial financial effect, however, the order still does not provide Mr. Diehl with any decision-making authority, but rather states that the parties may "petition the Court to make the decision . . . ."

Id. at 646, 630 S.E.2d at 28 (alteration in original). As to the findings made to support such an abrogation of authority, the trial court in *Diehl* found that " '[t]he parties are currently unable to effectively communicate regarding the needs of the minor children.' " *Id.* at 647, 630 S.E.2d at 28 (alteration in original). The *Diehl* trial court also made findings that

> Ms. Diehl has occasionally found it difficult to enroll the children in activities or obtain services for the children when Mr. Diehl's consent was required, as his consent is sometimes difficult to obtain; and when John's school recommended he be evaluated to

> determine whether he suffered from any learning disabilities, Mr. Diehl refused to consent to the evaluation unless it would be completely covered by insurance.

Id. In that case, this Court reversed and remanded the trial court's decision, holding that findings related to failure to communicate and obtain consent when required are insufficient to abrogate a parent's decision-making authority when granting joint legal custody. *Id.* at 648, 630 S.E.2d at 29.

Defendant argues that *Diehl* controls the instant case in that all of defendant's decision-making authority has been abrogated. Plaintiff counters that his authority has not been completely abrogated, as the parties are required to share decision-making responsibilities regarding the children's athletic and extracurricular activities. That said, were there to be an unresolvable dispute as to that issue, a parent coordinator would, like the trial court in *Diehl*, make the final decision.

A careful reading of *Diehl*, however, reveals that this Court's ultimate holding was that upon an order granting joint legal custody, the trial court may only deviate from "pure" legal custody after making specific findings of fact. The extent of the deviation is immaterial, so while the order in *Diehl* is distinguishable from the one in the instant case in terms of the authority granted to the respective defendants, that is not the relevant inquiry. Accordingly, this Court must determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority.

In this case, as in *Diehl*, the trial court concluded that defendant was a fit and proper person for joint legal custody. The trial court, however, made no findings that a split in the decision-making was warranted. Instead, the trial court made numerous findings regarding the parties' tumultuous relationship, which, as in *Diehl*, merely support the trial court's conclusion to award primary physical custody to plaintiff. Moreover, the trial court did not even make findings that this Court held to be insufficient on their own in *Diehl*, regarding inability to communicate and availability to consent. Accordingly, we reverse the trial court's ruling regarding the decision-making and remand for further proceedings regarding the issue of joint legal custody. On remand, the trial court may allocate decision-making authority between the parties again; however, were the court to do so, it must set out *specific findings* as to why deviation from "pure" joint

legal custody is *necessary*. Those findings must detail why a deviation form "pure" joint legal custody is in the *best interest of the children*.[3] As an example, past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient, but mere findings that the parties have a tumultuous relationship would not.

[4] We also address defendant's arguments concerning the use of a parenting coordinator to decide disputes that are unresolvable by the parties. Defendant argues that the trial court failed to follow the statutory mandates required before a parenting coordinator may be appointed. We agree.

N.C. Gen. Stat. § 50-90 (2005) sets forth the statutory authority for parenting coordinators and defines the terms. Under N.C. Gen. Stat. § 50-91(b) (2005), a parenting coordinator may be appointed when "the [trial] court . . . makes specific findings [1] that the action is a high-conflict case, [2] that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and [3] that the parties are able to pay for the cost of the parenting coordinator." Although there was evidence presented regarding all three issues, the trial court did not make specific findings as to each. Accordingly, upon remand, if the trial court decides the use of a parenting coordinator is appropriate, the findings required by N.C. Gen. Stat. § 50-91 must be made.

III.

In summary, we hold that the trial court did not abuse its discretion in awarding primary physical custody to plaintiff. We also find no error with the trial court's "best interest" determination. Finally, we reverse and remand the trial court's order regarding the decision-making authority between the parties.

Affirmed in part, reversed and remanded in part.

Judges CALABRIA and STROUD concur.

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3. There is no presumption in favor of joint custody; however, it must be considered by the trial court upon the request of either parent. N.C. Gen. Stat. § 50-13.2(a). Thus, the trial court may grant legal custody only to one party, joint custody to both, or, if proper findings are made, joint legal custody with a split in decision-making authority.

MACHER v. MACHER

[188 N.C. App. 537 (2008)]

OLLIE MAE MACHER, N/K/A OLLIE MAE HARRIS, PLAINTIFF v.
ABE MORRIS MACHER, DEFENDANT

No. COA07-164

(Filed 5 February 2008)

Civil Procedure; Divorce— Rule 60 motion for relief from judgment—authenticity of signature on documents—abuse of discretion standard

The trial court did not abuse its discretion by denying defendant husband's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from a divorce judgment entered 28 October 1998 even though defendant contends the signatures on the answer and summary judgment motion were not his because there was evidence from which the trial court could have concluded that defendant signed the answer, thereby conferring personal jurisdiction upon the court in the divorce proceeding, including that: (1) the notary who created a notorial certificate on defendant's pleading stated that although she had no memory of ever meeting defendant, it was her practice to require the person whose signature she was notarizing to produce identification and to make the signature in front of her; and (2) plaintiff's divorce lawyer testified that defendant contacted him before the divorce judgment was entered and asked what was taking it so long to get done.

Judge CALABRIA dissenting.

Appeal by Defendant from order entered 21 November 2006 by Judge J. Henry Banks in Granville County District Court. Heard in the Court of Appeals 12 September 2007.

Hopper, Hicks & Wrenn, LLP, by N. Kyle Hicks, for Plaintiff-Appellee.

Burton & Ellis, PLLC, by Alyscia G. Ellis, for Defendant-Appellant.

STEPHENS, Judge.

Abe Morris Macher ("Defendant") appeals from an order denying his motion for Rule 60(b) relief from a divorce judgment entered 28 October 1998. We affirm.

Ollie Mae Macher, n/k/a Ollie Mae Harris, ("Plaintiff") and Defendant were married on 15 July 1993. The parties resided in Maryland until 1996, when Plaintiff moved to North Carolina. The parties separated on 27 May 1997.

At 11:36 a.m. on 28 October 1998, Plaintiff filed a complaint for absolute divorce.[1] Several documents were filed in the action later that afternoon. At 1:52 p.m., an uncaptioned pleading was filed which stated:

> I am Answering 98 CVD 708, a Complaint for Divorce my Wife has filed in Granville County. I am the Defendant. I admit all of the allegations. I acknowledge that I have been served with the Complaint. I am a Medical Doctor in Bethesda, Maryland[,] and have traveled to North Carolina today to expedite my Divorce. I do not wish to retain an attorney in this matter. With the upcoming wedding this weekend, I wholeheartedly consent to the Divorce. I hereby waive any further notice of hearing, and am aware that my wife's attorney will be seeking a Divorce today[,] October 28[,] 1998[,] by way of Summary Judgment, and I consent to that[.]
>
> Sincerely,
>
> /s/ Abe Morris Macher, MD

This pleading (the "answer") also contained a notary's signature and stamp, and the following notarial certificate: "Sworn to and Subscribed before me on this the 28 day of October, 98." At 1:53 p.m., Plaintiff filed a motion for summary judgment, asking the trial court to grant an absolute divorce. The summary judgment motion contained the signature, "Abe Morris Macher, MD[,]" and the same notarial certificate as was contained on the answer. At 2:07 p.m., Plaintiff filed a divorce judgment, signed by the Honorable J. Henry Banks, dissolving the bonds of matrimony between the parties.

On or about 16 February 2006, Defendant was served with a summons to appear in federal court on seven charges of embezzling money from the United States government, his employer. The affidavit in support of the federal criminal complaint alleged that Defendant, knowing that the parties were divorced, had claimed

1. The summons included in the record on appeal is not file stamped, but the deputy clerk of court who issued the summons wrote that it was issued "11-28-98" also at 11:36 a.m. In his brief, Defendant states that the summons was filed on 28 October 1998.

Plaintiff as a dependent wife on a federal government housing allowance form each year from 1999 to 2005.

On 28 August 2006, Defendant filed a Rule 60(b) motion for relief from the 1998 divorce judgment on the ground that the judgment was void and should be set aside. In support of the motion, Defendant filed two affidavits: one by Defendant and one by a former wife of Defendant. Both Defendant and the former wife swore that the signatures on the answer and summary judgment motion were not Defendant's signatures.

A hearing on Defendant's Rule 60(b) motion was held 21 November 2006 by Judge Banks. The trial court heard testimony from the notary, Plaintiff's attorney in the divorce proceeding, and Defendant. Additionally, Defendant entered in evidence exhibits which Defendant contended supported his testimony that the signatures on the answer and motion for summary judgment were not his. The former wife's affidavit was not entered in evidence. That day, Judge Banks entered an order denying Defendant's Rule 60(b) motion. From this order, Defendant appeals.

The standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006). A trial court may be reversed for abusing its discretion only upon a showing that its ruling was " 'manifestly unsupported by reason.' " *Id.* at 523, 631 S.E.2d at 118 (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)). " 'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

"Rule 60(b)(4) provides relief from judgments that are void . . . ." *Freeman v. Freeman*, 155 N.C. App. 603, 606, 573 S.E.2d 708, 711 (2002), *disc. review denied*, 357 N.C. 250, 582 S.E.2d 32 (2003); *see also* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). A judgment against a defendant is void where the court was without personal jurisdiction. *Freeman*, 155 N.C. App. 603, 573 S.E.2d 708. "Jurisdiction over the person of a defendant is obtained by service of process upon him, by his voluntary appearance, or consent." *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985) (citing *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)). "The filing of an answer is equivalent to a general appearance, and a general appearance waives all defects and irregulari-

ties in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons." *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956) (citations omitted).

The issue before the trial court in this case was whether Defendant signed the answer, thereby conferring personal jurisdiction upon the court in the divorce proceeding. The purported answer is signed "Abe Morris Macher, MD[.]" The notarial certificate on the answer states, "Sworn to and Subscribed before me on this the 28 day of October, 98[,]" and is stamped and signed by a notary. The notary who created the notarial certificate testified that although she had no memory of ever meeting Defendant, it was her practice to require the person whose signature she was notarizing to produce identification and to make the signature in front of her. Plaintiff's lawyer in the divorce action testified that Defendant contacted him before the divorce judgment was entered and asked "what was taking it so long to get done." This evidence tends to support Plaintiff's contention that Defendant signed the answer.

Defendant's attorney advised the trial court that she could not offer the testimony of an expert witness in handwriting analysis because original copies of the answer and summary judgment motion could not be located. Defendant, however, testified that he did not sign the answer and that the signature thereon did not resemble his signature. In support of the latter contention, Defendant entered in evidence copies of the housing allowance forms which he had submitted almost every year between 1982 and 2005 and which contained his signature. Defendant also submitted a copy of a separation agreement signed by the parties in 2005, more than six years after the divorce judgment was entered.[2] Finally, Defendant acknowledged that he was being federally prosecuted for embezzling money from the United States government because he had claimed Plaintiff as his dependent wife in the years following the 1998 divorce judgment.

We agree with the trial court that there are "some obvious serious concerns" in this case. Nevertheless, the evidence conflicted on the issue of whether Defendant signed the answer. "The weight, credibility, and convincing force of such evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations." *Freeman*, 155 N.C. App. at 608, 573 S.E.2d at 712 (citing *Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738, *disc.*

2. Plaintiff signed the separation agreement as "Ollie M. Harris."

review denied, 348 N.C. 291, 501 S.E.2d 925 (1998)). Because there was evidence from which the trial court could have concluded that Defendant signed the answer, the trial court's ruling was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. The trial court did not abuse its discretion in resolving the evidentiary conflict in favor of Plaintiff, and its judgment is affirmed.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge CALABRIA dissents in a separate opinion.

CALABRIA, Judge, dissenting.

I respectfully dissent. I conclude that the trial court abused its discretion in denying defendant's Rule 60(b) motion to set aside the judgment. As the majority correctly states, the issue before the court was whether the defendant signed the purported answer, thereby conferring personal jurisdiction upon the court in the divorce proceeding.

In *Freeman v. Freeman*, 155 N.C. App. 603, 607-08, 573 S.E.2d 708, 711-12 (2002), this Court upheld a trial court's grant of a Rule 60(b) motion to set aside a divorce judgment for lack of personal jurisdiction based on defendant's testimony that the purported signature on the return of service was not hers; her testimony that she had never been to the Alamance County Courthouse where the divorce occurred; and, her subsequent actions, which were inconsistent with knowledge of a divorce.

North Carolina Rule of Civil Procedure 60(b)(4) provides: "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) The judgment is void;. . . ." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2007). "Rule 60(b)(4) provides relief from judgments that are void . . . ." *Freeman*, 155 N.C. App. at 606, 573 S.E.2d at 711.

In this case, the trial court heard conflicting evidence on whether the defendant signed the purported answer, waived his notice, and consented to the motion for summary judgment in the presence of a notary public.

I. Testimony

A. The Notary Public's Testimony

Defendant's evidence consisted of testimony by the notary public that her standard protocol was to ask for identification before she notarizes a signature, and that she typically does not notarize non-clients' signatures unless they come to the office. However, she did not recall defendant coming to her office.

Plaintiff's evidence also consisted of the notary's testimony. On cross-examination, she testified that she was in her first year of practice as a notary, she took her responsibility very seriously and that she would not notarize a signature unless that person was in front of her.

B. Wallace Bradsher's Testimony

Wallace Bradsher ("Bradsher") was plaintiff's attorney at the time the complaint was filed and signed the complaint as attorney for plaintiff. He also was plaintiff's co-counsel at the Rule 60(b) hearing. Bradsher testified he did not prepare the purported answer and he did not know who prepared it. Bradsher also testified he directed a staff member to contact defendant about obtaining his consent to the divorce. Bradsher further testified he never met defendant and only spoke with him over the telephone. Bradsher recalled defendant "wanting the divorce" and wondering "what was taking it so long to get done." Bradsher testified that he recalled telling defendant via telephone about the divorce judgment, including the fact that plaintiff planned to be married that weekend and it was his practice to mail divorce judgments to defendants.

C. Defendant's Testimony

Defendant testified he was not served with the civil summons or complaint and did not discover the divorce until 2005 when his former wife, who was in contact with plaintiff, learned about the divorce. In addition, he did not recall any conversations with Bradsher and he never met the notary public. Defendant testified the signature on the purported answer and the signature purporting to consent to the motion for summary judgment were not his signatures. Defendant illustrated his signature by submitting copies of his dependency forms and an affidavit that he submitted with the Rule 60 motion, also illustrating his signature. Defendant testified that notwithstanding the dependency forms and the affidavit, the only document he signed was a separation agreement on 21 March 2005

("separation agreement"), which was sent to plaintiff for her signature. Plaintiff signed the separation agreement in the presence of a notary on 5 April 2005 in North Carolina.

II. Missing, Incomplete, Incorrect Court Documents

A. Original Documents

Original documents were missing from the Granville County court's file. Neither the original of the purported answer, nor the original of the motion for summary judgment could be located. The majority agrees and the trial court stated there were "some obvious serious concerns" in this case. The court stated its concerns more than one time and was aware of the missing original documents by repeating its concern. "My biggest concern—probably biggest puzzlement is the documents. We don't have the original[s]."

B. Incomplete and Incorrect Civil Summons

The trial court was aware of an irregularity regarding the civil summons, "I don't have any indication in the file at all that the summons[,] the service was actually attached to the complaint." Not only was the summons not attached to the complaint, but it was dated 28 November 1998, more than thirty days from the date the complaint was filed and more importantly, more than thirty days after the divorce judgment was entered. In addition, the name and address of plaintiff's attorney is missing from the section of the civil summons that is designated as the section for completion of the name and address of plaintiff's attorney. This section of the civil summons is typically blank unless the plaintiff is represented by an attorney. Since Bradsher signed the complaint as plaintiff's attorney, the civil summons should have included Bradsher's name and address as plaintiff's attorney. N.C. Gen. Stat. § 1A-1, Rule 4(b) (2007) (the civil summons "shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff.").

C. Certificates of Service

N.C. Rule of Civil Procedure 5(b) requires: "A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4." N.C. Gen. Stat. § 1A-1, Rule 5(b) (2007). No certificates of service for the motion for summary judgment or the divorce judgment are in the record.

D. Divorce Judgment and Separation Agreement

The divorce judgment signed by the Honorable J. Henry Banks included language, *inter alia*, that the court reviewed "the Separation and Property Settlement Agreement" that had been signed by both parties. However the separation agreement was not signed by the parties on 28 October 1998, the date that the judgment was signed. The only separation agreement that was offered as an exhibit was signed by the defendant on 21 March 2005 and by the plaintiff on 5 April 2005. More importantly, the plaintiff's signature indicated she was already divorced when she signed the separation agreement because she signed as Ollie M. Harris, not Ollie Mae Macher, the name on the verification attached to the divorce complaint that was filed 28 October 1998.

III. Conclusion

Neither the plaintiff's attorney, nor the notary public had personal knowledge that defendant came to their office to sign documents waiving his consent for notice of an absolute divorce. This alone would be insufficient not only to determine that the court lacked personal jurisdiction, but also to overcome our abuse of discretion standard of review. However, the nature of the conflicting evidence, the lack of originals of the contested documents, an incomplete and unattached civil summons dated more than thirty days after the divorce judgment was entered, a divorce judgment incorrectly stating the parties signed a separation agreement that was not signed until over six years after the divorce, raise the issue of personal jurisdiction over the defendant.

Although abuse of discretion is rarely invoked, in this case, the trial court abused its discretion in denying defendant's motion for Rule 60 relief. The divorce judgment is void for lack of personal jurisdiction. The order of the trial court should be reversed and remanded.

HOUSEHOLD REALTY CORPORATION AND HSBC MORTGAGE SERVICES INC., PLAINTIFFS v. JOYCE EARL DELANCY LAMBETH A/K/A J.E.D. LAMBETH, INDIVIDUALLY; D. SCOTT HEINEMAN AND KURT F. JOHNSON, INDIVIDUALLY AND AS TRUSTEES OF THE "LAMBETH FAMILY TRUST," AND FREMONT INVESTMENT & LOAN, DEFENDANTS

No. COA07-362

(Filed 5 February 2008)

1. Mortgages and Deeds of Trust— priorities—fraudulent cancellation

In an action to determine the priority between two lenders arising from a fraudulent mortgage elimination scheme, the trial court correctly determined that the deed of trust from the first lender, which was cancelled by an unauthorized act, was entitled to priority over a subsequent deed of trust from an innocent third party. The case is controlled by *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456 (1927), rather than *Monteith v. Welch*, 244 N.C. 415 (1956).

2. Mortgages and Deeds of Trust— fraudulent cancellation—failure to respond to Administrative Demand

The failure of a lender (Household) to respond to an "Administrative Demand" by the perpetrator of a fraudulent mortgage cancellation did not preclude Household from having its deed of trust reinstated as the superior lien. It would not have occurred to anyone of ordinary business judgment and prudence to make any inquiry into the information contained in the 38-page Administrative Demand, which was bizarre, confusing, and absurd.

Appeal by Defendant Fremont Investment & Loan from judgment entered 11 September 2006 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 17 October 2007.

Katten Muchin Rosenman LLP, by Jeffrey C. Grady, Bradley E. Pearce, and Richard L. Farley, for Plaintiffs-Appellees.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for Defendant-Appellant.

STEPHENS, Judge.

This matter arises out of a fraudulent mortgage elimination scheme participated in by defendant Joyce Earl Delancy Lambeth ("Lambeth") and orchestrated by defendants Kurt F. Johnson and D. Scott Heineman, the principals of the Dorean Group. This scheme operated to fraudulently remove valid deeds of trust and mortgages given to lenders as security for residential loans. The fraudulent mortgage elimination scheme ultimately victimized both appellant Fremont Investment & Loan ("Fremont") and appellees Household Realty Corporation and HSBC Mortgage Services, Inc. (collectively, "Household").

The sole matter before this Court on this appeal involves a priority dispute between Household and Fremont in connection with deeds of trust in favor of Household and Fremont that were negatively affected by the fraudulent mortgage elimination scheme.

I. FACTS

Lambeth acquired real property located at 3914 Berkshire Drive, Browns Summit, North Carolina 27214 ("Lambeth Property") by Special Warranty Deed dated 23 September 1997, and recorded on 3 October 1997 in the Guilford County Register of Deeds. On or about 18 February 2000, Lambeth executed and delivered to mortgage lender Axiom Financial Services an adjustable rate note for the principal amount of $400,000.00, and a deed of trust, pledging the Lambeth Property to secure Lambeth's obligations under the note. The deed of trust was duly recorded with the Guilford County Register of Deeds on 29 February 2000.

During 2000, Axiom assigned and transferred to Household the note ("Household Note") and the deed of trust ("Household Deed of Trust"). In connection with the transfer and assignment, two assignments of Deed of Trust were recorded with the Guilford County Register of Deeds.

A. FACTS RELATED TO THE FRAUDULENT CANCELLATION

On or about 24 March 2004, Lambeth recorded a quitclaim deed with the Guilford County Register of Deeds. This deed purported to transfer all of Lambeth's rights and interest in the Lambeth Property to defendants Heineman and Johnson, as Trustees of the "Lambeth Family Trust." The transfer was made without notice to or the consent of Household.

On or about 23 April 2004, Heineman and Johnson, as the purported Trustees of the Lambeth Family Trust, mailed Household 38 pages of documents purporting to be part of a "Private International Remedy Demand Number HMS-042304-JEDL" ("Administrative Demand"). The Administrative Demand purported to, among other things, create a self-executing agreement whereby Household automatically appointed Heineman as "attorney-in-fact" for Household, and authorized Heineman and Johnson to prepare and record all necessary documents for "proper reconveyance" of the Lambeth Property if Household, within 10 days, did not rebut "point for point" a so-called "Affidavit of Truth" contained therein. Household did not respond to the Administrative Demand.

On or about 3 August 2004, the Dorean Group fraudulently cancelled the Household Deed of Trust by recording fraudulent documents with the Guilford County Register of Deeds. First, without Household's authorization, the Dorean Group recorded a document captioned "Substitution of Trustee," representing that Heineman was the "attorney-in-fact" for Household Mortgage Services, and further purporting to substitute Lambeth as Trustee under the Household Deed of Trust. Immediately thereafter, the Dorean Group fraudulently recorded a so-called "Full Reconveyance" wherein Heineman, as the purported Trustee for Household under the Household Deed of Trust, represented that (i) all sums secured by the Household Deed of Trust had been paid, and (ii) the Household Deed of Trust and the Household Note had been surrendered to the Trustee for cancellation. Both statements were false. The Full Reconveyance also purported to reconvey the estate to the Lambeth Family Trust. The Substitution of Trustee and the Full Reconveyance are hereinafter referred to as the "Unauthorized Cancellation."

B. FACTS RELATING TO THE FREMONT LOAN

On 22 October 2004, four days prior to the date Household learned of the Unauthorized Cancellation, Lambeth obtained a new loan from Fremont, executing a promissory note in the amount of $367,000.00 payable to Fremont ("Fremont Note") and executing a deed of trust in favor of Fremont ("Fremont Deed of Trust"), pledging the Lambeth Property as security for the Fremont Note.

For reasons which do not appear of record, the Fremont Deed of Trust was not recorded in the records of the Guilford County Register of Deeds until 28 January 2005. Fremont purportedly relied on an examination of the records of the Guilford County Register of Deeds,

up to and including 12 September 2004, to determine that the Lambeth Property was unencumbered at the time Lambeth executed the Fremont Deed of Trust on 22 October 2004. The Unauthorized Cancellation was included in the documents upon which Fremont relied.

C. FACTS RELATING TO THE PRIORITY DISPUTE ON APPEAL

By Order and Judgment entered 28 August 2006, the General Court of Justice, Superior Court Division for Guilford County, held that the Household Deed of Trust was fraudulently cancelled and should be reinstated as a lien on the Lambeth Property.[1] The summary judgment was not appealed. The Judgment and Order did not specify a reinstatement date of the Household Deed of Trust and, therefore, left the priority issue between the Household Deed of Trust and the Fremont Deed of Trust to be determined at a subsequent hearing.

On 28 August 2006, the Honorable Stuart Albright presided over the bench trial between Household and Fremont. On 11 September 2006, Judge Albright entered Judgment in favor of Household, restoring the Household Deed of Trust as a lien upon the Lambeth Property, effective from its original recordation date of 29 February 2000. As between the Household Deed of Trust and the Fremont Deed of Trust, the trial court held the Household Deed of Trust to be a "first-in-time superior lien" against the Lambeth Property. Fremont appeals this Judgment. We affirm.

II. DISCUSSION

[1] Fremont first contends the trial court erred in applying the rule of law discussed in *First Fin. Savings Bank, Inc. v. Sledge*, 106 N.C. App. 87, 415 S.E.2d 206 (1992), in determining that the Household Deed of Trust was entitled to priority over the Fremont Deed of Trust. Fremont argues the trial court should have relied on *Monteith v. Welch*, 244 N.C. 415, 94 S.E.2d 345 (1956), instead, to reach a ruling in favor of Fremont. We disagree for the following reasons:

The Monteiths were the beneficiaries of a properly recorded deed of trust for which Thomas Franks was named as trustee. After several years, the underlying property was sold to the Welches. At the time of the sale, the Monteiths' deed of trust had not been cancelled. The

1. The court also granted summary judgment in favor of Household Realty Corporation and against Lambeth in the sum of $486,177.66, with interest thereon, representing the outstanding principal and interest on the Household Note.

Welches, aware of the outstanding lien, gave Franks money at closing to pay the Monteiths to cancel their deed of trust. Although Franks cancelled the Monteiths' deed of trust eight days later, he never paid the Monteiths. The Monteiths then sued to re-establish their security interest. *Monteith*, 244 N.C. 415, 94 S.E.2d 345.

The North Carolina Supreme Court rejected the Welches' argument that they were entitled to rely on Franks' cancellation of the lien. The Court held that since the Welches had notice of the Monteiths' senior lien, they did not qualify as subsequent innocent purchasers. In the course of its discussion, the Court noted that "[t]he cancellation made by Franks could not, in any event, protect [the Welches] unless it was made before they purchased and in fact purchased relying on its validity." *Id.* at 420, 94 S.E.2d at 349.

Subsequently, in *Smith v. United Carolina Bank*, 1995 U.S. App. LEXIS 696 (4th Cir. Jan. 13, 1995), the Fourth Circuit, in an unpublished opinion referencing the *Monteith* quote above, stated:

> From this passage, we discern the following rule of North Carolina law: a subsequent lien creditor with a properly recorded deed of trust enjoys priority, despite the unauthorized cancellation of a prior deed of trust, if the subsequent creditor obtains its deed of trust after the cancellation has occurred, in reliance on the cancellation's validity, and without knowledge that the cancellation was unauthorized.

Id. at *9. This "passage," however, was plainly *obiter dictum*, and does not constitute the Court's holding in *Monteith*. Furthermore, any purported rule of law that the Fourth Circuit formulated in an unpublished opinion based on that *dictum* is not controlling on this Court.

Here, the trial court correctly determined that the law stated by our Supreme Court in *Union Cent. Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927), and followed in *First Financial*, is the longstanding rule in North Carolina, and thus controls the resolution of this case.

> As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith . . . the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior.

Union Central, 193 N.C. at 462, 137 S.E. at 327 (quotation marks and citations omitted).

In *First Financial*, Mr. and Mrs. Sledge executed a promissory note secured by a deed of trust to Henry A. Boyd, trustee, and First Financial Savings Bank, Inc. The deed of trust was recorded and secured First Financial's lien on real estate lots 28, 29, 31, 34, and 35. Subsequently, Mr. Sledge requested a release deed for lot 31 and agreed to pay First Financial a release fee. After receiving the fee, First Financial gave Mr. Sledge the unrecorded deed releasing lot 31. Without the knowledge or authorization of First Financial, Mr. Sledge altered the release deed to include lots 28, 29, and 34. He then recorded the deed for the release of lots 28, 29, 31, and 34. *First Financial*, 106 N.C. App. 87, 415 S.E.2d 206.

The Sledges later sold lot 34 to the Walkers. The deed for the sale of lot 34 was recorded, and the Walkers subsequently executed a deed of trust on that lot in favor of the State Employees' Credit Union. After discovering the release deed had been materially altered, First Financial brought an action to set aside the release deed as it pertained to lots 28, 29, and 34. The trial court granted summary judgment in favor of First Financial, and this Court affirmed. *Id.* Citing *Union Central*, this Court stated: "The law in this State is clear regarding material alterations of written instruments. The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value." *First Financial*, 106 N.C. App. at 88, 415 S.E.2d at 207.

The law as enunciated in *Union Central*, and followed in *First Financial*, is the rule in North Carolina, and *Monteith* did not overturn it. Accordingly, the trial court correctly applied the law of North Carolina to the facts in this case and correctly determined that the Household Deed of Trust, which had been cancelled of record by the unauthorized act of the Dorean Group, was entitled to priority over the Fremont Deed of Trust, such deed of trust, and the underlying loan, having been made and given by Fremont in reliance upon the presumed validity of the record cancellation of the Household Deed of Trust. Fremont's assignment of error is overruled.

[2] Fremont next contends that Household's failure to respond to the Administrative Demand should preclude Household from having its Deed of Trust reinstated as the superior lien. We disagree.

> The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value. *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927). The owner of a mortgage, however, will lose priority over an innocent purchaser if the mortgagee is negligent with respect to the release of the mortgage. *Id.*

First Financial, 106 N.C. App. at 88, 415 S.E.2d at 207-08.

In its judgment, the trial court made the following finding of fact:

> 9. Household did not reply to the Administrative Demand and filed no document on the public record with respect to the [Lambeth] Property prior to the Unauthorized Cancellation, even though Defendant Lambeth stopped paying on the Note in May 2004; however, the existence of the mortgage elimination scheme was not well known to mortgage companies such as Household and Fremont at the time and the Court does not find that Household's failure to take affirmative action was unreasonable or breached any duty Household owed to Fremont.

The trial court also made the following conclusion of law:

> 7. The Court, having found that Household was not negligent in its handling of the Administrative Demand and the Unauthorized Cancellation, concludes that Household did not breach any duty it owed that caused injury to Fremont.

Fremont contends that the trial court, in reaching the quoted finding and conclusion, improperly applied a tort law negligence standard to determine that Household was not at fault for the Unauthorized Cancellation of its lien. Fremont argues that the rule in *Union Central* instead requires a "balancing of the equities" in determining whether an instrument wrongfully cancelled is entitled to priority over subsequent innocent purchasers once the cancelled instrument is restored as a lien. Fremont further contends that, when balancing the equities between two innocent lienholders, the threshold question is whether the lender whose instrument was wrongfully cancelled was "in any way responsible" for the harm. We conclude that, regardless of the test applied in this case, Household's actions or inactions do not preclude Household from having its Deed of Trust reinstated as the superior lien.

In *First Financial*, the sole issue on appeal was whether First Financial Savings Bank was negligent in giving its mortgagor, Mr. Sledge, possession of an unrecorded release deed. This Court found that First Financial breached no duty in giving Mr. Sledge possession of the deed as "[t]here are neither cases nor statutes which require a mortgagee to record a release deed prior to delivering it to the mortgagor." *First Financial*, 106 N.C. App. at 88, 415 S.E.2d at 208. This Court thus held that "Mr. Sledge's alteration of the deed was an unauthorized act, and [First Financial Savings Bank was] in no way negligent for his act." *Id.* at 88-89, 415 S.E.2d at 208.

Similarly, here, there were neither statutes nor case law that imposed any duty on Household to respond to the Administrative Demand. The Dorean Group's cancellation of the Household Deed of Trust was an unauthorized act, and Household was in no way negligent for the Dorean Group's act. Furthermore, Household was "in no way responsible" for the Unauthorized Cancellation of the Household Deed of Trust, or any injury Fremont sustained as a result of the Dorean Group's fraud. Although Fremont contends that the Administrative Demand provided Household with a "roadmap" of the fraud several months before it occurred, upon reviewing the Administrative Demand, the trial court correctly found that "Household's failure to take affirmative action was not unreasonable[.]" The 38-page Administrative Demand, or so-called "roadmap," was a confusing compilation of, among other things: (i) various cartoons; (ii) various articles; (iii) a power of attorney; (iv) a "Notice of Intent to Correct Title"; (v) a so-called "Affidavit of Truth"; (vi) a letter from a purported certified public accountant; (vii) and various propaganda. To characterize this document as bizarre and absurd would be an understatement. The Administrative Demand was wholly inadequate to raise Household's suspicions of potential impending wrongdoing by the Dorean Group, especially since, as the trial court found, "the existence of the mortgage elimination scheme was not well known to mortgage companies such as Household and Fremont at the time" the Administrative Demand was delivered to Household. As it would not have occurred to anyone of ordinary business judgment and prudence to make any inquiry into the information contained therein, Household's inaction was reasonable. Furthermore, Household did not actually learn of the Unauthorized Cancellation until 26 October 2004, four days after Fremont extended its loan to Lambeth. As such, Household could not have prevented Fremont's harm by taking immediate action once it learned of the Unauthorized Cancellation, as the harm had already been done. Finally, Household

filed a lawsuit within four months of discovering the fraud, a reasonable time considering the substantial investigation required to address the fraudulent mortgage elimination scheme. Moreover, there is no evidence that Fremont suffered any injury based on any action or inaction during the time between Household's discovery of the Unauthorized Cancellation and Household's filing of a lawsuit. Accordingly, the trial court correctly concluded that Household's failure to respond to the Administrative Demand did not preclude Household from having its Deed of Trust reinstated as the superior lien. Fremont's assignment of error is overruled.

For the reasons stated, the trial court's judgment is

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JOSE JESUS GARCIA LOPEZ

No. COA07-422

(Filed 5 February 2008)

1. Evidence— drunken driving accident—defense testimony that defendant driving—irrelevant

In a prosecution arising from an automobile accident and death involving drunken driving, the trial court did not err by excluding as irrelevant testimony from two defense witnesses who had been told by a passenger that defendant was the driver. The testimony does not create even an inference that the passenger was driving the car and is not inconsistent with the guilt of defendant.

2. Sentencing— aggravating factor—use of weapon hazardous to more than one person—automobile

The trial court did not err in a prosecution arising from a death involving drunken driving by submitting the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device normally hazardous

to the lives of more than one person. It is well settled that this aggravating factor is proper within the context of motor vehicle collisions caused by intoxicated drivers.

3. Sentencing— prosecutor's closing argument—not prejudicial

There was no prejudicial error from the prosecutor's closing argument in defendant's sentencing for involuntary manslaughter and other offenses arising from an automobile accident involving driving. The argument involved the sentencing grid and a discussion of the merger doctrine, and its clear import was to ask the jury to find the aggravator so that the court could impose a higher sentence. While the trial court abused its discretion in allowing the argument, there was overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while illegally intoxicated, and there was no reasonable possibility of a different result without the instruction.

Judge ARROWOOD concurs in part, and concurs in the result in part.

Appeal by Defendant from judgments entered 30 May 2006 by Judge Ola M. Lewis in Columbus County Superior Court. Heard in the Court of Appeals 31 October 2007.

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

Nora Henry Hargrove for Defendant.

STEPHENS, Judge.

Defendant appeals from three judgments entered following jury verdicts which found him guilty of four offenses. We find no prejudicial error in Defendant's trial or sentencing.

FACTS

Defendant was indicted on one count each of second-degree murder, N.C. Gen. Stat. § 14-17, felony death by vehicle, N.C. Gen. Stat. § 20-141.4(a1), assault with a deadly weapon inflicting serious injury, N.C. Gen. Stat. § 14-32(b), and felony hit and run, N.C. Gen. Stat. § 20-166(a). Defendant was tried before a jury in May 2006. The trial was conducted in two phases: a guilt-innocence phase and a sentencing phase.

In the guilt-innocence phase, the State's evidence tended to show that at approximately 6:00 p.m. on 19 December 2004, Defendant was driving his car at a speed of approximately 80-100 miles per hour when he crossed a center line and collided with a car being driven by twenty-year-old Natalie Housand. Ms. Housand was killed in the collision, and her boyfriend was injured. At the time of the accident, Defendant had a blood alcohol concentration of 0.18. After the accident, Defendant went into the woods near the scene of the accident but later emerged and was arrested.

Defendant testified that he remembered very little about the accident, that the car which struck Ms. Housand's car belonged to him, and that he remembered being a passenger in the car at the time of the collision. He further testified that he remembered being with his brother, Victor Lopez, on the day of the accident. Defendant sought to introduce the testimony of Ms. Jeannie Bullard, a registered nurse at a Columbus County hospital. On *voir dire*, Ms. Bullard testified that Victor Lopez came to the hospital on 20 December 2004 and stated that he had been in an automobile accident the day before at approximately 5:00 p.m. Victor Lopez told Ms. Bullard that he had spent the night in the woods after the accident and that he "was a front seat passenger" in Defendant's car. Defendant also sought to introduce the testimony of Trooper Anthony Parrish who interviewed Victor Lopez after the accident. On *voir dire*, Trooper Parrish testified that Victor Lopez told him, through an interpreter, he was a passenger in Defendant's vehicle and that Defendant was the vehicle's driver. The trial court did not allow Ms. Bullard or Trooper Parrish to offer such testimony to the jury.

On the charge of second-degree murder, the trial court submitted to the jury a verdict sheet which permitted the jury to find Defendant guilty of second-degree murder, involuntary manslaughter, or misdemeanor death by motor vehicle, or to find Defendant not guilty. The jury found Defendant guilty of involuntary manslaughter and of the other three charges on which he had been indicted.

In the sentencing phase, the State presented no additional evidence but argued to the jury that it should find the aggravating factor that Defendant knowingly created a great risk of death to more than one person by means of a weapon or device—Defendant's car—which would normally be hazardous to the lives of more than one person. In so arguing, the State presented to the jury the sentencing grids for the crimes of which Defendant had been found guilty, outlined the effect of the finding of an aggravating factor, and explained

that through the doctrine of merger, Defendant would not be sentenced for both involuntary manslaughter and felony death by vehicle. The jury found the existence of the aggravating factor. Defendant then presented evidence of mitigating factors. The trial court found two factors in mitigation, but determined that the aggravating factor outweighed the mitigating factors. The trial court imposed aggravated sentences in each judgment, sentencing Defendant to a total of 59 to 81 months in prison.

1. EXCLUSION OF EVIDENCE

[1] Defendant first argues the trial court erred in excluding the testimony of Ms. Bullard and Trooper Parrish. The trial court excluded the testimony on the ground that it was irrelevant.

"All 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 these rules." N.C. Gen. Stat. § 8C-1, Rule 402 (2003). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue." *State v. Smith*, 357 N.C. 604, 613, 588 S.E.2d 453, 460 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004). "In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *Id.* at 613-14, 588 S.E.2d at 460 (quotation marks and citation omitted).

The trial court must determine if the proposed evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). "[A] trial court's rulings on relevancy . . . are not discretionary and therefore are not reviewed under the abuse of discretion standard[.]" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). "Nevertheless, 'such rulings are given great deference on appeal.' " *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005) (quoting *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228).

> "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Un-

der Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant."

State v. Israel, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000) (quoting *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987)).

The excluded evidence does not point directly to the guilt of Victor Lopez, does not tend to implicate Victor Lopez in the commission of the crimes, and is not inconsistent with the guilt of Defendant. Neither Ms. Bullard nor Trooper Parrish testified that Victor Lopez told them he was driving Defendant's car. In fact, Victor Lopez told both Ms. Bullard and Trooper Parrish that he was a passenger in Defendant's car at the time of the accident. Moreover, Victor Lopez told Trooper Parrish that Defendant was driving the car. Such evidence does not even create an inference that Victor Lopez was driving the car. The trial court did not err in excluding this evidence, and Defendant's argument to the contrary is overruled.

2. SUBMISSION OF AGGRAVATING FACTOR

[2] Defendant next argues the trial court erred in submitting the aggravating factor to the jury because "[t]he evidence does not support a finding beyond a reasonable doubt that in its normal use, a motor vehicle is a hazardous device." *See* N.C. Gen. Stat. § 15A-1340.16(d)(8) (2003) (defining the aggravating factor at issue in the case at bar). Defendant made no such argument to the trial court, there arguing only that the trial court could not submit any aggravators to the jury because, given the date of the accident, the United States Supreme Court's decision 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), left North Carolina without a constitutional means of aggravating Defendant's sentence. " '[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.' " *State v. Muhammad*, 186 N.C. App. 355, 358, 651 S.E.2d 569, 572 (2007) (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002)).

Notwithstanding Defendant's equine swap, "[i]t is well-settled that the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers is proper." *State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 866 (citations omitted), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000); *see also State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922

(2000) ("It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.") (citation omitted). In this case, the State presented ample evidence that Defendant was operating his vehicle in a reckless manner by driving at a high rate of speed while legally intoxicated. Moreover, " 'any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path.' " *Fuller*, 138 N.C. App. at 488, 531 S.E.2d at 867 (quoting *State v. McBride*, 118 N.C. App. 316, 319-20, 454 S.E.2d 840, 842 (1995)). The trial court did not err in submitting the aggravating factor to the jury for its consideration.

3. STATE'S CLOSING ARGUMENT DURING SENTENCING PHASE

[3] Finally, Defendant argues the trial court abused its discretion in allowing the State, over Defendant's objection, to argue as follows in its closing argument during the sentencing phase:

> Folks, I'm going to write up some numbers. These numbers are the—basically, the sentencing grid for the offenses that you found the Defendant guilty of.
>
> . . . .
>
> This is the involuntary manslaughter. Presumptive range is 13 to 16 months. Assault with a deadly weapon inflicting serious injury, presumptive range is 20 to 25 months. This is the hit and run. The presumptive range, 5 to 6 months. Now, there was a felony death by motor vehicle, and that merged in because it had a lot of the same elements of this manslaughter conviction, so it merges in here. All right. So, that's kind of already in; that's why I didn't put it up here.
>
> The judge sentences within this presumptive range, and that's what I've highlighted for you, unless the State puts up an aggravating factor. Okay? We have to present to you an aggravating factor, and you have to find it beyond a reasonable doubt. Just like anything else that we present to you, you have to make a determination, we have to prove it to you beyond a reasonable doubt.
>
> If we prove aggravators, which I've submitted one to you, then that gives the option for the judge to return a sentence in this range. Okay? It doesn't mean that's where it comes from, it just gives her that option.

> Now, the State of North Carolina—I'm going to put a couple more numbers up here for you. We have a minimum and then we have a maximum. Okay. In other words, the minimum, say if the minimum was 13 months, there would be a corresponding maximum sentence that goes with that. All right. If we got up to this range, this aggravator, say we're in the aggravated range of 20, there would be a corresponding maximum that goes with that. And this one would be 24. This one would be 47. And this one would be 10. And these are all in months. Okay?

Defendant does not assert that the State misrepresented or inaccurately explained the law. Instead, Defendant maintains that the argument was *irrelevant* to a finding of the aggravating factor, that the presentation of the sentencing grids "alert[ed] the jury that [Defendant] may not get as much of a sentence of imprisonment as the jurors might want him to receive[,]" and that the discussion of merger let the jurors know "they were being 'shortchanged' on one of their verdicts." Defendant asks us to remand his case for a new sentencing hearing.

After the date of the accident and in response to the United States Supreme Court's decision in *Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403, North Carolina's General Assembly amended N.C. Gen. Stat. § 15A-1340.16 effective 30 June 2005 to provide that "[i]f the defendant does not . . . admit [to the existence of an aggravating factor], only a jury may determine if an aggravating factor is present in an offense." 2005 N.C. Sess. Laws 145. Prior to the statutory revision, "special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury." *State v. Blackwell*, 361 N.C. 41, 49, 638 S.E.2d 452, 458 (2006), *cert. denied*, —— U.S. ——, 167 L. Ed. 2d 1114 (2007). A special verdict is one "in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict." *Black's Law Dictionary* 1593 (8th ed. 2004).

As the jury is called upon to return a special verdict in the penalty phase of a capital case, the principles governing the propriety of jury arguments in those cases apply equally to the propriety of the arguments at issue in the case at bar. In such proceedings, "the trial court has broad discretion to control the scope of closing arguments[,]" *State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007) (citing *State v. Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 280, *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 116 (2006)), and the trial court errs only

upon a showing that its ruling could not have been the result of a reasoned decision. *Cummings*, 361 N.C. 438, 648 S.E.2d 788. As a general rule, "counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding." *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 41 (citation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). "While it is generally true that counsel's argument should not be impaired without good reason, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), one 'good reason' to limit argument is its irrelevance." *State v. Price*, 326 N.C. 56, 83, 388 S.E.2d 84, 99, *judgment vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990).

We agree with Defendant that the amount of punishment which the finding of an aggravating factor will empower a judge to impose and the effect of the merger doctrine on a defendant's convictions are irrelevant to the issue of a factor's presence in an offense.[1] *See State v. Rhodes*, 275 N.C. 584, 588, 169 S.E.2d 846, 848 (1969) (holding that in a trial's guilt-innocence phase, "[t]he amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt. It is, therefore, no concern of the jurors'."). "Jurors, as every trial judge knows, are always interested in the consequences of their verdict. As laymen, it is hard for them to understand that they have nothing to do with punishment." *Rhodes*, 275 N.C. at 591, 169 S.E.2d at 851. Although the Court in *Rhodes* was addressing arguments made in a trial's guilt-innocence phase, we believe the Court's observations also apply to the case at bar.

Moreover, although the State never directly asked the jury to find the existence of the aggravator so that the trial court could impose an elevated sentence, we think such is the clear import of the State's argument and that this argument is improper. The jury's conviction of Defendant on the charge of involuntary manslaughter, rather than on

1. The Supreme Court has held that a trial court does not err in allowing the State to accurately present the jury's role in the penalty phase of a capital trial, including informing the jury of the effect of its finding of an aggravating factor. *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996). Moreover, the State is allowed "to present argument for . . . sentence of death." N.C. Gen. Stat. § 15A-2000(a)(4) (2003). The jury's role in a capital case's penalty phase, however, is wholly different from the jury's role in returning a special verdict in the sentencing phase of a non-capital offense. *See* N.C. Gen. Stat. § 15A-2000(b) (2003) (tasking the jury in a capital case's penalty phase with determining whether aggravating factors exist, whether aggravating factors are outweighed by mitigating factors, and whether a defendant should be sentenced to death or life imprisonment).

the charge of second-degree murder on which Defendant was indicted, exposed Defendant to considerably less prison time than he otherwise could have received.[2] Considering that the accident resulted in the death of a twenty-year-old female, the State's argument could have served no other purpose than to inflame and appeal to the jury's passion. There is no rational basis for allowing the State to argue as it did, and the trial court abused its discretion in allowing the State to make this argument to the jury. *See State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) ("[C]ounsel [may not] argue principles of law not relevant to the case.") (citation omitted).

Having concluded that the trial court erred in allowing the State to so argue, we must now determine if Defendant was prejudiced as a result of the argument and whether he is entitled to a new sentencing hearing. The test for whether an error is prejudicial or harmless 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) (2003). Based on the overwhelming evidence that Defendant was operating his vehicle at a dangerously high rate of speed while legally intoxicated, we conclude there is no reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which this appeal arises. Any rational jury would have found the existence of the aggravating factor even in the absence of the State's improper closing argument. Thus, Defendant is not entitled to a new sentencing hearing.

NO ERROR IN TRIAL; NO PREJUDICIAL ERROR IN SENTENCING.

Judge CALABRIA concurs.

Judge ARROWOOD concurs in the portion of the opinion finding no error in trial and concurs in the result with respect to the sentencing phase issues.

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2. The presumptive range of imprisonment upon a conviction for second-degree murder for a defendant with the same prior record level as Defendant in the case at bar is between 125-198 months. N.C. Gen. Stat. § 14-17 (2003); N.C. Gen. Stat. § 15A-1340.17 (2003).

STATE OF NORTH CAROLINA v. ANDRE JONES, SR.

No. COA07-969

(Filed 5 February 2008)

1. Burglary and Unlawful Breaking or Entering— felonious breaking and entering—allegation of residence—building within curtilage—no fatal variance

The trial court did not err by failing to dismiss the charge of felonious breaking and entering under N.C.G.S. § 14-54(a) based on an alleged fatal variance between the indictment and the evidence where the indictment alleged defendant broke and entered into the residence when the facts tended to show that defendant broke and entered into a building outside the residence, because: (1) a variance is not material, and thus not fatal, if it does not involve an essential element of the crime charged; (2) the court has previously expounded the meaning of residence or dwelling house with regard to burglary to include buildings in the curtilage of the dwelling house, and the same logic is pertinent and persuasive for felonious breaking and entering; (3) the transcript revealed the indictment enabled the accused to prepare for trial; and (4) the occupancy of the pertinent building was not an essential element of the offense, and thus the word "residence" in the indictment was mere surplusage.

2. Larceny— felonious larceny—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of felonious larceny even though defendant contends the value of stolen goods was below $1,000 because: (1) contrary to defendant's assertion, the variance, if any, between the indictment and the evidence regarding the felonious breaking and entering of the garage was not material; and (2) N.C.G.S. § 14-72(b) states that the crime of larceny is a felony, without regard to the value of the property in question, if the larceny was committed pursuant to a felonious breaking and entering in violation of N.C.G.S. § 14-54 such as in this case.

3. Evidence— exclusion of testimony—failure to show prejudice

Even assuming error in a felonious breaking and entering and felonious larceny case based on the trial court's exclusion of the

testimony of two witnesses who would allegedly have corroborated defendant's alibi testimony that he was given and loaned the pertinent electric cords by the witnesses, defendant failed to show prejudice as required by N.C.G.S. § 15A-1443(a) when: (1) the evidence supporting defendant's conviction was strong and tended to show that the power cords were specifically identifiable with specific notations of the victim's initials on them; and (2) it cannot be concluded that a different result would have been reached if this testimony had been admitted.

Appeal by Defendant from judgment entered 20 March 2007 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 16 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Parish & Cooke, by James R. Parish for Defendant-Appellant.

ARROWOOD, Judge.

Defendant appeals from judgment entered convicting him of felonious breaking and entering and felonious larceny. We find no error.

The evidence tends to show that Andrew Jones, Sr. (Defendant) lived near Lindsay Hardison (Hardison); their backyards were adjacent. Hardison employed Defendant on several occasions to help him clear his yard and to paint. However, Hardison quickly discharged Defendant for his unreliability.

In January 2006, Hardison left his home to go to work, and at approximately 1:30 P.M., he returned to find his garage door opened. The garage, in which Hardison kept tools, paint and electrical cords, was an independent structure, fifteen feet from Hardison's home, and the garage did not have a lock; rather, the door was a metal "roll-up" door. When Hardison investigated the opened garage door, he discovered that his work bench had been cleared of the power tools and extension cords. Hardison called the police.

Two months later, Hardison saw an extension cord in Defendant's back yard draped over the fence and coiling to a neighbor's residence. Hardison again called the police, and the police obtained and employed a search warrant, finding an orange power cord in Defendant's master bedroom, which Hardison identified as property stolen from his garage. Hardison stated at trial that he "put [his] initials on the

bottom corner of the tags so that [he] . . . [could] be sure [they were] the right ones." Hardison noticed that the cord in his neighbor's yard had a "tag with my initials on it."

At trial, Defendant and Sarah Jones (Jones), Defendant's wife, admitted that their electricity had been turned off because they failed to pay the electric bills, that the extension cords were borrowed, and that Defendant used the extension cords for electricity from their neighbor's home.

On 13 November 2006, Defendant was indicted on the charges of felonious breaking and entering and felonious larceny after breaking and entering. On 13 March 2007, the court entered judgment convicting Defendant of both charges. The convictions were consolidated and Defendant was sentenced to six to eight months in the Department of Correction.

Sufficiency of Indictment

[1] In his first argument, Defendant contends that the trial court erred by failing to dismiss the charge of felonious breaking and entering because there was a fatal variance between the indictment and the evidence. We disagree.

> A bill of indictment must contain the following:
>
> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2005). An indictment " 'is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.' " *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (quoting *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984)). "[T]he primary purpose of the indictment is to enable the accused to prepare for trial." *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866 (2007) (internal quotation marks omitted).

"To support a conviction for felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a), there must exist substantial evi-

dence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 102 (1988) (citing *State v. White*, 84 N.C. App. 299, 352 S.E.2d 261 (1987)). N.C. Gen. Stat. § 14-54 (2005) specifically requires the following:

> (a) 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.
>
> . . . .
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

Occupancy of the "building" is not an element of the offense of felonious breaking and entering. *State v. Young*, 60 N.C. App. 705, 711, 299 S.E.2d 834, 838 (1983).

"In order for a variance [in an indictment] to warrant reversal, the variance must be material." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citing *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968) (stating that "it is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense"). "A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged. *Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457 (citing 41 Am. Jur. 2d *Indictments and Information* § 259).

In the instant case, the indictment for felonious breaking and entering states, in pertinent part, the following: "[t]he defendant . . . did break and enter a building occupied by Lindsay Hardison, used as a residence[.]" Defendant specifically argues that because the indictment alleges that Defendant broke and entered into a "residence," when the facts tend to show that Defendant broke and entered into a "building" outside the residence, there was a fatal variance between the indictment and the evidence. We find this argument unconvincing for the following reasons: (1) the Court has previously expounded the meaning of "residence" or "dwelling house" with regard to burglary to include buildings in the curtilage of the "dwelling house"; (2) the trial

transcript reveals that the indictment enabled the accused to prepare for trial; and (3) the occupancy of the "building" in question was not an essential element of the offense of felonious breaking and entering. For the foregoing reasons, the word "residence" in the indictment here was surplusage, and the variance between the indictment and the evidence, if any, was not material.

First, we examine the related law regarding the crime of burglary, in which the Court has expounded the meaning of "residence" or "dwelling house" to include buildings in the curtilage of the dwelling. "The curtilage is the land around a dwelling house upon which those outbuildings lie that are 'commonly used with the dwelling house.' " *State v. Fields*, 315 N.C. 191, 194, 337 S.E.2d 518, 520 (1985) (citing *State v. Twitty*, 2 N.C. 102 (1794)). Our Supreme Court has held that the definition of a "dwelling house" is not limited to the "house proper":

> The term "dwelling-house" includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, such as kitchen, smokehouse, and the like: provided they are within the curtilage, or are adjacent or very near to the dwelling-house. If the kitchen, smokehouse, or other house of that kind be placed at a great distance from the dwelling, and particularly if it stand outside of the curtilage or inclosed [sic] yard, it cannot be considered a part of the dwelling-house for the purpose of being protected against a burglary. The reason is that the law protects from unauthorized violence the dwelling-house and those which are appurtenant, because it is the place of the owner's repose; and if he choose to put his kitchen or smokehouse so far from his dwelling that his repose is not likely to be disturbed by the breaking into it at night, it is his own folly. In such cases the law will no more protect him than it will when he leaves his doors or windows open.

State v. Green, 305 N.C. 463, 472-73, 290 S.E.2d 625, 630 (1982) (citation omitted). "The question whether a building was part of the dwelling rested upon whether it served the 'comfort and convenience' of the dwelling." *Fields*, 315 N.C. at 194, 337 S.E.2d at 520. "[T]he visual and auditory proximity of outbuildings that serve the comfort and convenience of the homeowner is . . . a useful theoretical measure of whether those buildings lie within or beyond the curtilage." *Id.* at 195, 337 S.E.2d at 521.

Here, although the law pertaining to the definition of "dwelling house" in relation to the crime of burglary is not binding precedent to N.C. Gen. Stat. § 14-54 and the crime of felonious breaking and entering, we find the logic of the Court's interpretation of "dwelling house" pertinent and persuasive. Here, the evidence tended to show that the "building" was a small garage, fifteen feet from the home, serving the comfort and convenience of the homeowner, and within close visual and auditory proximity. The building was within the curtilage of the residence.

Second, the trial transcript reveals that the indictment enabled the accused to prepare for trial. *See State v. Miller*, 271 N.C. 646, 654, 157 S.E.2d 335, 342 (1967) (stating that "no fatal variance existed between the allegation and proof, it being apparent that all the witnesses were referring to the same corporation[,]" even though the name of the corporation in the indictment varied from the actual name of the corporation); *see also State v. Simpson*, 297 N.C. 399, 409, 255 S.E.2d 147, 153 (1979) (stating that "[t]he description of [a] house . . . was adequate to bring the indictment within the language of the statute" and the house was "identified with sufficient particularity to enable the defendant to prepare his defense[,]" even though the indictment contained an error in the street address). In the instant case, when asked "[d]id you ever have occasion while working with . . . Mr. Hardison to go into his garage or storage shed," Defendant stated, "I had no reason to ask him that." When asked, "[was] the garage open or shut while you [painted][,]" Defendant answered, "It was open." When asked whether he had ever been in the garage, Defendant replied, "[I've] never been in that garage, ever. . . . Not a single [time]." The transcript revealed that Defendant and the other witness who testified on Defendant's behalf showed no confusion as to whether the stolen items were stored in the house or the garage. The witnesses referred to the same garage, which housed the tools and cords—not to Hardison's residence—and the Defendant presented an ordered and prepared defense at trial.

Third, the occupancy of the "building" in question was not an essential element of the offense of felonious breaking and entering. *Young*, 60 N.C. App. at 711, 299 S.E.2d at 838. N.C. Gen. Stat. § 14-54(a) only requires that there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein. "[B]uilding" is "construed to include any dwelling, dwelling house, uninhabited house, building under construction, building

within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property[.]" N.C. Gen. Stat. § 14-54(c) (2005). Therefore, the allegation in the indictment here that "[t]he defendant . . . did break and enter a building occupied by Lindsay Hardison, used as a residence . . . with the intent to commit a felony therein[,]" contained surplus language. The indictment would have been sufficient to state that "the defendant did break and enter a building with the intent to commit a felony therein." Because Hardison's occupation of the building was not an essential element of the crime of felonious breaking and entering, and because "[a] variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged[,]" *Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457, we conclude that the variance here, if any, was not material. The language in the indictment in the case *sub judice* regarding the occupancy of the building by Hardison, and the building's use as a residence, was not essential to the crime of felonious breaking and entering.

We accordingly hold that the allegations in the indictment support the elements of the offense of felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54(a). This assignment of error is overruled.

Sufficiency of Evidence

[2] In his second argument, Defendant contends that because the felony breaking and entering charge must be dismissed due to the fatal variance between the indictment and the evidence, the charge of felonious larceny must also be dismissed, because the value of the stolen goods was below $1,000. *See* N.C. Gen. Stat. § 14-72(a) (2005). We disagree. The variance, if any, between the indictment and the evidence regarding the felonious breaking and entering of the garage was not material, and therefore, Defendant's felonious larceny conviction pursuant to N.C. Gen. Stat. § 14-72(b)(2) (2005) was proper.

Pursuant to N.C. Gen. Stat. § 14-72(a), "[l]arceny of goods of the value of more than one thousand dollars ($ 1,000) is a Class H felony[,] . . . [and] where the value of the property or goods is not more than one thousand dollars ($ 1,000), [larceny of property] is a Class 1 misdemeanor." However, N.C. Gen. Stat. § 14-72(b), states that "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted pursuant to a violation of G.S. . . . 14-54[.]" S*ee also State v. Brooks*, 178 N.C. App. 211, 215, 631 S.E.2d 54, 57 (2006).

We conclude that Defendant's felonious larceny conviction pursuant to N.C. Gen. Stat. § 14-72(b)(2) was proper as incident to Defendant's felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54. This assignment of error is overruled.

Exclusion of Evidence

[3] In his third argument, Defendant contends that the trial court erred by excluding the testimony of two witnesses who would have corroborated Defendant's alibi testimony that he was given and loaned the electrical cords. We conclude that the exclusion of the testimony, even if error, was not prejudicial.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). "When relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial." *State v. Weeks*, 322 N.C. 152, 163, 367 S.E.2d 895, 902 (1988). This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed. N.C. Gen. Stat. § 15A-1443(a) (2005).

In the instant case, Defendant specifically argues that the trial court erred by excluding the testimony of James Ragland (Ragland) and Gail Taylor (Taylor), regarding their loan or gift to Defendant of the power cords and equipment. Specifically, Ragland testified on *voir dire* that Defendant borrowed power cords from him, and Taylor testified on *voir dire* that she gave Defendant equipment that she no longer needed, including a "lawn mower" and a "leaf blower."

We decline to address whether the trial court erred in excluding the testimony of Ragland and Taylor because even assuming *arguendo* that it was error for the trial court to exclude this testimony, we hold that Defendant has failed to show prejudice as required by N.C. Gen. Stat. § 15A-1443(a). The evidence supporting Defendant's conviction is strong, and tends to show that the power cords were specifically identifiable, with specific notations of

Hardison's initials on them. We cannot conclude that a different result would have been reached at trial had the trial court admitted the foregoing testimony. Thus, this assignment of error is overruled.

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

No Error.

Judges McCULLOUGH and ELMORE concur.

LAWRENCE E. ROUSH, Plaintiff v. TOLLY A. KENNON, JR., DDS, P.A., a North Carolina Professional Association and TOLLY A. KENNON, JR., DDS, Individually, Defendants

No. COA07-209

(Filed 5 February 2008)

1. Dentists— malpractice—standard of care—specialized defendant—general practice witness

The record contained competent evidence sufficient to qualify a dentist as a standard-of-care witness in a malpractice case against an oral surgeon. Given his training and experience, and the fact that he chose to perform oral surgery in addition to other general dentistry work, the witness was a general dentist who specializes in oral surgery, including the extraction of molars (the subject of this case).

2. Dentists— standard of care—familiarity with Charlotte

A dentist from Atlanta was qualified to offer an opinion on the standard care for Charlotte in a malpractice claim against an oral surgeon. Although the witness indicated in a deposition that he knew nothing about the dental community in Charlotte and believed in a national standard of care, he subsequently reviewed demographic data for Charlotte, the rules of the North Carolina State Board of Dental Examiners, and the deposition of defendant and concluded that the standard of care for Atlanta, where he practiced, was the same as the similar community of Charlotte.

ROUSH v. KENNON

[188 N.C. App. 570 (2008)]

Appeal by plaintiff from judgment entered 28 August 2006 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2007.

Crumley & Associates, P.C., by Thomas H. Ainsworth, III, for plaintiff appellant.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff appeals from an order granting defendants' motion to strike plaintiff's expert witness and to dismiss the action. We reverse the order of the trial court and remand for further proceedings.

FACTS

On 13 November 2001, Lawrence E. Roush ("plaintiff") visited Tolly A. Kennon, Jr., D.D.S., an oral and maxillofacial surgeon employed by Tolly A. Kennon, Jr., D.D.S., P.A., for an oral examination. Following this examination, plaintiff agreed to undergo the surgical extraction of plaintiff's impacted lower molars (teeth numbers 17 and 13) on 11 January 2002, under sedation. On 11 January 2002, Dr. Kennon surgically extracted plaintiff's impacted lower molars without any known complications. On 18 January 2002, 28 January 2002, and 30 January 2002, plaintiff returned to Dr. Kennon complaining of pain on the right side of his mandible and neck. During the 30 January 2002 examination, Dr. Kennon informed plaintiff that his symptoms were suggestive of a temporomadibular joint (TMJ) problem and advised plaintiff to take over-the-counter medications to relieve the pain.

After experiencing continued pain in his jaw, plaintiff again visited Dr. Kennon on 4 March 2002. Dr. Kennon performed a clinical examination of plaintiff's right mandible and took a Panorex image of plaintiff's mouth and jaw area. Following the examination, Dr. Kennon explained to plaintiff that plaintiff's problems with his lower jaw were likely the result of stress, which was causing pain in his TMJ. Dr. Kennon then recommended plaintiff visit his primary care physician, Dr. William Larsen, for a follow-up examination.

Plaintiff visited Dr. Larsen later that morning for an examination. Dr. Larsen noted that plaintiff's gland appeared to be infected and prescribed plaintiff an antibiotic to combat the infection. When plain-

tiff's pain persisted, Dr. Larsen suggested on 12 March 2002, that plaintiff make an appointment with Dr. F. Brian Gibson, an otolaryngologist, for further examination.

On 19 March 2002, plaintiff met with Dr. Gibson. Dr. Gibson diagnosed plaintiff as having a glandular infection and placed plaintiff on different antibiotics. On 2 April 2002, plaintiff again met with Dr. Gibson complaining of jaw pain. Dr. Gibson reviewed x-ray's of plaintiff's jaw, and diagnosed plaintiff as having a fractured jaw. Dr. Gibson then referred plaintiff to Dr. Steven G. Gollehon, a specialist in oral and maxillofacial surgery.

On 16 April 2002, Dr. Gollehon examined plaintiff's jaw and found plaintiff to be suffering from an oblique mandibular angle fracture of the right mandible with approximately eight millimeters to a centimeter of diathesis between the proximal and distal segments. On 24 April 2002, Dr. Gollehon performed a bone graft on plaintiff's jaw. Dr. Gollehon later performed several post-surgical examinations, the last of which occurred on 8 August 2002. At the time of the final visit, Dr. Gollehon found plaintiff's jaw to be healing well, but he was not totally satisfied with the amount of union near the area of the inferior border of the mandible.

On 7 January 2003, plaintiff once again visited Dr. Gollehon complaining of tenderness in his right mandible. After examining plaintiff's jaw, Dr. Gollehon found there to be a lack of union or minimal bony union in the area of the posterior angle. On 21 April 2003, Dr. Gollehon performed a second bone graft on plaintiff's jaw. Following the second graft, plaintiff visited Dr. Gollehon for several post-surgical examinations, the last of which occurred on 13 November 2003. During these visits, plaintiff complained of numbness on the right side of his mouth.

On 10 January 2005, plaintiff filed suit against defendants for professional negligence in Mecklenburg County Superior Court. On 19 June 2006, defendants filed a motion to strike plaintiff's expert witness and a motion to dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, Rule 702 of the Rules of Evidence, and N.C. Gen. Stat. §§ 90-21.11 and 90-21.12. On 31 July 2006, defendants' motions were heard before the Honorable David S. Cayer in Mecklenburg County Superior Court. On 28 August 2006, Judge Cayer entered an order allowing defendants' motion to strike and motion to dismiss. On 30 August 2006, plaintiff filed a notice of appeal.

I.

Plaintiff contends the trial court committed error by striking plaintiff's witness, Dr. Tuzman, and subsequently dismissing plaintiff's claim for medical malpractice pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. We agree.

"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 (citation omitted), *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998); N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (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.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2005).

As stated in Rule 702(b), the appropriate standard of health care is defined in N.C. Gen. Stat. § 90-21.12 (2005), which provides in pertinent part:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care,

> the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Id. "Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671 (2003); *see Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998); *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005). For such testimony to be admitted, the testifying expert must be a practitioner in the particular field of practice of the defendant or equally familiar and competent to testify as to that limited field of practice. *Smith*, 159 N.C. App. at 195, 582 S.E.2d at 672.

It is not required that the witness testifying as to the applicable standard of care has actually practiced in the same community as the defendant. *Id.*; *see Warren v. Canal Industries*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983). However, "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities." *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672.

In the case *sub judice*, defendants argue that the expert witness, Dr. Tuzman, proffered by plaintiff, is not, and could not be expected to be, a suitable expert witness to testify as to the standard for medical care as required by North Carolina Rule of Civil Procedure 9(j) and North Carolina Rule of Evidence 702. Specifically, defendants contend: (1) as a general dentist, Dr. Tuzman was not competent to testify with respect to the standard of care applicable to Dr. Kennon, a specialist; and (2) Dr. Tuzman was not qualified to offer standard of care opinions because he had no familiarity with Charlotte, North Carolina. Upon review of the record, we disagree with defendants' arguments.

[1] With regard to defendants' first contention, we hold that the record contains competent evidence sufficient to qualify Dr. Tuzman as a standard of care witness. The record indicates that Dr. Kennon is a specialist in the field of oral and maxillofacial surgery, while plaintiff's witness, Dr. Tuzman, practices general dentistry. However, to be

certified under Rule 702, it is not necessary that a standard of care witness specialize in the same area of practice as the medical specialist against whom the claim is being brought. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b). Rather, Rule 702(b)(1)(b) of the North Carolina Rules of Evidence provides that a person may give expert testimony with regard to the standard of medical care if that person specializes "in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and [has] prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(b).

In the instant case, both Dr. Tuzman and Dr. Kennon are licensed dentists, both received degrees as Doctors of Dental Surgery, and both are licensed to perform oral surgery. Further, both Dr. Tuzman and Dr. Kennon, in the course of their practice, performed the surgical extraction of molars. Thus, Dr. Tuzman fulfills the "performance of the procedure" and "prior experience" requirements put forward by Rule 702(b)(1)(b). The question before this Court is whether Dr. Tuzman is properly considered a specialist under the rule. We have previously held that "a doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a 'specialist' for purposes of Rule 702." *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). We must also note that "our legislature intended the term 'specialist' to include a broader category of physicians than those who are board certified." *Sweatt v. Wong*, 145 N.C. App. 33, 37, 549 S.E.2d 222, 224 (2001).

Upon review of the record, we conclude that Dr. Tuzman does practice in a similar specialty to Dr. Kennon for the purposes of Rule 702(b)(1)(b). It is undisputed that Dr. Tuzman, at the time plaintiff's claim arose, was practicing dentistry which included oral surgery. A further review of the record also indicates that Dr. Tuzman possessed significant experience in the field of oral surgery. After finishing dental school, Dr. Tuzman participated in an oral surgery program held by the Army Dental Corps. As a participant in this program, Dr. Tuzman worked under Major Ossavado, a maxillofacial surgeon. Subsequent to his tenure in the Army, Dr. Tuzman entered private practice, performing significant work in oral surgery. In addition, testimony provided by Dr. Tuzman indicates that although no special training is required for a dentist to practice oral surgery, it is in the discretion of the dentist as to whether he has sufficient knowledge,

experience, and training to perform such procedures. Thus, there is a clear difference between a general dentist, and one who chooses to also practice oral surgery. Given his training, experience, and the fact that he chose to perform oral surgery in addition to other general dentistry work, we hold that Dr. Tuzman is a general dentist who specializes in the practice of oral surgery, including the extraction of molars. *See Edwards v. Wall*, 142 N.C. App. 111, 118, 542 S.E.2d 258, 264 (2001) (holding that a physician who specialized in pediatric gastroenterology was also properly considered a pediatrician because he served in the dual roles of gastroenterologist and primary pediatrician for a significant number of his patients). Therefore, we hold Dr. Tuzman is a specialist and is qualified to testify as to the appropriate standard of medical care as required under Rule 702 of the North Carolina Rules of Evidence and Rule 9(j) of the North Carolina Rules of Civil Procedure.

[2] With regard to defendants' second contention, we hold that Dr. Tuzman was qualified to offer an opinion as to the proper standard of care for the metropolitan area of Charlotte, North Carolina. Specifically, defendants argue Dr. Tuzman is not qualified as an expert witness, because in a deposition prior to trial, Dr. Tuzman testified that he had never been to Charlotte, knew nothing about the dental community in Charlotte, and believed in the existence of a national standard of care for all dentists. However, the record on appeal indicates that subsequent to his deposition, Dr. Tuzman sought to supplement his understanding of the applicable standard of care in the Charlotte metropolitan area by reviewing, *inter alia*, the demographic data for the Charlotte metropolitan area, the Dental Rules of the North Carolina State Board of Dental Examiners, and the deposition of Dr. Kennon regarding the procedures, techniques, and implements which he used while performing a molar extraction on plaintiff. After reviewing these sources, Dr. Tuzman was able to conclude that the standard of care for Atlanta, Georgia (in which he practiced), was the same standard of care that applied to the similar community of Charlotte, North Carolina. The fact that Dr. Tuzman previously testified that he believed in a national standard of care does not invalidate this conclusion. *See Cox v. Steffes*, 161 N.C. App. 237, 245, 587 S.E.2d 908, 913-14 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004) (rejecting the argument that testimony regarding a nationwide standard is always insufficient under N.C. Gen. Stat. § 90-21.12). Thus, we find that Dr. Tuzman possessed sufficient familiarity with Charlotte and the practice of dentistry therein to testify as to the appropriate standard of care as required by N.C.

Gen. Stat. § 90-21.12. *See Coffman v. Roberson*, 153 N.C. App. 618, 624-25, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003) (holding that a doctor's testimony regarding the standard of care was sufficient when the doctor testified generally that he was familiar with the standard of care in similar communities and that he based his opinion on internet research regarding the hospital, and that he knew the hospital was a sophisticated, training hospital).

For the aforementioned reasons, we hold the trial court erred in striking plaintiff's witness, Dr. Tuzman, and subsequently dismissing plaintiff's claim. We therefore reverse the order of the trial court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges CALABRIA and STEPHENS concur.

DEBORAH J. TRIPP, PLAINTIFF v. THE CITY OF WINSTON-SALEM, DEFENDANT

No. COA07-533

(Filed 5 February 2008)

1. Police Officers— disabled former officer—loss of retirement benefits—substantive due process—not protected property interest

A former city police officer's loss of police officer retirement benefits when she became disabled did not violate her substantive due process rights because her interest in her retirement benefits was not a protected property interest since the city reserved the option to transfer a disabled officer to another position in the police department or elsewhere in the city.

2. Police Officers— disabled former officer—loss of retirement benefits—substantive due process—rational relation to legitimate government interest

A former city police officer's loss of retirement benefits upon disability did not violate the former officer's substantive due process rights based upon her claims that the city's failure to offer her a position outside the police department and the police

chief's unfettered discretion to approve positions to be offered to disabled police officers bore no rational relation to a legitimate government interest where the city provided a mechanism for the officer to pursue employment with the city outside the police department and informed the officer of that right, and the police chief's recommendation of transfer of a disabled officer to other duties was subject to review and recommendation by the retirement commission to the city manager.

3. Civil Procedure— statute of limitations defense—motion for summary judgment

The affirmative defense of the statute of limitations may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer absent prejudice to plaintiff.

4. Police Officers— disabled former officer—loss of retirement benefits—breach of contract—statute of limitations

A provision in a city retirement ordinance that no action shall be commenced against the city or the plan by any retired member or beneficiary with respect to any deficiency in the payment of benefits more than three years after the deficiency did not extend the two-year statute of limitations in N.C.G.S. § 1-53(1) applicable to a disabled former police officer's action against the city for breach of contract arising from the retirement plan.

5. Police Officers— disabled former officer—loss of retirement benefits—good faith and fair dealing

A city's denial of plaintiff disabled former police officer's retirement benefits was not a breach of the implied duty of good faith and fair dealing that constituted a material breach of contract where the retirement code provided that a disabled officer could be transferred to other duties within the police department or another position within the city, the city offered plaintiff both options, and plaintiff did not pursue the option to apply for a position outside the department.

6. Police Officers— disabled former officer—loss of retirement benefits—amendment of retirement code—no impairment of contract

Plaintiff disabled former police officer cannot make a claim for impairment of contract based on a 1990 amendment to the retirement code where plaintiff was a nonvested member of the retirement plan at the time of the amendment.

Appeal by plaintiff from judgment entered 7 December 2006 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 December 2007.

Randolph M. James, PC, by Randolph M. James, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff was a sworn police officer working for the Winston-Salem Police Department ("WSPD") beginning on 6 February 1989. In July 1999, she injured her back while away from work. The injury caused her persistent debilitating pain for months, and plaintiff sought treatment. In August 2001, plaintiff was transferred from her position as detective to a street patrol position, but plaintiff indicated that she was unable to perform the duties of a patrol officer. Thereafter, plaintiff was assigned to light duty tasks within the WSPD. Because plaintiff's condition did not improve, plaintiff underwent surgery in December 2001 and remained out of work until February 2002 while she recuperated. Plaintiff continued on light duty assignments until May 2002, when her doctor informed her that she was physically incapable of performing the duties of a sworn police officer. As a result, plaintiff inquired about alternatives for reassignment.

The portion of the City of Winston-Salem Code of Ordinances governing retirement of City personnel (the "Retirement Code") states, with regard to disabled police officers:

> Any member, who did not have five years of creditable service as of August 20, 1990, and who is no longer able to perform the duties of a sworn police officer as certified by the medical review board may be transferred by the city to other duties within the police department upon recommendation of the police chief and/or human resources director, subject to the review and recommendation of the retirement commission to the city manager. Should a member of the plan desire transfer to a civilian position outside of the police department, the city will assist with the transfer. The following provisions, in order to maintain police officer retirement benefits insofar as possible, will apply to a transfer to another position within the city under this section:
>
> . . . .

> (6) An officer who did not have five years of creditable service as of August 20, 1990, and elects not to accept a transfer to a new position in the police or other city department will not be eligible to continue participation in the city [retirement] plan or to receive [retirement] benefits . . . , or to thereafter elect to accept the transfer.

Winston-Salem, N.C., Code of Ordinances § 50-104(g) (2007). Plaintiff did not have five years of creditable service on 20 August 1990. Therefore, under the ordinance, the City could require her to transfer to another position in the WSPD or to a civilian position with the City outside of the WSPD, and if plaintiff refused such a position, she would be entitled to a refund of her entire contributions to the retirement plan, but she would not be eligible to receive benefits under the plan.

Plaintiff met with an attorney for the WSPD, who explained plaintiff's options with respect to the retirement plan, citing the Retirement Code. Plaintiff was informed of three positions that were available within the WSPD for which plaintiff may have been qualified. When plaintiff inquired about employment positions with the City outside the WSPD, she was informed that she also had the option to apply for such positions, and she was directed to call for more information if she was interested. Plaintiff did not pursue the option of employment outside the WSPD, and on 1 August 2002, plaintiff was offered a position in the WSPD as a Police Records Specialist. Plaintiff accepted the position and shortly thereafter began the new job.

In November 2002, when interacting with her supervisor, plaintiff said "you piss me off" and at a later date "I cannot talk to you. . . . Because I don't want to hurt you." From these incidents, an internal complaint was filed, alleging that plaintiff violated the City's Workplace Violence Policy. Subsequently, plaintiff was suspended pending termination, and after a hearing on the matter, the City Manager upheld her termination.

Plaintiff filed a complaint against defendant (the "City") alleging constitutional violations as well as claims in contract and tort. The City answered the complaint and moved for judgment on the pleadings pursuant to Rule 12(c), moved to dismiss the claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted, and moved for summary judgment pursuant to Rule 56. N.C.

Gen. Stat. § 1A-1, Rules 12(b)(6), 12(c), and 56 (2007). The trial court granted summary judgment in favor of the City. Plaintiff appeals.

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

> A defendant moving for summary judgment bears the burden of showing either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence that supports an essential element of her claim; or, (3) the plaintiff cannot overcome affirmative defenses raised in contravention of her claims. In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor.

Glenn-Robinson v. Acker, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000) (citation omitted). If the City met its burden of proving, as to each of plaintiff's claims, that there was no genuine issue of material fact, then we must affirm the trial court's grant of summary judgment.

[1] Plaintiff first argues that the trial court erred in granting the City's motion for summary judgment as to her claim that the City violated her substantive due process rights. "In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest." *Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002); *see also* U.S. Const. amend. XIV, § 1 (stating that no government shall "deprive any person of life, liberty, or property, without due process of law."). In the present case, plaintiff argues that she had a protected property interest in her retirement benefits, and she concedes that it is not a fundamental right. "[W]here the interest is not fundamental, the government action need only have a rational relation to a legitimate governmental objective to pass constitutional muster." *Toomer*, 155 N.C. App. at 469, 574 S.E.2d at 84. Therefore, in order for plaintiff to make a substantive due process claim, she must allege that she had a pro-

tected property interest and the government's action depriving her of it was without rational relation to a legitimate governmental interest. Plaintiff's claim fails on both accounts.

Plaintiff's argument presumes that her interest in her retirement benefits is a protected property interest, but in order for this to be so, she must have a legitimate claim of entitlement to the property interest. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Thus, to determine whether plaintiff has a claim of entitlement to her benefits, this Court must look to the Winston-Salem Code of Ordinances, which created the property interest. According to the Retirement Code, plaintiff was never entitled to collect retirement benefits upon her disability because, under § 50-104(g), the City reserved the option to transfer a disabled police officer to another position in the WSPD or elsewhere in the City. Therefore, plaintiff's interest in her retirement benefits was not a protected property interest.

[2] Plaintiff also argues that the City's actions bore no rational relation to a legitimate government interest when the City failed to offer her a position outside the WSPD and when the police chief exercised unfettered discretion under the Retirement Code to approve positions to be made available to disabled police officers. These assertions are without merit. The evidence presented shows the City did provide a mechanism for plaintiff to pursue employment with the City outside the WSPD, in accordance with Code of Ordinances § 50-104(g). Furthermore, § 50-104(g) does not grant the police chief unfettered discretion to approve positions for disabled police officers. The Retirement Code specifies that either the police chief or the human resources director may recommend transfer of a disabled police officer to other duties, "subject to the review and recommendation of the retirement commission to the city manager." Winston-Salem, N.C., Code of Ordinances § 50-104(g). Plaintiff has presented no genuine issue of material fact as to any arbitrary governmental action that would substantiate her claim that the City violated her substantive due process rights.

Plaintiff next argues that the trial court erred in granting summary judgment as to her claim for breach of contract. In its motion for summary judgment, the City argued that plaintiff's claims sound-

ing in contract were barred by the statute of limitations appearing in N.C.G.S. § 1-53(1). Section 1-53(1) provides that a statute of limitations is "within two years" for any "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." N.C. Gen. Stat. § 1-53(1) (2007).

[3] Although plaintiff argues that the City waived the defense of the statute of limitations because the City failed to raise the affirmative defense in its answer, "we have held that absent prejudice to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether or not it was pleaded in the answer." *Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993). Plaintiff has not demonstrated any prejudice arising from the City's failure to raise the defense in its answer.

[4] Alternatively, plaintiff argues that the statute of limitations for her claim is not two years, as provided in N.C.G.S. § 1-53(1), but rather is three years, as provided in the Winston-Salem Code of Ordinances. We reject plaintiff's argument. The Retirement Code provides:

> No action shall be commenced against the city, the plan, the commission or any person specified in section 50-34(a) by any retired member or beneficiary, or other person nominated to receive benefits under the plan, respecting any deficiency in the payment of benefits more than three years after such deficiency arose.

Winston-Salem, N.C., Code of Ordinances § 50-105(d) (2007). Plaintiff would have us read this language to extend the statute of limitations to three years for a claim which is otherwise subject to a two-year statute of limitations. However, we read the language in the ordinance as purporting only to further limit a plaintiff's ability to make a claim for which the statute of limitations may be longer than three years.

In the present case, the contract between plaintiff and the City with respect to plaintiff's retirement benefits was formed when plaintiff became vested. *Schimmeck v. City of Winston-Salem*, 130 N.C. App. 471, 473, 502 S.E.2d 909, 911 (1998) ("In the context of retirement benefits, a contractual obligation exists once the employee's rights have vested."). Pursuant to the Retirement Code, plaintiff's right to benefits under the retirement plan vested after five years of service. Winston-Salem, N.C., Code of Ordinances § 50-104(a). Since plaintiff began working as a sworn police officer on 6 February 1989 and worked continuously for five years, her rights to her retirement

benefits became vested on 6 February 1994. The alleged breach of contract occurred between May and August of 2002. Plaintiff filed her complaint on 13 January 2005, more than two years after the alleged breach. Accordingly, plaintiff's claims against the City for breach of contract arising from the retirement plan were properly barred by the statute of limitations described in N.C.G.S. § 1-53(1).

[5] We further comment that, even if the statute of limitations had not barred plaintiff's contractual claims, the trial court properly granted summary judgment. Plaintiff's claim, as stated in her complaint, was that the City's denial of her disability retirement benefits was a material breach of contract. In her brief, plaintiff claims that the City breached the implied duty of good faith and fair dealing by requiring plaintiff to accept another position in order to retain her benefits and by failing to assist with her transfer to another position within the City. Members of the retirement plan have "a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights [become] vested." *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988). Plaintiff alleged no genuine issue of material fact that the WSPD failed to follow the terms of the retirement plan as it existed in the Winston-Salem Code of Ordinances when plaintiff became vested.

[6] Plaintiff ultimately argues, based on this Court's decision in *Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 466 S.E.2d 303, *aff'd per curiam*, 344 N.C. 728, 477 S.E.2d 150 (1996), that the 20 August 1990 amendment to the Winston-Salem Code of Ordinances gives rise to an impairment of contract claim, where plaintiff was a member of the retirement plan when the Retirement Code was amended but whose rights had not vested. This Court addressed this issue in *Schimmeck*, stating where the plaintiff did not have five years of service at the time of the amendment to the Retirement Code, there was no contractual obligation and no impairment of contract. *Schimmeck*, 130 N.C. App. at 475, 502 S.E.2d at 912. Accordingly, plaintiff in this case cannot make a claim for impairment of contract based on the 1990 amendment to the Retirement Code.

Affirmed.

Judges McGEE and STEPHENS concur.

MYERS v. BRYANT

[188 N.C. App. 585 (2008)]

WILSON MYERS, ADMINISTRATOR OF THE ESTATE OF TIMOTHY JAMES TICKLE, AND CYNTHIA MYERS, PLAINTIFFS v. BILLY BRYANT, SHERIFF OF LEE COUNTY, NORTH CAROLINA, AND LEE COUNTY, NORTH CAROLINA; AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, DEFENDANTS[1]

No. COA07-285

(Filed 5 February 2008)

Police Officers— death of prisoner—sheriff's sovereign immunity

The trial court did not err by denying a sheriff's motion for summary judgment based on sovereign immunity in an action which arose from a prisoner's death from cocaine poisoning while in custody. Plaintiffs' negligence claims in excess of the sheriff's bond were not barred by exclusions to the North Carolina Counties and Property Insurance Pool Fund.

Appeal by defendant from order entered 5 December 2006 by Judge Franklin F. Lanier in Superior Court, Lee County. Heard in the Court of Appeals 16 October 2007.

West & Smith, LLP, by Stanley W. West, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan and Bradley O. Wood, for defendant-appellant Bryant.

WYNN, Judge.

The "waiver of a sheriff's official immunity may be shown by the existence of his official bond as well as by his county's purchase of liability insurance."[2] Here, Defendant Billy Bryant argues the trial court erred by denying him summary judgment on Plaintiffs' claims that were in excess of the amount of his official bond, because the county's liability insurance policy excludes coverage for Plaintiffs' claims. We agree with the trial court that Plaintiffs' claims are not excluded from coverage by the insurance policy; accordingly, we affirm the trial court's denial of summary judgment.

On 18 January 2004, Timothy Tickle, age 34, left a halfway house in Dunn, North Carolina. The next day, Mr. Tickle's mother, Cynthia

1. On 5 December 2005, the trial court issued an order allowing plaintiffs to amend their complaint to add Fidelity and Deposit Company of Maryland as a defendant.

2. *Smith v. Phillips*, 117 N.C. App. 378, 384, 451 S.E.2d 309, 314 (1994).

Myers, picked him up from a local service station and took him to the Lee County Jail, which she was obligated to do because his bond required him to be at a treatment facility or in custody.

At the Lee County Jail, Officers Christopher Black and B.J. Gardner responded to a call for assistance with Mr. Tickle. Both officers stated that Mr. Tickle appeared intoxicated. Ms. Myers told Sergeant Benjamin Greene, Jr., who was on duty at the Lee County Jail, that Mr. Tickle may have taken some of her pills and was tired because he had probably not slept since Thursday night, four days before, and had walked approximately twenty-five miles from Dunn to Broadway, North Carolina.

Because Mr. Tickle appeared impaired, Sergeant Greene dispensed with the normal in-processing procedures, including an Inmate Medical Screening Form, on which he wrote "under the influence, unable to do anything." In her deposition, Ms. Myers stated that she had no reason to think her son was in a state of medical emergency when she took him to Lee County Jail.

After being placed in an isolation cell, Mr. Tickle fell asleep. Sergeant Greene testified that because of Mr. Tickle's medical condition, it would have been wrong not to put him on a quarter-hour watch. Accordingly, Sergeant Greene personally made rounds in addition to the normal rounds made twice an hour. During rounds, Sergeant Greene and other officers, including Officer Kevin Richard Zastzabski, observed Mr. Tickle sleeping, snoring loudly, and moving around. Once Sergeant Greene's shift ended between 5:30 and 5:45 a.m., he told the sergeant on the next shift, Sergeant Charles Richardson, that Mr. Tickle had been brought in during the night and was high on something. At his deposition, Sergeant Richardson testified that he was not told that Mr. Tickle was on a fifteen minute watch.

Throughout the morning of 20 January, various officers continued to observe Mr. Tickle snoring loudly and moving around; but, at approximately 2:35 p.m., Officer Kimberly M. Kruger found Mr. Tickle not breathing. An hour later, he was pronounced dead as the result of a cardiac arrest from cocaine poisoning.

In December 2005, Wilson Myers, administrator of the estate of Mr. Tickle, and Ms. Myers ("Plaintiffs") brought an action against Billy Bryant, formerly the elected Sheriff of Lee County ("Defendant"), in his official capacity, asserting claims for wrongful death and

negligent infliction of emotional distress. Though Plaintiffs also brought suit against Lee County, and against Defendant for punitive damages, they voluntarily dismissed those claims in November 2006.

On 27 November 2006, a hearing was held on Defendant's motion for summary judgment and on Plaintiffs' motion to amend their complaint. On 5 December 2006, the trial court issued an Order allowing Plaintiffs to amend their complaint to add Fidelity and Deposit Company of Maryland, the surety on Defendant's official bond, as a defendant. On 11 December 2006, the trial court denied Defendant's motion for summary judgment.

On appeal, Defendant solely contends that the trial court erred by denying his motion for summary judgment. Specifically, Defendant argues that sovereign immunity entitles him to summary judgment as a matter of law to the extent Plaintiffs seek to recover damages in excess of $25,000, the amount of his official bond. Though interlocutory, Defendant's appeal from the denial of summary judgment is properly before this Court because "orders denying dispositive motions grounded on the defense of sovereign immunity are immediately reviewable as affecting a substantial right." *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *reh'g denied*, 343 N.C. 511, 472 S.E.2d 8, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996).

The standard of review from the denial of 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). Though we view the evidence presented by the parties in the light most favorable to the non-movant, where the movant establishes a complete defense to the plaintiff's claim, such as sovereign immunity, summary judgment is appropriate. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986).

The doctrine of sovereign immunity provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity. *Smith v. Phillips*, 117 N.C. App. 378, 381, 451 S.E.2d 309, 312 (1994). Thus, as to county sheriffs, "[i]t is generally established that a sheriff is a public official entitled to sovereign immunity and, unless the immunity is waived pursuant to a statute, is protected from suit against him in his official capacity." *Id.*

Our Legislature has prescribed two ways for a sheriff to be sued in his official capacity, thus waiving sovereign immunity. *Id.* at 383, 451 S.E.2d at 313. First, under section 58-76-5, a plaintiff may sue a sheriff and the surety on his official bond for acts of negligence in the performance of official duties. *Id.*; N.C. Gen. Stat. § 58-76-5 (2005) ("Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . ."). Our General Statutes require all sheriffs to purchase a bond not to exceed $25,000. N.C. Gen. Stat. § 162-8 (2005).

Second, a sheriff may be sued in his official capacity under section 153A-435. *Smith*, 117 N.C. App. at 383, 451 S.E.2d at 312; N.C. Gen. Stat. § 153A-435 (2005). Section 153A-435 permits a county to purchase liability insurance, which includes participating in a local government risk pool, for negligence caused by an act or omission of the county or any of its officers, agents, or employees when performing government functions. *Id. §* 153A-435(a). The "[p]urchase of insurance under this subsection waives the county's sovereign immunity, to the extent of insurance coverage . . . ." *Id.*

Where a sheriff is covered by his county's liability insurance purchased pursuant to section 153A-435(a) and his official bond, the county's liability insurance "serves to complement the purpose of the bond statute, insuring an adequate remedy for wrongs done to the plaintiff if . . . the bond does not provide an adequate remedy." *Smith*, 117 N.C. App. at 383, 451 S.E.2d at 314.

Here, Defendant does not dispute that his immunity is waived for Plaintiffs' claims up to $25,000, the amount of his official bond purchased pursuant to N.C. Gen. Stat. § 162-8. Rather, this appeal addresses whether the Plaintiffs' claims in excess of $25,000 are covered under the North Carolina Counties and Property Insurance Pool Fund ("Fund"), sponsored by the North Carolina Association of County Commissioners. As a participant in the Fund, Lee County's insurance policy provides coverage for law enforcement liability, including sheriffs, in the amount of up to $2,000,000 per occurrence. The Coverage Agreement states that the Fund will pay on behalf of a participant or covered person all sums which they are legally obligated to pay because of an occurrence resulting in personal or bodily injury or property damage. Defendant contends the Fund excludes coverage for Plaintiffs' claims.

Plaintiffs claim, in their complaint, that Defendant was negligent:

(a) In failing to exercise due care for the safety of Tim Tickle under the circumstances;

(b) In violating the standards and duties established by the Sheriff's written rules and procedures, as aforesaid;

(c) In failing to train and supervise employees and agents of the Sheriff's Department in a manner to require adherence to the Sheriff's written rules and procedures;

(d) In violating the provisions of N.C. Gen. Stat. § 153A-224;

(e) In such other ways as may be shown by discovery and trial of this matter.

Defendant contends that Plaintiffs' claims in excess of $25,000 are excluded from coverage under the following insurance policy exclusions applicable to "Law Enforcement Employees":

This coverage does not apply to any claim as follows:

4. any claim for damages arising out of fraudulent, dishonest, or criminal behavior, including the willful violation of a penal statue or ordinance committed by or with the knowledge or consent of the Participant, and claims or injury arising out of the willful, intentional or malicious conduct of any Covered Person;

   . . .

8. any claim for the acts of any Covered Person while engaged in any form of health care or ambulance services, except for first aid as specifically defined and limited herein;

9. any claim based on or arising out of any alleged failure to provide police protection sufficient and/or adequate to prevent the happening of any Occurrence resulting in injury, Property Damage, property loss, or any consequential loss therefrom[.]

In interpreting an insurance policy, "provisions which exclude liability of insurance companies are not favored and therefore all ambiguous provisions will be construed against the insurer and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). If an insurance policy is not ambiguous, we must "enforce the policy as written and [] not remake the policy under the guise of interpreting an ambiguous pro-

vision." *Doe v. Jenkins*, 144 N.C. App. 131, 134, 547 S.E.2d 124, 127 (2001), *review dismissed and denied*, 355 N.C. 284, 560 S.E.2d 798 (2002).

Defendant first argues that Plaintiffs' negligence claims are barred by exclusion number four of Lee County's policy, which bars claims "for damages arising out of . . . criminal behavior." In their complaint, Plaintiffs allege that Defendant was negligent by violating N.C. Gen. Stat. § 153A-224 (2005), a Class 1 misdemeanor. Although Lee County's policy excludes claims arising out of criminal behavior, Plaintiffs allege various other grounds for Defendant's negligence, including the failure to exercise due care and the violation of standards established by the Sheriff's written rules. Because Plaintiffs did not base their negligence claims solely on damages arising out of criminal behavior, we cannot conclude that Plaintiffs' claims are barred by exclusion number four.

Defendant also argues that Plaintiffs' negligence claims are barred by exclusion number eight of Lee County's policy, which bars claims for the acts of a covered person "while engaged in any form of health care . . . except for first aid." In their complaint, Plaintiffs argue that the rules and policies of the Sheriff's Department were violated, because "at no time did the employees of the Sheriff's Department provide or attempt to provide any medical examination" to Mr. Tickle. Essentially, Plaintiffs are arguing that Defendant failed to provide medical care to Mr. Tickle.[3]

The plain language of exclusion number eight bars claims for acts that occur while *engaged in* any form of health care, not claims based on the alleged failure to provide health care. Neither party argues that Defendant was engaged in providing health care to Mr. Tickle. Rather, the dispute is over whether Defendant failed to administer medical care or failed to procure a medical evaluation. Either way, there is no evidence that Defendant was engaged in health care. Accordingly, we cannot conclude that Plaintiffs' claims are barred by that exclusion.

Defendant lastly argues that Plaintiffs' negligence claims are barred by exclusion number nine of Lee County's policy, which bars claims "based on or arising out of any alleged failure to provide police

3. In their brief, Plaintiffs note that they are not arguing that Defendant failed to administer medical care, but rather failed to obtain a medical evaluation of Mr. Tickle. However, Plaintiffs' own expert witness, Dr. Richard Serra, testified that Defendant failed to provide proper medical care to Mr. Tickle. Additionally, he testified that he considered a medical evaluation to be a form of medical care.

protection." In their complaint, Plaintiffs allege that by accepting Mr. Tickle into custody, Defendant created a special relationship and "made a promise of protection," the combination of which represented an exception the public duty doctrine. Defendant construes this language as barring Plaintiffs' claims under exclusion number nine of Lee County's insurance policy.

To determine whether exclusion number nine applies, we must determine whether Plaintiffs' claims are "based on or arising out of" Defendant's failure to provide police protection. In their complaint, Plaintiffs primarily base their negligence claims on Defendant's violation of standards and duties established by the Sheriff Department's written rules and failure to exercise due care under the circumstances. Although Plaintiffs mention a promise of protection, that statement occurs in the context of a discussion about the public duty doctrine, not as a basis for or cause of Plaintiffs' negligence claims. Accordingly, in considering the evidence in the light most favorable to Plaintiffs, we cannot conclude that their claims are barred under exclusion number nine.

In sum, because Defendant has failed to establish sovereign immunity for Plaintiffs' claims exceeding $25,000, we uphold the trial court's denial of summary judgment. *See Overcash*, 83 N.C. App. at 26, 348 S.E.2d at 528.

Affirmed.

Judges STEELMAN and GEER concur.

MICHAEL W. PATRICK, GUARDIAN AD LITEM AND GUARDIAN OF THE ESTATE OF J.D., MINOR CHILD, PLAINTIFF v. WAKE COUNTY DEPARTMENT OF HUMAN SERVICES, A NORTH CAROLINA AGENCY; MARIA SPAULDING, IN HER OFFICIAL CAPACITY AS DIRECTOR OF WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; JOHN WEBSTER, IN HIS CAPACITY AS CHILD PROTECTIVE SERVICES SUPERVISOR FOR WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; V. ANDERSON KING, IN HER CAPACITY AS CHILD PROTECTIVE SERVICES SUPERVISOR FOR WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; DEFENDANTS

No. COA07-824

(Filed 5 February 2008)

Immunity— sovereign—insurance policy exclusions—negligence and emotional distress

Summary judgment was properly granted for defendant county department of human services based on sovereign immunity in a negligence and emotional distress action arising from defendant's alleged failure to investigate reports of sexual abuse of a child. Defendants' insurance policy excluded claims for negligence and negligent infliction of emotional distress and so did not waive immunity.

Appeal by plaintiff from order entered 23 March 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 January 2008.

Holtkamp Law Firm, by Lynne M. Holtkamp, plaintiff-appellant.

Wake County Attorney's Office, by Scott W. Warren and Corinne G. Russell, for defendants-appellees.

TYSON, Judge.

J.D., through her Guardian *ad litem* Michael Patrick ("plaintiff"), appeals the trial court's order granting Wake County Department of Human Services, Maria Spaulding, John Webster, and V. Anderson King's (collectively "defendants") motion for summary judgment and denying plaintiff's motion to compel discovery. We affirm.

I. Background

On 23 August 2001, a physician reported a case of suspected child abuse to defendants regarding J.D., a twelve year old girl, by James McDaniel Webb ("Webb"). The physician stated to defendants that

Webb had contacted his office to inquire about a possible castration because he was having inappropriate sexual thoughts about J.D. The physician gave defendants J.D.'s name and Webb's name, address, and telephone number.

On 24 August 2001, defendants opened an investigation regarding the 23 August report. On 26 August 2001, a caseworker conducted a home visit and interviewed Webb and J.D. During the home visit, Webb stated to the caseworker that he was single and in the process of adopting J.D.

On 28 August 2001, a second physician contacted defendants concerning J.D. Plaintiff alleged the second physician told defendants that Webb became upset when the physician conducted a full physical examination of J.D. and Webb stated to the physician that J.D. had a history of reporting sexual abuse. Defendants denied they were given Webb's name in the second report. In January 2002, the investigation was closed as unsubstantiated. From November 2001 to January 2003, Webb repeatedly sexually assaulted J.D. In January 2003, Webb was arrested and charged with numerous counts of sexual assault.

On 25 August 2006, plaintiff filed a complaint against defendants alleging negligence, institutional negligence, and negligent infliction of emotional distress. Plaintiff alleged defendants had failed to properly and thoroughly investigate two separate and independent reports of suspected child abuse of J.D. by Webb.

On 17 October 2006, defendants filed their answer and asserted as their fifth defense: "[a]ll claims of Plaintiff against all Defendants are barred by sovereign immunity as there has been no waiver of immunity by the purchase of insurance." Defendants also filed and served a motion asserting entitlement to summary judgment on the basis of sovereign immunity. Additionally, defendants filed and served a motion for protective order and objection to discovery until final disposition of their motion for summary judgment. Subsequently, plaintiff filed a motion to compel discovery responses and gave notice of deposition.

On 23 March 2007, the trial court entered an order: (1) granting defendants' motion for summary judgment; (2) granting defendants' motion for protective order; and (3) denying plaintiff's motion to compel. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) granting defendants' motion for summary judgment on the ground of sovereign immunity and (2) denying plaintiff's motion to compel discovery and to continue the summary judgment hearing.

III. Motion to Dismiss

Defendants moved to dismiss plaintiff's appeal for failure to comply with the provisions of Rules 28 and 41 of the North Carolina Rules of Appellate Procedure. Plaintiff subsequently obtained leave to file and filed an amended brief which corrected the prior rule violations. In our discretion, we decline to dismiss plaintiff's appeal and review the merits of the case.

IV. Summary Judgment and Motion to Compel

Plaintiff argues the trial court erred by granting defendants' motion for summary judgment. We disagree.

A. Standards of Review

1. Summary Judgment

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

> We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

Wilkins v. Safran, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

2. Motion to Compel

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

B. Sovereign Immunity

Plaintiff argues defendants' purchase of liability coverage partially waived its sovereign immunity and the trial court erred by granting defendants' motion for summary judgment based on this defense. We disagree.

"Sovereign immunity bars claims brought against the state or its counties, where the entity sued is being sued for the performance of a governmental, rather than a proprietary, function." *Doe v. Jenkins*, 144 N.C. App. 131, 134, 547 S.E.2d 124, 126 (2001) (internal citation and quotation omitted), *disc. rev. denied*, 355 N.C. 284, 560 S.E.2d 799 (2002). This Court has established that "[i]nvestigations by a social service agency of allegations of child sexual abuse are in the nature of governmental functions . . . . Thus a county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

Sovereign immunity may be waived by the purchase of liability insurance. *See* N.C. Gen. Stat. § 153A-435 (2005) ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omis-

sion occurring in the exercise of a governmental function."). A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy. *See Norton v. SMC Bldg. Inc.*, 156 N.C. App. 564, 577 S.E.2d 310 (2003) (holding the purchase of liability insurance does not waive sovereign immunity because the exclusion in the policy excludes coverage for plaintiff's claim); *Doe*, 144 N.C. App. at 135, 547 S.E.2d at 127 ("[B]ecause the insurance policy does not indemnify defendant against the negligent acts alleged in plaintiff's complaint, defendant has not waived its sovereign immunity . . . ."). Further, "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

Here, defendants acknowledge the purchase of liability insurance, but argue the policy excludes any coverage for plaintiff's claim of negligence and negligent infliction of emotional distress. Defendants' liability insurance policy includes a provision titled "Governmental Immunity Endorsement." This provision states:

> This policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, *this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable* or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

(Emphasis supplied).

C. Construing Insurance Policies

Plaintiff argues the language of the endorsement does not expressly and unambiguously exclude or limit coverage. We disagree.

"Our courts have long followed the traditional rules of contract construction when interpreting insurance policies." *Dawes v. Nash County*, 357 N.C. 442, 448, 584 S.E.2d 760, 764 (2003) (citation omitted). "If the language in an exclusionary clause contained in a policy is ambiguous, the clause is 'to be strictly construed in favor of coverage.' " *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (quoting *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C.

App. 199, 201-02, 415 S.E.2d 764, 765, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992)). "If the meaning of the policy is clear and 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." *Dawes*, 357 N.C. at 449, 584 S.E.2d at 764 (citation and quotation omitted).

Here, defendants' insurance policy unambiguously states, "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable . . . ." A county is immune from liability for injuries caused by negligent social services employees working in the course of their duties absent a waiver of that immunity. *Hare*, 99 N.C. App. at 699, 394 S.E.2d at 235. Furthermore, "an action against government personnel in their official capacities is one against the State for the purpose of applying the doctrine of sovereign immunity." *Id.* at 701, 394 S.E.2d at 237 (citation omitted). Defendants' insurance policy excludes coverage for plaintiff's action for negligence and negligent infliction of emotional distress. Defendants did not waive sovereign immunity through the purchase of this policy and properly asserted this affirmative defense in their answer. The defense of sovereign immunity clearly applies to bar plaintiff's claims. The trial court properly granted defendants' motion for summary judgment. This assignment of error is overruled.

D. Motion to Compel Discovery

Plaintiff argues the trial court erred by denying its motion to compel discovery and to continue the summary judgment hearing. We disagree.

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). However, "[a] trial court is not barred in every case from granting summary judgment before discovery is completed." *N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995), *aff'd*, 343 N.C. 117, 468 S.E.2d 58 (1996).

Because we affirm the trial court's order granting defendant's motion for summary judgment based on sovereign immunity, it is

unnecessary to address plaintiff's assertion that the trial court erred by denying plaintiff's motion to compel discovery.

V. Conclusion

Defendants did not waive the asserted affirmative defense of sovereign immunity. Plaintiff's claims of negligence and negligent infliction of emotional distress brought against defendants are excluded from coverage under their insurance policy. The trial court properly granted defendants' motion for summary judgment.

In light of our decision, it is unnecessary to examine plaintiff's remaining assignment of error regarding the trial court's denial of its motion to compel discovery. The trial court's order is affirmed.

Although this Court holds that plaintiff is legally barred from asserting this action against defendants based on sovereign immunity, we express grave concern over defendants' alleged lack of investigation into and monitoring of independent reports by two medical doctors occurring within days of each other alleging sexual abuse against a child. Allowing a minor child to remain in the unsubstantiated custody of a single adult, who had no known relationship to the child and who was an alleged convicted felon, in light of such reports is an egregious failure to act in the best interest of the child.

Affirmed.

Judges JACKSON and ARROWOOD concur.

STATE OF NORTH CAROLINA v. FANNTON DUMU CUMMINGS

No. COA07-374

(Filed 5 February 2008)

Search and Seizure— Miranda warnings not applicable—consent—admitting fruits of search harmless error

The trial court did not err in a second-degree murder, first-degree burglary, and attempted robbery with a firearm case by denying defendant's motion to suppress evidence found by officers during the initial search of his vehicle at the Marine Corps Air Station even though defendant consented to the search after

he invoked his right to consult with an attorney because: (1) Miranda warnings are not applicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent; (2) there was competent evidence to support the trial court's findings that defendant's consent to search his vehicle was consensual and not coerced; and (3) even if a constitutional error had occurred in the search of defendant's vehicle, the error in admitting the fruits of the search was harmless beyond a reasonable doubt when there was no reasonable possibility that the evidence complained of might have contributed to the conviction, and there was overwhelming evidence of defendant's guilt, including testimony by two of defendant's accomplices.

Appeal by defendant from judgment entered 28 April 2006 by Judge Lindsay R. Davis in Superior Court, Guilford County. Heard in the Court of Appeals 13 November 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis, for the State.

M. Alexander Charns for defendant-appellant.

WYNN, Judge.

Miranda warnings "are inapplicable to searches and seizures."[1] Here, the defendant argues that a search of his vehicle was unconstitutional because he consented to the search after he invoked his right to consult with an attorney. Because *Miranda* warnings are not required for a search to be valid and any error in admitting the fruits of the search was harmless, we affirm.

At trial, the State presented evidence that tended to show that on 15 December 2003, Defendant Fannton D. Cummings, Robert Blair, Darius Rutledge, and Adrian Watkins participated in the robbery of a residence located on Martin Street in Greensboro, North Carolina. The robbery resulted in the fatal shooting of Anthony Graham.

At trial, Mr. Blair, a co-defendant, testified that after 4:00 p.m. on 15 December 2003, he, Mr. Rutledge, Mr. Watkins, and Defendant drove to the home of Tarcia Mack, the mother of Defendant's child. The four met with Ms. Mack to discuss the idea of robbing her aunt's house on Martin Street because it was a known drug house, contain-

1. *State v. Frank*, 284 N.C. 137, 142, 200 S.E.2d 169, 173 (1973).

ing cocaine and at least $25,000 in cash. They planned to go to the house on Martin Street after dark, when no one would be there, with Defendant carrying the gun. They also rented a U-Haul for the purpose of transporting stolen property.

At approximately 7:30 or 8:00 p.m., the foursome arrived at Martin Street, went around to the back of the house, and kicked the door open. Defendant carried a shotgun and Mr. Watkins carried a .40 caliber handgun. Mr. Blair testified that once in the home, he heard a shot come from the occupants of the home and heard Defendant and Mr. Watkins respond by shooting through the bedroom door of the room where the drugs were supposed to be located. Mr. Rutledge testified that he saw Defendant fire several shots from a sawed-off shotgun and saw Mr. Watkins fire from a handgun. Mr. Rutledge stated that he then jumped out of a window and heard several more shots. Mr. Blair testified that after hearing the last shot, he went into the bedroom and saw Mr. Graham lying on the floor with the door on top of him. The four men then left the house and drove away in the U-Haul.

Later that evening, Defendant called Deborah Johnson to ask for a ride because he had lost his keys. Defendant directed Ms. Johnson to McKnight Mill Boulevard, but she was unable to turn onto the street because police were blocking it off due to the recent robbery and shooting on nearby Martin Street. Ms. Johnson pulled over and Defendant got out, leaving his hooded jacket and gloves in her car. Shortly thereafter, Ms. Johnson and Defendant were questioned by police officers, including Detective Michael Conwell. Detective Conwell took custody of the clothing left by Defendant in Ms. Johnson's car and took Defendant downtown for questioning.

At the police department, Detective Conwell interviewed Defendant for approximately six hours and was suspicious about Defendant's explanation for being near Martin Street. Since Defendant told Detective Conwell that he was in the Marine Corps, Detective Conwell contacted Special Agent Eric Chapman of the Naval Criminal Investigative Service (NCIS) and asked him to secure Defendant's vehicle.

At the request of Detective Conwell, Agent Chapman interviewed Defendant on 19 December 2003 at the Marine Corps Air Station in New River. Defendant was not under arrest and his handcuffs were removed in the interview room. Agents advised Defendant of his rights, read him a military "acknowledgment and waiver of rights"

form, and gave him the chance to read the form himself. Defendant acknowledged that he understood his rights and requested permission to go to the bathroom, where officers overheard him pushing buttons on a cell phone. Defendant then requested a cigarette break and a glass of water.

Upon his return to the interview room, Defendant signed and initialed the waiver form. When asked what happened on 15 December 2003, Defendant stated that he was looking for his keys, then he paused and said "or something like that," and paused again. Defendant then requested legal counsel. Defendant was not asked any further questions about the shooting, but was asked if he would sign a "permissive authorization for search and seizure" form, and the form was explained to him. After Defendant attempted twice to call an attorney, he signed the form.

A search was conducted of Defendant's Ford Explorer, while Defendant was present. The search revealed a .12-gauge shotgun shell with red plastic casing, a box labeled "Remington Slugger," and two rolls of black electric tape. Agent Chapman called Detective Conwell and informed him of the items found, some of which Detective Conwell had specifically mentioned. A more thorough search was planned for the following day and Brigadier General Dickerson authorized the command search.

Based on the evidence found in the search and on additional evidence, Detective Conwell obtained an arrest warrant to charge Defendant with first-degree murder and first-degree burglary.

On 4 February 2005, defense counsel made a motion to suppress "all evidence secured as a result of the initial search of [Defendant's] vehicle on or about December 19, 2003, and all evidence secured through a subsequent command authorization." The trial court denied Defendant's motion on 1 May 2005.

Defendant's trial took place during the 3 April 2006 session of court. The jury found Defendant guilty of second-degree murder, first-degree burglary, and attempted robbery with a firearm. Defendant was sentenced as a Prior Record Level III and received consecutive sentences of 220 to 273 months for second-degree murder, 96 to 125 months for first-degree burglary, and 96 to 125 months for attempted robbery with a firearm.

The sole issue raised by Defendant on appeal is that the trial court erred by denying his motion to suppress the evidence found by

officers during the initial search of his vehicle at the Marine Corps Air Station. Specifically, Defendant argues that the search was unconstitutional because he consented to the search after he invoked his right to consult with an attorney. We disagree.

In reviewing an appeal of a denial of a motion to suppress:

> [O]ur review is limited to whether the trial court's findings of fact are supported by competent evidence. If competent evidence is found to exist, the findings of fact are binding on appeal. We must then limit our review to whether the findings of fact support the trial court's conclusions of law.

State v. Houston, 169 N.C. App. 367, 370-71, 610 S.E.2d 777, 780, *appeal dismissed*, 359 N.C. 639, 617 S.E.2d 281 (2005).

Defendant first challenges the search of his vehicle as a violation of his Fifth Amendment right against self-incrimination. Our Supreme Court has noted that *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), together with *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), "establish that custodial interrogation must cease when an accused requests an attorney and may not be resumed by police officers without an attorney present." *State v. Daughtry*, 340 N.C. 488, 506, 459 S.E.2d 747, 755 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *State v. Young*, 65 N.C. App. 346, 348, 309 S.E.2d 268, 269 (1983).

However, our Supreme Court has also held that *Miranda* warnings "are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent." *State v. Frank*, 284 N.C. 137, 142, 200 S.E.2d 169, 173 (1973). Additionally, we find it persuasive that numerous federal courts have concluded that asking for consent to search is not an interrogation within the meaning of *Miranda*. *See United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996) (holding that "the consent to search was not a custodial interrogation triggering the previously invoked *Miranda* right to counsel"); *United States v. McCurdy*, 40 F.3d 1111, 1118 (10th Cir. 1994) ("An officer's request to search a defendant's automobile does not constitute interrogation invoking a defendant's Miranda rights.").

Here, at Detective Conwell's request, Defendant was brought to NCIS headquarters for an interview. Agents advised Defendant of his

rights, read him a military "acknowledgment and waiver of rights" form, and gave him the chance to read the form himself. Defendant acknowledged that he understood his rights, and signed and initialed the waiver form; but shortly after questioning began, he requested legal counsel. Defendant was not asked any further questions about the shooting, but was asked if he would sign a "permissive authorization for search and seizure" form, and the form was explained to him. After Defendant attempted twice to call an attorney, he signed the form, giving his consent for his vehicle to be searched.

After Defendant invoked his right to counsel, interrogation ceased. Agents did not ask any further questions about the robbery or Mr. Graham's homicide. The agents asked only whether Defendant would give his consent for his vehicle to be searched, a question to which *Miranda* warnings do not apply. *See Frank*, 284 N.C. at 142, 200 S.E.2d at 173. Because there is competent evidence to support the trial court's finding of fact, we cannot conclude that the trial court erred in finding that Defendant's "consent to search his vehicle was consensual."

Defendant also challenges the search of his vehicle as a violation the Fourth Amendment. Our Supreme Court has stated:

> It is beyond dispute that a search pursuant to the rightful owner's consent is constitutionally permissible without a search warrant as long as the consent is given freely and voluntarily, without coercion, duress or fraud. The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.

State v. Powell, 297 N.C. 419, 425-26, 255 S.E.2d 154, 158 (1979) (citations omitted). Where a defendant is in custody, "the added factor of custody is a circumstance to be taken into account with all other surrounding circumstances in determining whether consent was freely and voluntarily given in the absence of coercion." *State v. Long*, 293 N.C. 286, 294, 237 S.E.2d 728, 733 (1977). We have previously held that where a defendant had requested to speak to a lawyer, his subsequent consent to the rolling of his trousers with a lint brush was voluntary and the trial court did not err in denying his motion to suppress. *State v. Davy*, 100 N.C. App. 551, 557, 397 S.E.2d 634, 637, *cert. denied*, 327 N.C. 638, 398 S.E.2d 871 (1990).

Here, uncontested findings of fact numbers sixteen and seventeen state that "defendant agreed, and was transported to NCIS head-

quarters," where "Agent Chapman advised [him] of his constitutional rights to remain silent and consult with counsel." Finding of fact nineteen states that "defendant said that he wanted to talk with his lawyer, and attempted to contact an attorney by telephone." Defendant presented no evidence of duress and coercion. To the contrary, the State's evidence tends to show that Agent Chapman allowed Defendant to use the bathroom, have a drink of water, and use his cell phone. Additionally, Defendant was not handcuffed during questioning.

In considering the totality of the circumstances, we cannot say that the trial court erred in concluding that "[t]he initial search of defendant's vehicle was pursuant to the defendant's consent, which was not coerced." Because we conclude that Defendant's Fourth and Fifth Amendment rights were not violated, we affirm the trial court's denial of Defendant's motion to suppress.

We note that even if a constitutional error had occurred in the search of Defendant's vehicle, the error in admitting the fruits of the search was harmless beyond a reasonable doubt. "Error committed at trial infringing upon one's constitutional rights is presumed to be prejudicial and entitles [defendant] to a new trial unless the error was harmless beyond a reasonable doubt." *State v. Russell*, 92 N.C. App. 639, 644, 376 S.E.2d 458, 461 (1989). "[T]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Soyars*, 332 N.C. 47, 58, 418 S.E.2d 480, 487 (1992).

Here, in addition to the shotgun shells and black electric tape found in Defendant's vehicle, the State presented detailed testimony from two of Defendant's accomplices, testimony from numerous police officers regarding Defendant's presence near Martin Street after the shooting, test results showing gunshot residue on Defendant's gloves, and test results matching the shotgun recovered to shotgun shells found at the crime scene. Accordingly, we conclude that any error resulting from admission of the evidence was harmless beyond a reasonable doubt.

No error.

Judges STEELMAN and GEER concur.

REECE v. SMITH

[188 N.C. App. 605 (2008)]

ELIZABETH ANN REECE, Plaintiff v. GLENN SMITH, Administrator of the Estate of ROBERT NEIL SMITH, Defendant

No. COA07-368

(Filed 5 February 2008)

Statutes of Limitation and Repose— relation back—amended complaint filed after statute of limitations expired

The trial court did not err in a negligence case arising out of a motor vehicle accident by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12 based on plaintiff's failure to file the amended complaint within the three-year statute of limitations under N.C.G.S. § 1-52(16), because: (1) the estate administrator was not served until after the statute of limitations had expired, and there was no indication of any subterfuge or delay by him which prevented plaintiff from amending the complaint prior to the expiration of the statute of limitations; and (2) the key to relation back to the date of the original filing of a complaint is notice to defendant, and the proper individual was not put on notice of the lawsuit when no one was served within the statute of limitations.

Appeal by plaintiff from order entered 27 February 2007 by Judge Mark E. Powell in Superior Court, Buncombe County. Heard in the Court of Appeals 18 October 2007.

Kelly & Rowe, P.A. by James Gary Rowe for Plaintiff-Appellant.

Cogburn & Brazil, P.A. by Jennifer N. Foster for Defendant-Appellee.

STROUD, Judge.

The trial court granted defendant's motion to dismiss because plaintiff's amended complaint was not filed within the statute of limitations. Plaintiff appeals. The dispositive question before this Court is whether plaintiff's amended complaint should relate back to the date of her initial complaint. For the following reasons, we affirm.

I. Background

On or about 2 April 2003, plaintiff was driving a 1995 Ford motor vehicle east on RP 1338 in Buncombe County, North Carolina. At the same time, defendant Robert Neil Smith ("Robert") was driv-

ing a 1990 Mazda motor vehicle in a northwestern direction on RP 1357 in Buncombe County, North Carolina. Plaintiff alleged Robert negligently attempted to make a left turn onto RP 1338 and the vehicles collided.

On 31 March 2006, plaintiff filed a complaint against Robert alleging Robert's negligence was the proximate cause of her personal injuries and requesting damages in excess of $10,000.00. Robert could not be served because he had died on 30 March 2005. Glenn Smith, Robert's administrator ("Glenn"), claimed that an estate file on behalf of Robert had been opened, appropriate notice had been sent to creditors, and the estate had closed in November of 2005. On 11 April 2006, plaintiff filed an amended complaint against "Glenn Smith, Administrator of the Estate of Robert Neil Smith" with the same claims of personal injury due to Robert's negligence. On 13 April 2006, the summons and amended complaint was served on Rosalee Smith at Glenn's residence.

In his 4 May 2006 answer, Glenn moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12 because the action was not brought against the estate of Robert within the three-year statute of limitations. A hearing on the motion was held in Superior Court, Buncombe County, and on 27 February 2007 the trial court granted the motion to dismiss because

> Plaintiff's action was not commenced against the Estate of Robert Neil Smith prior to the expiration of the Statute of Limitations and, further, that Glenn Smith, the Administrator of the Estate of Robert Neil Smith, was not served with the Summons and Complaint prior to the expiration of the Statute of Limitations[.]

Plaintiff appeals.

II. Statute of Limitations

Plaintiff assigns error to the trial court's dismissal of her complaint. It is uncontested that plaintiff's cause of action has a three-year statute of limitations. *See* N.C. Gen. Stat. § 1-52(16) (2005). "A cause of action based on negligence accrues when the wrong giving rise to the right to bring suit is committed[.]" *Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002). The "wrong giving rise to the right to bring suit [was] committed" on 2 April 2003. *See id.* Plaintiff filed her initial complaint on 31 March 2006, within the three-year statute of limitations. Plaintiff's amended complaint was not

filed until 11 April 2006, after the statute of limitations had run. Plaintiff argues that because the initial complaint against Robert was filed within the three-year statute of limitations period, the amended complaint should relate back to the initial filing date pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(c).

We review a trial court's decision to dismiss an action based on the statute of limitations *de novo*. *Udzinski v. Lovin*, 159 N.C. App. 272, 273, 583 S.E.2d 648, 649 (2003), *aff'd*, 358 N.C. 534, 597 S.E.2d 703 (2004). "Ordinarily, a dismissal predicated upon the statute of limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law." *See id.* "The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Crawford v. Boyette*, 121 N.C. App. 67, 70, 464 S.E.2d 301, 303 (1995), *cert. denied*, 342 N.C. 894, 467 S.E.2d 902 (1996).

North Carolina General Statute Section 1A-1, Rule 15(c) provides:

> Relation back of amendments—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2005).

Plaintiff argues this case is controlled by *Pierce v. Johnson*, 154 N.C. App. 34, 571 S.E.2d 661 (2002). In *Pierce*, the plaintiff was injured in a motor vehicle accident allegedly caused by the negligence of John Daniel Johnson ("John"). *Id.* at 35, 571 S.E.2d at 662. John died, and approximately a year after his death plaintiff attempted to serve him within the statute of limitations at his last known address. *Id.* at 35-36, 571 S.E.2d at 662. Roby Daniel Johnson ("Roby"), the executor of John's estate, accepted service by signing "Daniel Johnson". *Id.* at 36, 571 S.E.2d at 662. Counsel for the estate then engaged in discovery and settlement negotiations with plaintiff's counsel. *Id.* at 36, 571 S.E.2d at 663. Plaintiff alleged, only after the statute of limitations had expired, at the hearing on the motion to dismiss, that defense counsel revealed the fact that the named defendant, John, was deceased. *Id.* at 36-37, 571 S.E.2d at 663. Plaintiff made a motion to amend the original complaint to substitute the estate as

the defendant, which the trial court denied. *Id.* at 37, 571 S.E.2d at 663. Plaintiff appealed. *Id.* at 37, 571 S.E.2d at 663.

This Court reversed and remanded the case determining that "[plaintiff's] failure to plead the estate of John Daniel Johnson was a misnomer, and therefore, the trial court made an error in law by not permitting an amendment under Rule 15(c)." *Id.* at 37-45, 571 S.E.2d at 664-68. "A misnomer is a mistake in name; giving an incorrect name to the person in accusation, indictment, pleading, deed, or other instrument." *Id.* at 39, 571 S.E.2d at 665 (citation and internal quotations omitted). The Court relied on *Liss v. Seamark Foods*, which stated that "correction of a misnomer in a pleading is allowed even after the expiration of the statute of limitations provided certain elements are met." 147 N.C. App. 281, 286, 555 S.E.2d 365, 368-69 (2001). *Liss* also provided that

> [a]n amendment to correct a misnomer in the description of a party defendant may be granted after the expiration of the Statute of Limitations if (1) there is evidence that the intended defendant has in fact been properly served, and (2) the intended defendant would not be prejudiced by the amendment.

Id. at 286, 555 S.E.2d at 369 (citation and internal quotations omitted).

The Court in *Pierce* distinguishes its case from the case of *Crossman v. Moore*, a case we deem to be more factually on point with the case at bar. *Pierce*, 154 N.C. App. 34, 571 S.E.2d 661; *Crossman*, 341 N.C. 185, 459 S.E.2d 715 (1995). In *Crossman*, plaintiff brought a cause of action for personal injury arising out of a motor vehicle accident against Van Dolan Moore (hereinafter referred to as "Moore I") and Dolan Moore Company, Inc. within the three-year statute of limitations. 341 N.C. at 186, 459 S.E.2d at 716.

Moore I moved for summary judgment because his son, Van Dolan Moore, II ("Moore II") was the driver involved in the accident. *Id.* Plaintiff moved the court to allow her to amend her complaint to make Moore II a defendant and to have her amended complaint relate back to the filing of her original complaint. *Id.* The trial court granted Moore I's summary judgment motion, allowed plaintiff to amend her complaint, but denied plaintiff's motion for her amended complaint to relate back to the date of filing the original complaint. *Id.*

Plaintiff appealed the denial of her motion. *Id.* at 186, 459 S.E.2d at 716-17. This Court affirmed the trial court's decision. *Id.* at 186, 459

S.E.2d at 717. The North Carolina Supreme Court also affirmed determining that

> the resolution of this case may be had by discerning the plain meaning of the language of [North Carolina General Statute Section 15(c)]. . . . When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that [North Carolina General Statute Section 15(c)] does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Id. at 187, 459 S.E.2d at 717.

Plaintiff in this case argues her error in naming Robert, the decedent, as defendant instead of his estate was a mere misnomer, as in *Pierce*. *See Pierce* at 37, 571 S.E.2d at 664. However, the distinguishing fact between *Pierce* and this case is that here no one was actually served with the summons and complaint before the statute of limitations expired. *Id.* at 36, 571 S.E.2d at 662. In *Pierce*, unlike the present case, the proper legal representative of the estate was actually served within the statute of limitations. *Id.* We also note that in *Pierce*, the decedent's personal representative signed for service of the summons and complaint about five months before expiration of the statute of limitations with what appeared to be the name of the decedent and waited until after the statute of limitations had run to reveal to the plaintiff that the named defendant was deceased. *See id.* at 36-37, 571 S.E.2d at 662. In the case at bar, Glenn, the estate administrator, was not served until after the statute of limitations had expired, and there is no indication of any subterfuge or delay by him which prevented plaintiff from amending the complaint prior to the expiration of the statute of limitations.

Key to the holding in *Crossman* for relation back to occur is notice to the defendant. *See Crossman* at 187, 459 S.E.2d at 717; *see also Liss* at 285-86, 555 S.E.2d at 368. Here, no one was served within the statute of limitations so it is evident that the proper individual was not put on notice of the lawsuit, as was the case in *Pierce*. *See Pierce* at 36, 571 S.E.2d at 662. Without notice to the proper party, plaintiff's amended complaint does not relate back to the date of the

original filing of the complaint. *See Crossman* at 187, 459 S.E.2d at 717. Accordingly, this assignment of error is overruled.

III. Conclusion

The trial court properly granted Glenn's motion to dismiss as the rule of relation back does not apply and the amended complaint was not filed until after the statute of limitations had expired. Therefore, we affirm.

AFFIRMED.

Judges TYSON and JACKSON concur.

KAI-LING FU, EMPLOYEE, PLAINTIFF v. UNC CHAPEL HILL, EMPLOYER, SELF INSURED (KEY RISK MANAGEMENT SERVICES THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA07-654

(Filed 5 February 2008)

Workers' Compensation— occupational disease—increased risk—significant causal factor

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff university lab researcher sustained a compensable occupational disease based on its determination that plaintiff's employment placed her at an increased risk for developing her symptoms and that a viral vaccine taken for her employment significantly contributed to her symptoms, because: (1) a doctor's testimony provided competent evidence to support the Commission's finding that plaintiff was placed at an increased risk over persons in the general population for her symptoms by virtue of her employment; and (2) although two doctors testified that they did not believe plaintiff's symptoms were related to the vaccine, the Commission, in its discretion, gave greater weight to the testimony of three other doctors who took the causation element out of the realm of conjecture and remote possibility.

Appeal by defendant-employer from Opinion and Award entered by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 December 2007.

Patterson Harkavy LLP, by Leto Copeley and Jessica E. Leaven, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for defendant-employer.

WYNN, Judge.

Appellate courts reviewing Industrial Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.[1] Here, the defendant argues the evidence does not support the findings that the plaintiff's employment placed her at an increased risk for developing her symptoms and that the vaccine taken for her employment significantly contributed to her symptoms. Because the record shows that the Commission's findings are supported by competent evidence, we affirm.

Defendant, the University of North Carolina Chapel Hill (UNC) invited Dr. Kai-Ling Fu to come to the United States from China to continue her research on the pathology of HIV infection in the Department of Microbiology and Immunology at UNC. As a condition of her employment in the lab, Dr. Fu was required to be vaccinated against the Venezuelan Equine Encephalitis (VEE)—the virus used to investigate the HIV virus. After undergoing numerous health tests, including VEE and HIV tests, Dr. Fu was cleared to receive a VEE vaccination.

On 16 December 2003, the United States Army Medical Research Institute of Infectious Disease ("Army Medical Institute") in Fort Detrick, Maryland vaccinated Dr. Fu using the live VEE virus. For six days following the first vaccination, Dr. Fu experienced side effects of fever, headache, nausea, muscle aches, and weakness. Dr. Ellen Boudreau, chief of the Army Medical Institute Special Immunizations Program, testified that approximately two-thirds of patients exposed to the live virus experience similar side effects. To satisfy the requirements of her employment, Dr. Fu was required to undergo a second inoculation, or booster shot, because an evaluation after the first vaccination showed that her level of antibodies was too low.

On 9 March 2004, Dr. Fu received a booster shot which consisted of killed or inactivated VEE virus. The following day, Dr. Fu began to

1. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)).

experience side effects, including weakness, nausea, fever, headache, and shortness of breath. Dr. Boudreau testified that approximately 15-17% of patients who receive the killed or inactive vaccine experience side effects similar to Dr. Fu's, but usually the side effects are not as pronounced or prolonged, and breathlessness is very unusual.

When Dr. Fu's side effects failed to subside, she visited a number of different doctors and received various types of medical treatment. On 23 March 2004, Dr. Michael Harrigan diagnosed Dr. Fu with a viral upper respiratory tract infection. Dr. Fu was also examined by Dr. Robert Gwyther on three different occasions, and in June 20004, he proscribed an inhaled bronchodilator to treat her shortness of breath. On 16 June 2004, Dr. Brian Boehlecke examined Dr. Fu and suggested counseling because he thought that she experienced hyperventilation and anxiety as part of a psychological reaction to her fear that the vaccine caused her physical harm. Additionally, Dr. Remy Coeytaux and Dr. Wunian Chen treated Dr. Fu with acupuncture through 20 September 2004, and Dr. Coeytaux recommended that Dr. Fu stop working for a short period due to her fatigue.

After a period of rest and acupuncture treatment, Dr. Fu's health returned to normal and she was ready to go back to work in December 2004. However, her former position was not available because Dr. Fu was not allowed to return to work in the VEE lab. On 1 April 2005, Dr. Fu accepted a position as a Research Technician III in the Lineberger Comprehensive Cancer Center.

On 31 March 2004, Dr. Fu filed a report of an injury or occupational disease, claiming that an injury occurred on 10 March 2004.[2] After UNC filed a denial of her claims, Dr. Fu filed a request for a hearing, seeking compensation for time out of work and payment of medical expenses that occurred as a result of her required inoculation. The hearing took place before Deputy Commissioner J. Brad Donovan on 15 June 2005, and on 13 April 2006, he issued an Opinion and Award denying Dr. Fu's claim for benefits based on contracting an occupational disease. Dr. Fu appealed to the Full Commission and on 1 May 2006, the Full Commission issued an Opinion and Award reversing the decision of Deputy Commissioner Donovan. The Full Commission concluded that Dr. Fu suffered a compensable occupational disease on 9 March 2004 and was entitled to temporary total disability benefits at the rate of $623.48 for the period of 11 March 2004 to 31 March 2005.

2. We note that the record shows that Dr. Fu's injury actually occurred on 9 March 2004.

In reviewing the Commission's decision, we are constrained by the well-established limitations that "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)). Guided by those restrictions, we now consider UNC's argument that the Full Commission erred by concluding that Dr. Fu sustained a compensable occupational disease under our Worker's Compensation Act.

Section 97-53 of the Worker's Compensation Act lists specific medical conditions that are automatically deemed to be occupational diseases. N.C. Gen. Stat. § 97-53 (2005). If a disease is not specifically listed in section 97-53, it may still qualify under section 97-53(13), which defines occupational disease as "any disease, other than hearing loss . . ., which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." *Id.* § 97-53(13).

Our Supreme Court has outlined a test to determine whether a disease is occupational under section 97-53(13):

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the claimant's employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quotation omitted). "In a worker's compensation claim, the employee has the burden of proving that his claim is compensable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quotation omitted).

UNC first argues the Commission erred by finding that Dr. Fu's employment placed her at a higher risk than the general public of developing her symptoms. We disagree.

Under the *Rutledge* test, "the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365.

In this case, Dr. Boudreau testified that the Army Medical Institute Special Immunizations Program clinic received a risk assessment from Dr. Fu's supervisor requesting that she be immunized against VEE "so that she would be able to work with the VEE replicon in her work at the University of North Carolina, Chapel Hill." Dr. Boudreau also stated that the VEE vaccine was approved by the FDA for research only, and 15 to 17 percent of the people who receive the booster shot of the killed VEE virus experience systemic side effects. Finally, when asked whether persons who take the VEE vaccine because of their employment are at an increased risk for having systemic side effects as opposed to the general public, Dr. Boudreau stated, "[t]hat's true like with any vaccine . . . ." Dr. Boudreau's testimony provides competent evidence to support the Commission's finding that Dr. Fu was placed at an increased risk over persons in the general population for her symptoms by virtue of her employment. Accordingly, we find no error.

UNC next argues that there is no competent evidence in the record to support the Commission's finding that Dr. Fu's ongoing symptoms were causally related to her employment. We disagree.

The third element of the *Rutledge* test is satisfied where the occupational exposure "significantly contributed to, or was a significant causal factor in, the disease's development." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70. The standard required to establish a causal connection between a plaintiff's injuries and her employment is "a reasonable degree of medical certainty." *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 759, 594 S.E.2d 446, 450 (2004). Our Supreme Court has held that where "expert opinion testimony is based merely upon speculation and conjecture, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753. The evidence "must be such as to take the case out of the realm of conjecture and remote possibility." *Id.*

Here, UNC argues that Dr. Fu did not present any objective evidence that the immune response she experienced was related to her 9 March 2004 booster shot, as Dr. Fu's blood work and pulmonary function test results were normal and there was no evidence of

contamination in the vaccine. UNC also argues that Dr. Chen and Dr. Coeytax could not say to a reasonable degree of medical certainty that Dr. Fu's symptoms were related to the booster shot.

The record shows that deposition testimony was given by five physicians in this case. When asked whether they had an opinion to a reasonable degree of medical certainty as to whether Dr. Fu's symptoms were related to the VEE vaccine, the doctors testified as follows. Dr. Boudreau stated, "It is totally out of the ordinary . . . so it is hard to me to attribute it to the vaccine." Dr. Boehlecke testified that he agreed with Dr. Boudreau's assessment that Dr. Fu's symptoms were not related to the VEE virus. Dr. Chen stated, "I don't think I can give you the medical answer . . . for the Western medical diagnosis. I only have—give an Eastern acupuncture diagnosis. . . . From that point, I say sure. Yes." Dr. Coeytaux answered, "I don't like using the term 'certain,' so I can't say certain, but . . . I would say that that is probably what happened. . . . I think it is more likely than not. I think it is probable that that is the case." Finally, when asked whether Dr. Fu's anxiety was a personal sensitivity, Dr. Gwyther responded, "I think she had some symptoms that were [] attributable to the virus, and she got worried about them."

Although Dr. Boudreau and Dr. Boehlecke did not believe Dr. Fu's symptoms were related to the vaccine, the Commission, in its discretion, gave greater weight to the testimony of Dr. Gwyther, Dr. Coeytaux, and Dr. Chen. Because the testimony of Dr. Gwyther, Dr. Coeytaux, and Dr. Chen took the causation element out of "the realm of conjecture and remote possibility," *Holley*, 357 N.C. at 232, 581 S.E.2d at 753, there is competent evidence supporting a causal connection between Dr. Fu's symptoms and her 9 March 2004 booster shot. Accordingly, the record contains competent evidence to support the Commission's findings of fact and in turn, the findings of fact support the conclusions of law.

Affirmed.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. KEVIN RAY PARKER

No. COA07-71

(Filed 5 February 2008)

Evidence— exclusionary rule—officer's eyewitness account of events after unlawful entry—not barred

The trial court did not err by denying defendant's motion to suppress evidence of an assault on an officer with a firearm inside a house. The officers' entry was with the permission of the spouse who was outside the house but against the express wishes of the spouse inside the house with the firearm. Even if the entry was unlawful, the exclusionary rule does not bar an officer's eyewitness account of events after the entry.

Appeal by Defendant from judgment entered 27 July 2006 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 10 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Richard G. Roose for Defendant.

McGEE, Judge.

Kevin Ray Parker (Defendant) was convicted on 26 July 2006 of assault with a firearm on a law enforcement officer. The trial court sentenced Defendant to a term of twenty-nine months to forty-four months in prison. Defendant appeals.

The evidence presented at trial tended to show the following: The Matthews Police Department received a telephone call on 31 October 2004 from Deana Parker (Ms. Parker). Ms. Parker told the dispatcher that she had been injured in an altercation with Defendant, her husband. Ms. Parker also told the dispatcher that Defendant had assaulted her on previous occasions, and that Defendant was armed. Ms. Parker left the marital residence (the house) and traveled to a friend's home, where she met police and paramedics. While paramedics tended to Ms. Parker's injuries, Ms. Parker told police that she feared for her own safety and for her children's safety. Ms. Parker also told police that Defendant had made comments about harming himself, and that Defendant had firearms inside the house. Ms. Parker

gave police permission to enter the house, and also gave police a key and a garage door opener to allow them to enter the house.

A short time thereafter, police arrived at the house. Sergeant Amy Clark (Sergeant Clark) knocked on the front door and announced: "Mint Hill Police." Receiving no answer, Sergeant Clark used her cellular telephone to try to contact Defendant inside the house. Police heard Defendant's telephone ring inside the house. Defendant testified that he spoke with Sergeant Clark over the telephone, and that during the conversation, Sergeant Clark asked Defendant for consent to enter the house. Defendant testified that he expressly refused such consent.

Sergeant Clark and other officers then entered the house using the key and garage door opener Ms. Parker had given to them. Once inside the house, the officers began to search for Defendant while continuing to announce their presence. The door to the master bedroom was closed and locked, and Sergeant Clark called for anyone in the bedroom to come out. No one came out of the bedroom, and Sergeant Clark attempted to kick in the bedroom door. Immediately after she kicked the door, two gunshots were fired through the door from inside the bedroom. Sergeant Clark again attempted to kick down the bedroom door, and three more shots were fired through the door. Police were eventually able to open the bedroom door by throwing a vacuum cleaner at the door. When the door opened, officers saw Defendant hiding behind a bed, pointing a rifle towards the bedroom door. After a lengthy standoff during which Defendant continued to threaten police, the officers were able to detain Defendant and take him into custody.

Defendant was indicted by a grand jury on 15 November 2004 for Assault with a Firearm on a Law Enforcement Officer. Defendant filed a motion to suppress all evidence, including police testimony and firearms, which could be traced to the police officers' entry into the house. Defendant claimed that the entry was illegal under the Fourth and Fourteenth Amendments to the United States Constitution, as well as the North Carolina Constitution. The trial court denied Defendant's motion on 24 July 2006, and the case proceeded to trial. A jury found Defendant guilty of Assault with a Firearm on a Law Enforcement Officer on 26 July 2006. Defendant argues on appeal that the trial court erred by denying his motion to suppress. We disagree.

Defendant contends that this case is squarely controlled by the United States Supreme Court's holding in *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed. 2d 208 (2006). In *Randolph*, police officers asked a married couple for permission to search their marital residence. One spouse refused permission, while the other spouse consented to the search. *Id.* at 107, 164 L. Ed. 2d at 217. Police searched the house, and the nonconsenting spouse was later charged with possession of cocaine based on evidence the police obtained during their search. *Id.* at 107, 164 L. Ed. 2d at 217-18. At trial, the nonconsenting spouse moved to suppress the evidence as a "product[] of a warrantless search of his house unauthorized by his wife's consent over his express refusal." *Id.* at 107, 164 L. Ed. 2d at 218. The trial court denied the defendant's motion to suppress, holding that the consenting spouse "had common authority to consent to the search." *Id.* at 108, 164 L. Ed. 2d at 218. The Supreme Court disagreed, holding that "one occupant may [not] give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search." *Id.*

Defendant argues that under *Randolph*, police had no authority to enter his house without a warrant because Ms. Parker's consent to entry could not prevail over Defendant's refusal of consent. Defendant further argues that no exigent circumstances existed that would otherwise justify the officers' warrantless entry into the house. We do not address the merits of Defendant's Fourth Amendment arguments because we find that even if the police officers' entry was unlawful, the exclusionary rule would not operate to exclude evidence of Defendant's assault on the law enforcement officers.

The North Carolina Supreme Court has previously held that the exclusionary rule does not operate to exclude evidence of crimes committed against police officers whose entry into a house otherwise violates the Fourth Amendment. In *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973), police entered a building to execute a search warrant. During the search, the defendant shot at the police officers, killing one officer and injuring another. *Id.* at 635-37, 194 S.E.2d at 354-55. The defendant was charged with first-degree murder. At trial, the defendant moved to suppress all evidence about the shooting that police obtained once inside the building, arguing that the officers' search warrant was invalid, and thus "all evidence obtained by such an illegal search [was] inadmissible by Fourth Amendment standards." *Id.* at 639, 194 S.E.2d at 357. The trial court denied the defendant's motion, and he was ultimately convicted of second-degree murder. *Id.* at 638, 194 S.E.2d at 356.

Our Supreme Court found that the search warrant was defective, and thus the officers' entry was unlawful. *Id.* at 639, 194 S.E.2d at 356-57. Nonetheless, the Court affirmed the defendant's conviction, holding that the statutory version of the exclusionary rule in effect at the time "was not designed to exclude evidence of crimes directed against the person of trespassing officers." *Id.* at 641, 194 S.E.2d at 358. *See* N.C. Gen. Stat. § 15-27(a) (Cum. Supp. 1971), *repealed by* 1973 N.C. Sess. Laws ch. 1286, § 26 ("No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial."). According to our Supreme Court:

> Application of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved—a result manifestly unacceptable and not intended by the Legislature. Although wrongfully on the premises, officers do not thereby become unprotected legal targets. Even trespassers may not be shot with impunity. . . .
>
> . . .
>
> Therefore, the gun and all other evidence seized, if relevant and material to the *murder charge*, was admissible; and it was competent for all eyewitnesses, both for the State and the defendant, whether lawfully or unlawfully present, to testify regarding every relevant fact and circumstance seen or heard bearing upon the shooting[.]

Id. at 641-42, 194 S.E.2d at 358 (emphasis in original).

While our Supreme Court in *Miller* based its holding upon a statutory version of the exclusionary rule, the Court has more recently made clear that the same principles apply to the exclusionary rule generally. In *State v. Guevara*, 349 N.C. 243, 506 S.E.2d 711 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999), law enforcement officers entered the defendant's mobile home, believing that the defendant was wanted on an outstanding arrest warrant. The defendant shot at the officers, killing one officer and injuring another. *Id.* at 248-49, 506 S.E.2d at 715-16. The defendant was charged with first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. *Id.* at 247, 506 S.E.2d at 715. At trial, the defendant moved to suppress one officer's eyewitness account of the shooting, claiming that the officers' entry was unlawful, and thus the testimony should be excluded as the fruit of an illegal entry. *Id.* at 249, 506 S.E.2d at 716. The trial court denied the defendant's motion, and the defendant was convicted of both charges against him.

On appeal, our Supreme Court affirmed the defendant's convictions. The Court first noted that it was unnecessary to consider whether the police officers' entry into the defendant's mobile home was unlawful because, under *Miller*, the exclusionary rule would " 'not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry.' " *Id.* at 249-50, 506 S.E.2d at 716 (quoting *Miller*, 282 N.C. at 641, 194 S.E.2d at 358). Therefore, regardless of whether the police officers' entry into the defendant's mobile home ran afoul of Fourth Amendment limitations, an officer's "eyewitness account of the events which transpired subsequent thereto [was] not barred by application of the exclusionary rule." *Id.* at 250, 506 S.E.2d at 716.

In the current case, it is likewise unnecessary for us to consider whether the officers' presence in the house was unlawful. Even if the officers' entry was unlawful, both *Miller* and *Guevara* make clear that the exclusionary rule did not bar the introduction of evidence of the subsequent assault at Defendant's trial on the assault charge. We recognize that the defendants in both *Miller* and *Guevara* faced murder charges, while Defendant here was charged with an assault crime. However, our Supreme Court clearly contemplated that the same exclusionary rule principle would apply in cases where a defendant assaulted, rather than killed, a police officer during an unlawful entry. *See Guevara*, 349 N.C. at 250, 506 S.E.2d at 716 (stating that the exclusionary rule does not bar evidence of "*crimes directed against the person* of trespassing officers" (emphasis added)); *Miller*, 282 N.C. at 641, 194 S.E.2d at 358 (noting that application of the exclusionary rule in such circumstances "would in effect give the victims of illegal searches a license to *assault* and murder the officers involved" (emphasis added)). Therefore, we hold that the trial court did not err in denying Defendant's motion to suppress all evidence of the assault that could be traced to the police officers' entry into the house.

No error.

Judges TYSON and ELMORE concur.

WEBB v. WEBB

[188 N.C. App. 621 (2008)]

ROBERT G. WEBB, PLAINTIFF v. RAINE TYNDALL WEBB, DEFENDANT

No. COA07-818

(Filed 5 February 2008)

Divorce— equitable distribution—denial of motion to compel filing of affidavit

The trial court did not abuse its discretion by dismissing defendant wife's motion to compel plaintiff husband to file an equitable distribution (ED) affidavit, because: (1) N.C.G.S. § 50-21(a) provides three methods for a party to assert a claim for ED including as a separate civil action, as a cross-action to another action brought under Chapter 50 of the General Statutes, or as a motion in the cause as provided by N.C.G.S. § 50-11(e) or (f); (2) defendant's alleged oral motion made during the 22 September 2003 divorce hearing did not constitute the filing of a motion in the cause as permitted by either N.C.G.S. § 50-11(e) or (f), and defendant failed to specifically assert any claim for ED by any method permitted by N.C.G.S. § 50-21(a); (3) no ED claim existed after plaintiff dismissed his claim on 6 June 2005, and defendant failed to file a claim for ED within six months thereafter; and (4) plaintiff failed to show the trial court's denial of her motion to compel was manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision.

Appeal by defendant from order entered 13 March 2007, *nunc pro tunc* 27 November 2006 by Judge William C. Farris in Edgecombe County District Court. Heard in the Court of Appeals 10 January 2008.

Janice A. Walston, for plaintiff-appellee.

W. Michael Spivey, for defendant-appellant.

TYSON, Judge.

Raine Tyndall Webb ("defendant") appeals from judgment entered that dismissed her motion to compel Robert G. Webb ("plaintiff") to file an equitable distribution affidavit. We affirm.

I. Background

Plaintiff and defendant were married on 7 June 1980 and separated on or about 1 February 2001. On 26 June 2001, plaintiff filed

a complaint in which he sought: (1) divorce from bed and board from defendant; (2) joint care and custody of the parties' children; (3) possession of a portion of the personal property and apportionment of the marital debts pending equitable distribution of the marital property; (4) that defendant be taxed with costs; and (5) such other relief as the trial court deemed just and proper. Defendant did not answer plaintiff's complaint. By order filed 3 July 2002, that cause became inactive.

On 18 June 2003, plaintiff filed a new complaint in which he again sought an absolute divorce from defendant. Defendant answered 16 July 2003 and stated, "[d]efendant shall not grant an absolute divorce to . . . [p]laintiff." Defendant's answer made no reference to equitable distribution. On 22 September 2003, the trial court granted plaintiff an absolute divorce from defendant and reserved "any claims pending in this cause or in [the inactive cause] for equitable distribution or other relief . . . ."

On 9 March 2005, plaintiff filed a motion to have the original cause "restored to active status to file a proper dismissal of his claim for equitable distribution, as said claim is the only property [sic] pending claim for equitable distribution." The original cause was restored to active status on 23 May 2005. Defendant did not answer plaintiff's complaint after the cause was restored to active status.

Plaintiff voluntarily dismissed with prejudice his equitable distribution issue in the original cause on 6 June 2005. On 13 October 2006, defendant moved for an order to compel plaintiff to file his equitable distribution affidavit. On 13 March 2007, the trial court denied defendant's motion on the ground that plaintiff's claim for equitable distribution was the only equitable distribution claim pending when the judgment of absolute divorce was entered and that plaintiff's voluntary dismissal terminated that claim on 6 June 2005. Defendant appeals.

II. Issue

Defendant argues the trial court erred when it denied her motion to compel plaintiff to file an equitable distribution affidavit.

III. Motion to Compel

Defendant asserts the trial court erred when it ruled no equitable distribution claim was pending in this action and denied her motion to compel plaintiff to file an equitable distribution affidavit. We disagree.

A. Standard of Review

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

B. Analysis

1. Waiver

> At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (2005).

> Our Supreme Court has held:
>
> Equitable distribution is a property right. Therefore, a married person is entitled to maintain an action for equitable distribution upon divorce *if it is properly applied for and not otherwise waived*. However, *equitable distribution is not automatic*. The statute provides that *a party seeking equitable distribution must specifically apply for it*.

Hagler v. Hagler, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (internal citation omitted) (emphasis supplied).

Here, defendant argues that finding of fact numbered 5 in the trial court's order, which denied her motion to compel equitable distribution, establishes that she made an oral motion for equitable distribution before the trial court granted the parties an absolute divorce. Finding of fact numbered 5 states:

> That the Plaintiff filed an action for absolute divorce, which was ultimately granted, in Edgecombe County File No. 03-CVD-701.

> The [d]efendant appeared at the September 22, 2003 divorce hearing and requested that the parties' property be divided. She had objected to the divorce in writing, but had not filed any Counterclaim for equitable distribution or any other matter.

2. Assertion of Claim for Equitable Distribution

N.C. Gen. Stat. § 50-21(a) provides three methods for a party to assert their claim for equitable distribution: (1) "as a separate civil action;" (2) as a cross-action to another action "brought pursuant to Chapter 50 of the General Statutes;" or (3) "as a motion in the cause as provided by G.S. 50-11(e) or (f)." Defendant asserts her "oral motion" sufficiently preserved her right to equitable distribution prior to the trial court's issuance of an absolute divorce. We disagree.

N.C. Gen. Stat. § 50-11(e) and (f) (2005) state:

> (e) An absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; *except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment* in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.
>
> (f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution under G.S. 50-20 *if an action or motion in the cause is filed within six months* after the judgment of divorce is entered. The validity of such divorce may be attacked in the action for equitable distribution.

(Emphasis supplied).

Defendant's alleged "oral motion," made during the 22 September 2003 divorce hearing, does not constitute the filing of a motion in the cause as permitted by either N.C. Gen. Stat. § 50- 11(e) or (f). Defendant failed to specifically assert any claim for equitable distribution pursuant to any permitted method allowed in N.C. Gen. Stat. § 50-21(a). No equitable distribution claim existed after plaintiff dismissed his claim on 6 June 2005 and defendant failed to file a claim for equitable distribution within six months thereafter. *Id.* The

trial court did not err by denying defendant's motion to compel plaintiff to file an equitable distribution affidavit. This assignment of error is overruled.

IV. Conclusion

Defendant's failure to file a separate action, a cross-action, or a motion in the cause before or within six months after absolute divorce was granted, to assert her right to equitable distribution prior to the divorce judgment, destroyed her right to claim equitable distribution. N.C. Gen. Stat. §§ 50-21(a), -11(e). Defendant has failed to show the trial court's denial of her motion to compel " '[was] manifestly unsupported by reason' " and " 'so arbitrary that it could not have been the result of a reasoned decision.' " *T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708 (1998) (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 832 (1985)). The trial court's order is affirmed.

Affirmed.

Judges JACKSON and ARROWOOD concur.

STATE OF NORTH CAROLINA v. ANGELO MAURICE RUSSELL

No. COA07-571

(Filed 5 February 2008)

Constitutional Law— right to confrontation—insufficiently explained absence from trial—waiver

Defendant's voluntary and unexplained absence from his trial after it began constitutes a waiver of his right to confrontation. The only explanations of the absence were second or third hand, and defense counsel was not in a position to verify what was told to her by other people. A letter from a doctor that defendant was in the hospital did not have any kind of diagnosis or prognosis, but only the statement that defendant was being kept for observation.

Appeal by defendant from judgment filed 23 October 2006 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 November 2007.

Attorney General Roy Cooper, by Associate Attorney General Catherine F. Jordan, for the State.

Jarvis John Edgerton, IV, for the defendant-appellant.

WYNN, Judge.

Under our case law, "[a] defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes . . . a waiver [of his right to confrontation]."[1] Here, Defendant Angelo Maurice Russell failed to provide a reasonable explanation for his absence from his trial. Accordingly, we find no error in the trial court's finding that he waived his right to confrontation.

On 20 August 2005, Annis Hannah was at the Smithfield Elementary School for her son's soccer tryouts between 11:00 a.m. and 1:00 p.m. When she returned to her minivan, parked in an open lot, she saw a man in her vehicle. She asked him what he was doing, at which point he got out of her minivan and got into a bronze-colored truck, with a woman in the passenger seat. Ms. Hannah recounted that a debit card was missing from her minivan, and that she wrote down the license plate number of the truck and called 911. Her husband, Sammy Hannah, also followed the truck when it left the parking lot and saw the truck with the license plate number recorded by Ms. Hannah stop at two ATM machines, where the man in the truck attempted to use a debit card.

Detective Julius Esposito of the Charlotte-Mecklenburg Police Department traced the license plate number of the truck as being registered to Enterprise Leasing, which in turn informed him that the truck had been leased to Elizabeth Crump on the date in question. Ms. Crump later testified that she had stayed overnight at her cousin Lynette McCorkle-Austin's house in Charlotte on the evening of 19 August 2005, and that Ms. McCorkle-Austin and Defendant had borrowed the truck on the morning of 20 August. Ms. Hannah picked Defendant's picture out of a photographic array prepared by Detective Esposito. Defendant was subsequently arrested and indicted for breaking and entering a motor vehicle and for being an habitual felon.

Jury selection for Defendant's trial began on 16 October 2006, with Defendant present in the courtroom. However, Defendant was absent on the following two days, 17 and 18 October, when jury se-

1. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (citations omitted).

lection concluded and witnesses testified for the State and the defense. A defense witness told Defendant's attorney that Defendant had called him on 17 October and told him that he was in the hospital due to chest pains. However, Defendant did not contact either his defense counsel or the trial court directly to inform them of the reason for his absence from his trial. Moreover, Defendant provided no documentation to the trial court to indicate that his absence was medically necessary or that he was being kept in the hospital on doctor's orders. The trial court considered additional information as to Defendant's location and condition as it became available and repeatedly denied defense counsel's motions for a continuance and motions to strike an order for arrest of Defendant that had been issued upon his failure to appear.

The jury found Defendant guilty of breaking or entering a motor vehicle and of being an habitual felon. The trial court entered judgment against Defendant on 18 October 2006, filed 23 October, and sentenced him to a minimum term of 131 months and a maximum term of 167 months in prison.

Defendant now appeals, presenting the sole argument that the trial court erred by denying him a continuance in his trial. He specifically contends that conducting his trial in his absence, despite information that he was being held on a doctor's orders at a local hospital for observation, violated his constitutional right to be present. We find this argument to be without merit.

As this Court recently stated in *State v. Davis*, "the right of a defendant to be present at his own trial is not absolute." 186 N.C. App. 242, 245, 650 S.E.2d 612, 615, *disc. review dismissed*, 362 N.C. 89, —— S.E.2d —— (2007); *see also State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) ("In noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant."). Significantly, "[a] defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred." *Id.* (internal citations omitted). We review a trial court's denial of a motion to continue a trial for an abuse of discretion. *State v. Ferebee*, 266 N.C. 606, 609, 146 S.E.2d 666, 668 (1966).

In the instant case, at the close of the State's evidence on the afternoon of 17 October, defense counsel informed the trial court that

Defendant had contacted one of his defense witnesses to tell him that he was in the hospital. Before that time, no explanation or reason had been provided for Defendant's absence. Further, Defendant never got in touch with either his defense counsel or the clerk of court to account for his failure to appear. As noted by the trial court, the only statements offered as to why Defendant was not present were second- or third-hand, and defense counsel was "not in a position to be able to certify, verify, or swear to anything that was told to her by other people. The Defendant has not provided [defense counsel] with any documentation from any hospital authority, he simply makes statements to her[.]"

Additionally, the trial court observed:

> I realize, and the Defendant realizes, that he is facing punishment under Class C, a felony, and there are many reasons why a person would be motivated just to simply leave with the belief that he would not be called upon to be tried. That, again, is just inconsistent with the concept of our court system and our cases must move along.

Even when defense counsel did offer a letter from a doctor verifying Defendant's location in the hospital, the letter did not have any kind of diagnosis or prognosis, but instead contained only the statement that Defendant was being kept for observation. The unspecific nature of the letter and Defendant's alleged ailment corresponded to the trial court's apparent suspicion that Defendant had claimed chest pains in order to be admitted and avoid his trial. Although the letter did, in fact, confirm Defendant's location, it was insufficient to show that his absence was involuntary or due to immediately necessary medical treatment; thus, it explained his absence without lawfully excusing it. *See Richardson*, 330 N.C. at 178, 410 S.E.2d at 63.

Moreover, in outlining its decision not to continue the trial because Defendant had waived his right to confrontation, the trial court referred defense counsel to *Richardson* and a number of decisions by this Court. We see no meaningful distinction between the facts in the instant case and those in *Davis*, *Richardson*, and the other cases mentioned by the trial court. Indeed, given this obvious reliance on past precedents in reaching its decision, as well as the measured explanations it gave throughout the course of trial, each time it determined to move forward in Defendant's absence, we can discern no abuse of discretion in the trial court's decision to proceed. *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005)

(holding that an abuse of discretion occurs only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). This assignment of error is accordingly overruled.

No error.

Judges BRYANT and ELMORE concur.

IN RE: I.D.G., A MINOR JUVENILE

No. COA07-1107

(Filed 5 February 2008)

Termination of Parental Rights— lack of subject matter jurisdiction—failure to issue summons to juvenile

The trial court lacked subject matter jurisdiction over a termination of parental rights proceeding because DSS failed to issue a summons to the juvenile under N.C.G.S. § 7B-1106(a)(5). Thus, the order terminating respondent father's parental rights is vacated. If DSS had filed a motion to terminate in the ongoing juvenile abuse, neglect, and dependency case as provided under N.C.G.S. § 7B-1102, the issuance of a summons would not have been required.

Appeal by respondent-father from an order entered 5 June 2007 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 7 January 2008.

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Social Services; Heather Adams for Guardian ad Litem.

Winifred H. Dillon for respondent-appellant father.

HUNTER, Judge.

Respondent-father appeals the order terminating his parental rights to the minor child, I.D.G. On 21 April 2005, the Gaston County Department of Social Services ("DSS") filed a juvenile petition alleg-

ing that I.D.G. was a neglected and dependent juvenile. The basis for these allegations included respondent-mother's ("mother") drug use, her failure to provide a stable home and financial support to the child due to her incarceration during most of the child's life. The petition further alleged that mother's husband, the legal father of I.D.G. ("legal father"), and respondent-appellant father ("respondent-father"), the biological father of the child, were incarcerated during most of the child's life and had each failed to provide support in any form to I.D.G.

On the date the juvenile petition was filed, DSS was granted non-secure custody, and a Guardian ad Litem was appointed for the child. While I.D.G. was initially placed with the child's maternal grandmother with whom he had resided for most of his life, DSS placed the child in foster care on 29 May 2005.

On 13 September 2005, the trial court adjudicated I.D.G. as neglected and dependent. Following a permanency planning hearing in March of 2006, the trial court changed the permanent plan to adoption. On 12 September 2006, mother's parental rights were terminated. On 11 October 2006, the legal father signed a release for adoption. While respondent-father initially requested to relinquish his parental rights, he subsequently rescinded.

On 29 November 2006, DSS filed a petition to terminate respondent-father's parental rights. A hearing was conducted on the petition on 16 May 2006. On 5 June 2007, the trial court entered an order terminating respondent-father's parental rights. Respondent-father now appeals.

The dispositive argument raised by respondent-father on appeal is that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding because DSS failed to issue a summons to the juvenile pursuant to N.C. Gen. Stat. § 7B-1106(a)(5) (2005). The appellees have conceded that neither the juvenile nor the Guardian ad Litem appointed for the juvenile were served with a summons as required by statute.

As we have most recently held, upon the filing of a petition to terminate parental rights, a summons must be properly issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106. Without the issuance of such summons, "an order terminating parental rights must be vacated for lack of subject matter jurisdiction." *In re K.A.D.*, 187 N.C. App. ——, ——, 653 S.E.2d 427, 429 (2007) (citing *In re C.T. &*

R.S., 182 N.C. App. 472, 474-75, 643 S.E.2d 23, 25 (2007)). Accordingly, as no summons was issued to the juvenile in this case, we conclude that the trial court lacked subject matter jurisdiction, and vacate the order terminating respondent-father's parental rights.

While DSS's failure to serve a summons on the juvenile compels our ruling in this case, we note that had DSS filed a *motion* to terminate in the ongoing juvenile abuse, neglect, and dependency case as provided by N.C. Gen. Stat. § 7B-1102, the issuance of a summons would not have been required. In such pending cases, a party seeking termination is only required to serve notice of the motion to terminate on the parties which are specified in N.C. Gen. Stat. § 7B-1106.1. Section 1106.1(a)(6) requires service of the notice on the juvenile only where the juvenile is age twelve or older. Furthermore, even where service of the required notice is not made on the necessary parties, such service can be waived by appearance and failure to raise an objection. *See In re J.S.L.*, 177 N.C. App. 151, 155, 628 S.E.2d 387, 389-90 (2006) (holding that a party who is entitled to notice under N.C. Gen. Stat. § 7B-1106.1 waives that notice by attending and participating in the hearing of the motion without objecting to the lack of notice) (citing *In re B.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005)). From a review of the record in this case, it appears that DSS had an option to file a motion in the ongoing juvenile cause under N.C. Gen. Stat. § 7B-1102, thereby avoiding the lack of subject matter jurisdiction resulting from the failure to serve the summons required by N.C. Gen. Stat. § 7B-1106.

Vacated.

Judges McGEE and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 FEBRUARY 2008

BUCHANAN v. N.C. DEP'T OF TRANSP. No. 07-426	Jackson (05CVS305)	Affirmed
BYNUM v. WHITLEY No. 07-451	Wilson (05CVS1774)	Affirmed in part; reversed in part
CLAYBORN v. NOVANT . HEALTH, INC. No. 07-183	Forsyth (04CVS4100)	Plaintiff's appeal: dismissed in part, affirmed in part; Defendant's appeal: affirmed
IN RE C.C.R. No. 07-1065	Watauga (05J3)	Reversed
IN RE D.M. No. 07-705	Mecklenburg (01J1186)	Affirmed; remanded for correction of clerical error
IN RE J.A.T., S.T.T., J.C.T. & E.D.T. No. 07-1189	Jackson (04J56-59)	Affirmed
IN RE J.E.J., B.M.J., T.L.J. No. 07-589	Wake (05JT650)	Affirmed
IN RE J.G. No. 07-1026	Harnett (04J231)	Affirmed
IN RE T.G., X.G., A.G. No. 07-1045	Harnett (05J205-07)	Affirmed
IN RE W.L., D.R.L., D.M.L. No. 07-1104	Cumberland (05JT145) (98JT8-9)	Vacated
McNEELY v. McNEELY No. 07-483	Transylvania (04CVD338)	Affirmed in part, vacated in part and remanded
PVC, INC. v. McKIM & CREED, P.A. No. 07-311	New Hanover (04CVS1315)	Affirmed
RANDELL v. BEACHAM No. 07-348	Beaufort (02CVS561)	Reversed and remanded
ROGERS v. BLACK No. 07-462	Harnett (01CVD2274)	Affirmed, remanded for correction of clerical mistakes

SHUFORD v. REGAL MFG. CO. No. 07-772	Indus. Comm. (I.C. 441413) (I.C. 488251)	Affirmed
STATE v. CAMPBELL No. 07-950	Cumberland (04CRS69091)	No error
STATE v. CARRINGER No. 06-1689	Cumberland (04CRS52964)	No error
STATE v. CHRISTMAS No. 07-564	Pasquotank (05CRS51409) (06CRS2041) (06CRS1535)	No error
STATE v. COLEMAN No. 07-886	Rowan (05CRS10810)	Vacated
STATE v. DALEUS No. 06-1622	Cumberland (01CRS61912)	No error
STATE v. FULLER No. 07-857	Guilford (04CRS100436)	Affirmed
STATE v. GOMEZ No. 07-636	Wake (05CRS100015-18) (05CRS100256) (05CRS100258-59)	No error in part; remanded in part
STATE v. HOLMAN No. 07-68	Forsyth (05CRS65571) (05CRS41901)	No error
STATE v. JOHNSON No. 07-907	Nash (05CRS54572-73)	No error
STATE v. LEE No. 07-541	Forsyth (06CRS53875)	No error
STATE v. LEWIS No. 07-902	Durham (05CRS51998)	Affirmed
STATE v. McDOUGALD No. 07-273	Cumberland (05CRS65317)	No error
STATE v. MELVIN No. 07-908	Scotland (06CRS51314)	No error
STATE v. MIDDLETON No. 07-355	Nash (99CRS7338-39)	No error in part, remanded in part for resentencing
STATE v. MORGAN No. 07-315	Pitt (04CRS58140)	No error
STATE v. PAYNE No. 07-821	Forsyth (06CRS57052)	No error

STATE v. POLEY No. 07-157	Henderson (05CRS51899) (05CRS51900)	No error
STATE v. RABON No. 07-725	Davidson (04CRS58304)	No error
STATE v. SHULER No. 07-800	Burke (06CRS4738-39)	No error
STATE v. SILER No. 07-328	Guilford (05CRS74756)	No error
STATE v. SMITH No. 07-905	Forsyth (06CRS55818)	No error
TUCK v. TUROCI No. 06-1571	Carteret (04CVS523)	Affirmed

STATE OF NORTH CAROLINA v. CHRISTOPHER RONALD BOWMAN, DEFENDANT

No. COA06-1146

(Filed 19 February 2008)

1. Evidence— prior crimes or bad acts—sexual battery—absence of mistake of age—specific intent—sexual gratification—remoteness in time

The trial court did not abuse its discretion in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting a prior victim's testimony regarding defendant's prior conviction for sexual battery for an incident in 1997, because: (1) the testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show absence of mistake of age, specific intent for kidnapping, and an intent for sexual gratification; (2) the evidence was sufficiently similar to the present case based on the relative likeness in age between the past and present victims and also the sexually related nature of the incidents; and (3) the former incident was temporally proximate to the present one since defendant was incarcerated for a period of three years after his conviction and then relocated to another state, the passage of time only evidenced the existence of a continuing plan, the evidence showed defendant resumed the same activities as soon as possible after being released from jail and relocating to North Carolina, and the time period between these incidents was less than ten years.

2. Evidence— certified copies of convictions for sexual battery—plain error analysis

Although the trial court erred in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting into evidence under N.C.G.S. § 8C-1, Rule 404(b) certified copies of defendant's convictions for sexual battery when there was already significant testimony regarding the facts underlying his prior conviction, it did not commit plain error, because: (1) the testimony regarding the incidents which resulted in defendant's prior conviction was properly admitted under Rule 404(b); and (2) in light of this testimony and the heightened burden on defendant associated with plain error review, the admission of the certified copies of prior convictions was not so fundamental as to have led the jury to reach a different verdict than it would have otherwise reached.

3. Evidence— victim impact testimony—no probative value during guilt phase

The trial court erred in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting into evidence the alleged emotional impact on others as a result of defendant's prior misconduct, and defendant is entitled to a new trial because: (1) although a victim has the right to offer admissible evidence of the impact of the crime during sentencing, victim impact testimony has little, if any, probative value during the guilt phase of a trial; and (2) the inflammatory nature of the impact evidence, combined with the emotions displayed during each witness's testimony, created a reasonable possibility that, had the error in question not been committed, a different result would have been reached.

4. Aiding and Abetting— statutory rape—requested instruction—knowledge of age of victims

The trial court erred by denying defendant's requested instruction to the jury that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape because: (1) the mere presence of defendant at the scene of the crime is not enough to establish a defendant's culpability, and defendant's specific intent to aid the perpetrator in the commission of the crime must also be shown; (2) defendant's subjective knowledge that his actions would aid a criminal act is necessary to uphold a conviction based upon the theory of aiding and abetting; (3) if a defendant mistakenly undertook his actions based upon the belief that he was assisting a lawful endeavor, he cannot be guilty of aiding and abetting; (4) an offense that contains an element of knowledge has mistake of fact available as a defense; (5) although statutory rape is a strict liability crime, aiding and abetting statutory rape is not; and (6) defendant's requested instruction was supported by the evidence when a detective testified that defendant did not know the victims' ages and thought both girls were over the age of eighteen.

5. Kidnapping— second-degree—instructions—defining unlawfully—plain error analysis

The trial court did not commit plain error by failing to define the term "unlawfully" in the jury instructions for the charge of second-degree kidnapping because: (1) N.C.G.S. § 14-39 does not

require a person to know the victim is under the age of sixteen and was removed without the parent's consent in order to be convicted for the crime of second-degree kidnapping; and (2) the State must only prove the elements provided under N.C.G.S. § 14-39 since defendant was charged as a principal.

Appeal by defendant from judgments entered 27 January 2006 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 24 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Belinda Smith, for the State.

Mark Montgomery, for defendant-appellant.

CALABRIA, Judge.

Christopher Ronald Bowman ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of three counts of aiding and abetting statutory rape, three counts of taking indecent liberties with a child, and two counts of second-degree kidnapping. We grant defendant a new trial.

The State presented the following evidence at trial: On 18 February 2005, Stephanie B. ("Stephanie"), age fourteen, asked her mother for permission to spend the night with Rachelle D. ("Rachelle"), age fifteen. Rachelle also asked her mother if she could spend the night with Stephanie. The girls lied to their mothers in order to stay with Rachelle's boyfriend, Christopher Hall ("Hall"), age twenty-four, and his friend, Timothy Cutshaw ("Cutshaw"), age eighteen. Rachelle's mother drove the two girls to the mall where they met defendant, along with Cutshaw and Hall. Defendant drove Rachelle, Stephanie, Hall and Cutshaw ("the group") to a store where Hall purchased alcohol. Afterwards, defendant drove the group to defendant's home.

Once they arrived at defendant's home, the group watched a movie in defendant's living room and drank the alcohol that Hall had purchased. While the group was drinking, defendant sat in the kitchen and played a game on his computer. After the group depleted Hall's alcohol supply, they drank some of defendant's alcohol that was stored on top of the refrigerator in the kitchen. At some point, Stephanie and Cutshaw went into a bedroom where they had sexual intercourse. Rachelle and Hall went into another bedroom and also had intercourse.

The next morning, Rachelle called her mother from a restaurant stating that she and Stephanie were having breakfast with Stephanie's father and were going to the skating rink after they finished eating. Rachelle's mother, Kathy D. ("Kathy D.") asked Rachelle to call her when they arrived at the skating rink. When Kathy D. had not heard from Rachelle by that evening, she became worried and went to the Woodfin Police Department. When Kathy D. arrived at the police department, she received a phone call from Rachelle. After Rachelle told her mother where she was, a family friend drove to the location to pick up Rachelle and bring her back to the police department. While at the police department, Rachelle reported to her mother and a police officer that she had been with Hall and that they had been at defendant's home. When Rachelle mentioned defendant's name, the officer asked Rachelle more questions about the events that occurred at defendant's home. Based on Rachelle's account of the events, Detective James Marsh ("Detective Marsh") was sent to question Stephanie about the events described by Rachelle. After talking with Stephanie, Detective Marsh arrested defendant and transported him to the police department.

Hall, Rachelle's boyfriend, testified that on 18 February 2005, Rachelle called him and asked if he could meet her at the mall. Because he did not have a driver's license, Hall called defendant to ask for a ride to the mall. At first, defendant said no, but changed his mind after Rachelle called to ask for a ride. During his testimony, Hall admitted that he had been sexually involved with Rachelle on several occasions, including occasions at defendant's home. Two witnesses, Jessica Hobbs ("Jessica") and Daniel Kalec ("Daniel") testified that on previous occasions defendant had sexually touched them without their consent.

Defendant was charged with four counts of aiding and abetting statutory rape, four counts of taking indecent liberties with a child, and two counts of second-degree kidnapping. On 27 January 2006, a jury returned a verdict finding defendant guilty of three counts of aiding and abetting statutory rape, three counts of taking indecent liberties with a child, and two counts of second-degree kidnapping. Defendant was sentenced to eight consecutive sentences of imprisonment, with the terms being two consecutive sentences of 288 months to 355 months, followed by one term of 100 months to 129 months, followed by two terms of 29 months to 44 months, followed by three terms of 19 months to 23 months. Defendant appeals from his convictions.

On appeal, defendant argues the trial court erred in (I) instructing the jury on the crime of aiding and abetting statutory rape; (II) instructing the jury on the crime of second-degree kidnapping; (III) denying defendant's motion to question potential jurors as to whether they would be able to follow the law regarding evidence of defendant's alleged prior bad acts; (IV) admitting into evidence facts illustrating defendant engaged in sexual misconduct with Daniel; (V) admitting into evidence the alleged emotional impact upon others as a result of defendant's prior misconduct and certified copies of defendant's prior criminal convictions; and (VI) denying defendant's motion for a mistrial without first holding a hearing. Since defendant on appeal does not contest the sufficiency of the evidence regarding his conviction for taking indecent liberties with a child, we need not set out the facts and evidence surrounding this conviction.

I. Evidence of Prior Misconduct

[1] Defendant argues the trial court erred by admitting evidence of other sexual assault crimes committed by defendant. Defendant only challenges the admission of testimony by Daniel regarding an incident that occurred in 1997. Defendant does not challenge the trial court's ruling admitting the testimony of Jessica regarding another incident that occurred in 1998.

"Evidence of other crimes or acts is inadmissible for the purpose of showing the character of the accused or for showing his propensity to act in conformity with a prior act." *State v. Bidgood*, 144 N.C. App. 267, 271, 550 S.E.2d 198, 201 (2001); N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). "[Rule 404(b)] is a general rule of inclusion of such evidence, subject to an exception if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (citation omitted). North Carolina courts have been "markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b) . . . ." *State v. Cotton*, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987).

Daniel testified that in 1997, when he was fourteen years old, his mother scheduled a golf lesson for him with defendant. When he arrived at the golf shop for his lesson, defendant closed the shop,

locked the front door, and turned off the lights. Defendant escorted Daniel into the backroom under the guise of beginning the golf instruction. During the course of the lesson, defendant stood behind Daniel to show Daniel how to position his body. Defendant then touched Daniel by placing his hands under Daniel's undergarments and touching his penis. Daniel testified that defendant became sexually aroused by the incident.

The trial court ruled that this testimony was admissible under Rule 404(b) to show absence of mistake of age, specific intent in the kidnapping, and an intent for sexual gratification. We agree.

"[T]he ultimate test for determining whether [evidence of other offenses] is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) (citation omitted). Our Supreme Court has stated:

> When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

State v. Artis, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 110 S.Ct. 1466, 108 L. Ed. 2d 604 (1990). Thus, "[t]he use of evidence under Rule 404(b) is guided by two constraints: 'similarity and temporal proximity.' " *Bidgood*, 144 N.C. App. at 271, 550 S.E.2d at 201 (citation omitted). In *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996), our Supreme Court held a ten-year gap between instances of defendant's similar sexual behavior did not render them so remote in time as to negate their admissibility under Rules 403 and 404(b).

Here, the trial court decided that the prior crimes evidence was sufficiently similar to the present case because of the relative likeness in age between the past and present victims and also the sexually related nature of the incidents. The trial court then concluded that the former incident was temporally proximate to the present because defendant was incarcerated for a period of three years after his conviction and then relocated to another state. The trial court determined that the passage of time only evidenced the exist-

ence of a continuing plan, and that defendant resumed the same activities as soon as possible after being released from jail and relocating to North Carolina.

Moreover, the trial court's admission of Daniel's testimony did not violate Rule 403 of the North Carolina Rules of Evidence. "Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and it will not be reversed absent an abuse of that discretion." *State v. Bagley*, 321 N.C. 201, 208, 362 S.E.2d 244, 248 (1987) (citation omitted). The trial court found from the evidence that the time period between defendant's prior crimes and the present incident was less than ten years. Therefore, based on the trial court's factual findings regarding the similarity and temporal proximity between the present and former incidents, defendant has failed to show any abuse of discretion. *See Penland*, *supra*. We conclude the trial court did not err by admitting Daniel's testimony with respect to the similar crime.

II. Defendant's Prior Convictions

[2] Defendant next argues the trial court committed reversible error when it admitted into evidence certified copies of defendant's convictions for sexual battery pursuant to Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

"It is well established in North Carolina that when the defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevance is to show the character of the accused or his disposition to commit the offense charged." *State v. Armistead*, 54 N.C. App. 358, 359, 283 S.E.2d 162, 163 (1981) (citing *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954)). However, Rule 404(b) allows for the admission of evidence of prior acts to show a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b).

Rule 404(b) is a rule of inclusion and defendant's prior acts should be excluded if their "only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Where the defendant does not testify, admitting the bare fact of the defendant's prior conviction violates Rule 404(b). *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002) (reversing this Court's decision and adopting Judge Wynn's

dissent in *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (2002)); *State v. Hairston*, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

Defendant relies on *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863 (2005), in asserting the trial court committed reversible error by admitting into evidence certified copies of defendant's conviction for sexual battery. In *McCoy*, the defendant was convicted for, *inter alia*, one count of assault inflicting serious bodily injury, two counts of assault inflicting serious injury, and two counts of assault with a deadly weapon. *Id.*, 174 N.C. App. at 108, 620 S.E.2d at 866. During trial, the State presented the testimony of a Greensboro police officer who testified to defendant's previous assault conviction seven years prior to the incidents for which defendant was on trial. *Id.*, 174 N.C. App. at 111, 620 S.E.2d at 868. The officer described the underlying facts surrounding defendant's previous assault conviction. *Id.* Following the officer's testimony, the State introduced into evidence a certified copy of defendant's conviction for assault resulting from the events the officer described. *Id.* Defendant did not testify. *Id.* This Court granted defendant a new trial and held the trial court's admission of defendant's bare conviction for assault was prejudicial error. *Id.* In holding the trial court committed prejudicial error, the Court relied on *Wilkerson*, *supra*, and determined *Wilkerson* was indistinguishable from *McCoy*.

In *Wilkerson*, two witnesses testified regarding the facts surrounding the defendant's prior conviction. *Wilkerson*, 148 N.C. App. at 311, 559 S.E.2d at 6. A deputy clerk then testified regarding the defendant's convictions for prior drug charges. *Id.* The defendant did not testify. *Id.* Our Supreme Court, in adopting Judge Wynn's dissent, established that, "in a criminal prosecution, the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime . . . ." *Id.*, 148 N.C. App. at 327, 559 S.E.2d at 16. Based on Judge Wynn's dissent, the defendant was entitled to a new trial.

In the instant case, as in *Wilkerson*, multiple witnesses testified concerning the facts underlying defendant's prior convictions for sexual battery. This testimony was then followed by the admission of the bare fact of defendant's prior convictions through a separate witness, Detective James Marsh. Unlike *Wilkerson*, however, the convictions admitted in the present case concerned a sexual offense. "In cases involving sexual offenses, our courts have been liberal in construing the exceptions to the general rule that evidence that defendant committed another, separate offense is inadmissible." *State v. Hall*, 85

N.C. App. 447, 450, 355 S.E.2d 250, 252 (1987) (citation omitted). Although *Wilkerson* did not involve sexual offenses, Judge Wynn took note of our Courts' treatment of such evidence in his opinion:

> [A]dmitting the bare fact of a defendant's prior *conviction*, except in cases where our courts have recognized a categorical exception to the general rule (e.g. *admitting prior sexual offenses in select sexual offense cases* . . .), violates Rule 404(b) . . . as well as Rule 403 . . . .

Id., 148 N.C. App. at 327-28, 559 S.E.2d at 16 (emphasis added).

Because of our Courts' liberal stance on evidence of similar sex offenses, there is an increased likelihood that defendant's prior convictions would be admissible under Rule 404(b). Nevertheless, determining their admissibility requires a case-by-case inquiry. *See Hall*, 85 N.C. App. at 450, 355 S.E.2d at 252 ("Whether a defendant's previous conviction for a sexual offense is pertinent in his prosecution for an independent sexual crime depends on the facts in each case, and among other things, the availability of other forms of proof.").

In *Hall*, the defendant was incarcerated for a prior conviction for assault with attempt to rape. *Id.* Two days after his release from prison he assaulted another woman. *Id.*, 85 N.C. App. at 451, 355 S.E.2d at 252. Because the victim escaped before the defendant completed the offense, the prior conviction was offered to show the defendant's intent was rape, not burglary as he contended. *Id.*, 85 N.C. App. at 450-51, 355 S.E.2d at 252. Defendant did not testify. *Id.*, 85 N.C. App. at 448, 355 S.E.2d at 251. The prior conviction was offered to establish the defendant's intent, which is admissible as a legitimate purpose under Rule 404(b). *Id.*, 85 N.C. App. at 451, 355 S.E.2d at 253.

In the case *sub judice*, however, there was substantial testimony regarding the facts underlying defendant's prior convictions for sexual battery, as well as the incidents at issue in the present case. Both Daniel and his mother testified to the events that culminated in defendant's conviction for sexual battery against Daniel. In addition, Jessica testified that when she was fifteen years old, she was best friends with defendant's teenage daughter, Kim. In November of 1998, Kim held a slumber party at defendant's house where Jessica and her friends drank alcohol. After Kim and Jessica's sisters fell asleep, Jessica changed into her pajamas and headed to the downstairs area of defendant's split level house. While Jessica was on the staircase,

defendant walked in front of her, pulled her shorts down, and proceeded to perform oral sex on her. Jessica's sister saw them on the stairs and defendant stopped touching Jessica. After these witnesses testified, the State offered into evidence defendant's bare convictions for sexual battery.

Although North Carolina is liberal in its inclusion of prior sexual offenses for 404(b) purposes, we find in the instant case there is little probative value in defendant's prior convictions for any 404(b) purpose since there was significant testimony regarding the facts underlying defendant's prior convictions. Thus, we conclude that the admission of defendant's prior convictions under Rule 404(b) was error. We now determine whether it was prejudicial and reversible error.

Despite defendant's objections to the testimony regarding the facts and incidents underlying the prior conviction, defendant failed to renew his objection when the convictions themselves were admitted at trial. Since defendant failed to object at trial, review on appeal is limited to consideration of whether the trial court's error constituted plain error. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We hold that it did not.

Plain error is applied cautiously and only in exceptional cases when

> 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 . . . ."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (alteration in original) (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, 103 S. Ct. 381 (1982)). Under this standard, a "defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). "In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the

defendant." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (quoting *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-07 (1983)). "Therefore, the test for 'plain error' places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection." *Id.*

We already have determined that the testimony regarding the incidents which resulted in defendant's prior conviction was properly admitted under Rule 404(b). In light of this testimony and the heightened burden on defendant associated with plain error review, we conclude that the admission of the certified copies of defendant's prior convictions for sexual battery was not so fundamental as to have led the jury to reach a different verdict than it would have otherwise reached. As such, the admission of defendant's prior convictions does not constitute plain and reversible error.

III. Victim Impact Testimony

[3] Defendant argues the trial court erred by admitting into evidence the alleged emotional impact on others as a result of defendant's prior misconduct. We agree.

At trial, the State presented evidence from a victim of a previous crime, named Daniel. Both Daniel and his mother testified about the emotional impact upon Daniel's life from an incident that occurred in 1997. The State also presented evidence from Jessica, another victim of a previous crime, regarding the social and emotional problems she developed as a result of defendant's sexual assault. During *voir dire*, defendant objected to the admission of the victim impact testimony. The trial court overruled defendant's objection, and admitted the testimony under Rule 404(b) of the North Carolina Rules of Evidence.

"A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in *sentencing the defendant*." *State v. Nicholson*, 355 N.C. 1, 39, 558 S.E.2d 109, 136 (2002) (emphasis added). *See also* N.C. Gen. Stat. § 15A-833 (2005).

In this case, the purpose of Daniel's, Daniel's mother's and Jessica's testimonies was to illustrate the impact of crimes from defendant's previous convictions. Their testimony was not relevant to the issue of whether defendant committed the crimes against Rachelle and Stephanie. Because victim impact testimony has little, if any, probative value during the guilt phase of a trial, victim im-

pact testimony is only admissible during the sentencing phase. The trial court erred in admitting victim impact testimony by victims of prior crimes, and by admitting the testimony during the guilt phase of the trial.

After determining the trial court erred, we now determine whether defendant met his burden of showing prejudice. When evidence is erroneously admitted by the trial court, the defendant has the burden of showing that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C. Gen. Stat. § 15A-1443(a) (2005).

In this case, three witnesses were allowed to testify regarding the effect of the defendant's prior bad acts. Daniel testified that after the incident with defendant, it was difficult for him to have any type of physical contact with males, including his own father. He also testified that he was constantly bombarded with thoughts of defendant and attributed his drug and alcohol problems to the incident as a means of coping. Daniel's mother testified the incident robbed her son of his innocence. Daniel's grades slipped, his interest in sports drastically declined, and Daniel's continuing struggle with drugs and alcohol was a result of the incident. The third witness, Jessica, cried during her testimony. She testified that before the incident she was an excellent student. However, after defendant assaulted her, she failed her courses and dropped out of school. She became sexually promiscuous, and struggled with alcohol abuse. Jessica further testified that as a result of the incident, she was unable to maintain healthy relationships and was involved in several life threatening accidents.

"The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction . . . ." *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). There was nothing about the emotional impact of defendant's prior misconduct that shed light on whether defendant was guilty of the crimes charged in the present case. We conclude the inflammatory nature of the impact evidence, combined with the emotions displayed during each witness's testimony, creates a "reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a).

Although we conclude that defendant is entitled to a new trial on all convictions, we address defendant's remaining arguments that are likely to reoccur at defendant's new trial.

IV. Instruction on Aiding and Abetting Statutory Rape

[4] Defendant argues the trial court erred by denying his request for an instruction that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. We agree.

Requests for special jury instructions are allowable pursuant to N.C. Gen. Stat. § 1-181 (2005) and N.C. Gen. Stat. § 1A-1, Rule 51(b) (2005) if the requests are in writing. *See State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). "The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case." *State v. Rogers*, 121 N.C. App. 273, 281, 465 S.E.2d 77, 82 (1996). "If a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993).

In order to determine whether the trial court should have given the instruction requested by defendant, we first determine whether the requested instruction was both a correct statement of the law and supported by the evidence. Defendant was charged with aiding and abetting statutory rape. The State argues that the requested instruction should not have been given because aiding and abetting statutory rape is a strict liability crime. In other words, the State contends that an aider and abettor of statutory rape is vicariously liable for the actions of the principal. We disagree.

Under the theory of aiding and abetting, a defendant may be convicted of a crime when: "(i) the crime was committed by some other person; (ii) the defendant *knowingly* advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (emphasis added). Our courts have consistently held that the mere presence of a defendant at the scene of the crime is not enough to establish the defendant's culpability. *See State v. Sanders*, 288 N.C. 285, 290, 218 S.E.2d 352, 357 (1975); *State v. Capps*, 77 N.C. App. 400, 403, 335 S.E.2d 189, 191 (1985). The defendant's intent to aid the perpetrator in the commission of the crime must also be shown. *Sanders*, 288 N.C. at 290, 218 S.E.2d at 357; *Capps*, 77 N.C. App. at 403, 335 S.E.2d at 191. The term "aid and abet" has been explained as:

> a legal term of art not commonly used . . . . It represents a legal theory under which one may be held derivatively liable as a prin-

> cipal for the criminal acts of another if two elements are met. Each element, aiding and abetting, performs a function necessary to justify the imposition of criminal liability.
>
> The "aiding" element requires some conduct by the accomplice that results in the accomplice becoming involved in the commission of a crime. The typical way in which a party becomes involved in the commission of a crime is through the assistance, promotion, encouragement, or instigation of criminal action. Once a party becomes involved in the commission of a crime, the aiding element has been met, no matter how slight the assistance. The law establishes no degree requirement to the amount of involvement required to fix liability as a principal.
>
> The second element, "abetting," serves to supply the mental state necessary to justify the imposition of criminal liability. This requirement looks for a criminal state of mind—*specifically, it requires that the accomplice has both knowledge of the perpetrator's unlawful purpose to commit a crime, and the intent to facilitate the perpetrator's unlawful purpose.*
>
> Thus, as in most criminal conduct, accomplice liability involves both an *actus reus* (the actual aiding) and a *mens rea* (the intent to facilitate the criminal purpose of the perpetrator).

Larry M. Lawrence, II, Comment, *Developments in California Homicide Law: VII. Accomplice Liability: Derivative Responsibility*, 36 Loy. L.A. L. Rev. 1524, 1526 (2003) (emphasis added).

Therefore, the question of defendant's intent is not limited to whether he aided the perpetrator but whether he aided with the specific intent to assist in the commission of the crime. If the defendant assisted the perpetrator but did not know that the perpetrator was committing a crime, the defendant could not have intended to aid in the commission of a crime.

North Carolina case law does not support a theory of vicarious strict liability. On the contrary, our Courts have consistently required evidence of the defendant's intent to aid in the commission of a crime even in cases where the defendant actively assisted the perpetrator. *See Evans*, 279 N.C. at 447, 183 S.E.2d at 540; *Capps*, 77 N.C. App. at 400, 335 S.E.2d at 189. *See generally State v. Barnett*, 304 N.C. 447, 463, 284 S.E.2d 298, 307 (1981) (conviction of aiding and abetting first degree sexual offense reversed because no evidence that defendant knew perpetrator had threatened victim); *State v. Sink*, 178 N.C. App.

217, 221, 631 S.E.2d 16, 19 (2006) (the State must show defendant's intent to encourage the principal to commit the crime of obtaining property by false pretenses), *disc. review denied*, 360 N.C. 581, 636 S.E.2d 195 (2006); LaFave, Wayne R., 2 SUBSTANTIVE CRIMINAL LAW § 13.2 (2d ed.) ("Under the general principles applicable to accomplice liability, there is no such thing as liability without fault."). The defendant's *subjective knowledge* that his actions would aid a criminal act is necessary to uphold a conviction based upon the theory of aiding and abetting. If the defendant mistakenly undertook his actions based upon the belief that he was assisting a lawful endeavor, he can not be guilty of aiding and abetting a criminal act.

In *Evans*, our Supreme Court reversed the defendant's conviction where there was no evidence the defendant knew that the two people who provided him a ride planned to rob a restaurant upon reaching their destination. *Evans*, 279 N.C. at 453-54, 183 S.E.2d at 544-45. Five or ten minutes prior to the robbery, the defendant entered a vehicle with the driver and a passenger for the sole purpose of receiving a ride. *Id.*, 279 N.C. at 450, 183 S.E.2d at 543. The two people in the car never informed defendant of their intention to commit a robbery and neither the driver nor the passenger discussed their plans regarding the robbery in defendant's presence. *Id.* The *Evans* Court reasoned that the defendant's "mere presence" at the scene of the crime during its commission was not sufficient to show his involvement in the crime. *Evans*, 279 N.C. at 453-54, 183 S.E.2d at 545.

In *Capps*, this Court reversed the defendant's conviction of aiding and abetting felonious breaking and entering a motor vehicle and felonious larceny. 77 N.C. App. at 403, 335 S.E.2d at 191. There was no evidence that the defendant knew his passenger was going to break into the trunk of a car and take items that did not belong to him. *Id.* This Court reasoned, "While the State's evidence does indicate the defendant was present at the scene of the crime, the State has failed to present substantial evidence that the defendant intended to aid [the codefendant] or communicated such intent to [the codefendant]." *Id.*, 77 N.C. App. at 402, 335 S.E.2d at 190. Finally, this Court held that "[a] defendant's mere presence at the scene of the crime does not make him guilty of felonious larceny even if he sympathizes with the criminal act and does nothing to prevent it." *Id.*

Our case law clearly establishes that aiding and abetting is a crime that involves an element of knowledge. When an offense contains an element of knowledge, mistake of fact is available as a defense. *See generally State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89

(1978) (trial court erred by not giving instruction on mistake of fact when defendant mistakenly abducted a child who he believed was his granddaughter); *State v. Lamson*, 75 N.C. App. 132, 330 S.E.2d 68 (1985) (error to not give instruction on mistake of fact when defendant tried to enter a house at night that he believed was the house where his friend was staying). "If there is evidence from which an inference can be drawn that the defendant committed the act without the criminal intent necessary, then the law with respect to that intent should be explained and applied to the evidence by the court." *State v. Connell*, 127 N.C. App. 685, 690-91, 493 S.E.2d 292, 295 (1997) (mistake of fact instruction should have been given when defendant inappropriately touched his girlfriend's daughter because he thought she was his girlfriend). "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005). Where there is sufficient evidence in a case to support an instruction on a defense, due process requires that the trial court instruct the jury on the defense. *See generally State v. Marshall*, 105 N.C. App. 518, 525, 414 S.E.2d 95, 99 (1992) (failure to give required instruction on defense of habitation violated defendant's due process rights). Failure to give the required instruction is an error of constitutional dimension and the defendant is presumed to have been prejudiced; the burden is upon the State to show beyond a reasonable doubt that the error was harmless. N.C. Gen. Stat. § 15A-1443(b) (2005); *Marshall*, 105 N.C. App. at 525, 414 S.E.2d at 99.

In this case, defendant's requested instruction was a correct statement of law and supported by the evidence. Although statutory rape is a strict liability crime, aiding and abetting statutory rape is not. *See People v. Wood*, 56 Cal. App. 431, 205 P. 698 (1922). In *Wood*, the California Court of Appeals affirmed defendant's conviction for aiding and abetting statutory rape. *Id.*, 56 Cal. App. at 433, 205 P. at 698. In affirming defendant's conviction, the Court conceded that although defendant did not have sexual intercourse with the victim, he procured a room for the victim and her assailant. *Id.*, 56 Cal. App. at 432, 205 P. at 698. The Court held, "[defendant] *knew the illegal purpose* for which the room was to be used and *knowingly both aided and abetted* [the assailant] in the commission of the crime[.]" *Id.* (emphasis added). Although the Court did not address the issue of strict liability in the crime of aiding and abetting statutory rape, the Court relied on an intent element in affirming defendant's conviction for aiding and abetting statutory rape. Moreover, strict liability crimes are disfavored. *See Staples v. United States*, 511

U.S. 600, 606, 128 L. Ed. 2d 608, 616 (1994) ("offenses that require no *mens rea* generally are disfavored"). Thus, the State was required to present evidence tending to show that defendant acted with knowledge that the girls were under the age of sixteen. Furthermore, defendant's requested instruction was supported by the evidence. Although Stephanie testified she told defendant her age, Detective Marsh testified that defendant stated during his interview that defendant did not know the victims' ages and that he thought both girls were over the age of eighteen. Therefore, we hold the evidence presented supported the jury instruction requested by the defendant and the trial court's failure to give the instruction, that should have been given, was error.

V. Second-degree Kidnapping

[5] Defendant argues the trial court committed plain error by not defining the term "unlawfully" in the instructions to the jury on the charge of second-degree kidnapping. We disagree.

During trial, defense counsel did not request a definition of the term "unlawfully" when the court instructed the jury on the charge of second-degree kidnapping. Therefore, our review of whether the trial court erred is limited to plain error review. *See Odom*, *supra*.

In the instant case, defendant was charged with two counts of second-degree kidnapping pursuant to N.C. Gen. Stat. § 14-39 (2005). N.C. Gen. Stat. § 14-39 provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping . . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

In the instant case, the trial judge's jury instructions stated in relevant part:

> Now, I charge that for you to find the defendant guilty of second-degree kidnapping the State must prove four things beyond a reasonable doubt. First, that the defendant unlawfully removed a person from one place to another. Second, that the person had not reached her sixteenth birthday and her parent/guardian did not consent to this removal. Consent obtained or induced by fraud or fear is not consent. Third, that the defendant removed the person for the reason of facilitating his or another person's commission of statutory rape. And fourth, that this removal was a separate, complete act independent of and apart from the statutory rape.

Defendant argues the trial court should have instructed the jury that defendant only unlawfully removed Stephanie and Rachelle if he knew the girls were under the age of sixteen and that they did not have their parents' consent to go to his house. However, N.C. Gen. Stat. § 14-39 does not require that a person must know the victim is under the age of sixteen in order to be convicted for the crime of second-degree kidnapping. Rather, our Supreme Court has held:

> the victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent.

State v. Hunter, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980).

Thus, pursuant to N.C. Gen. Stat. § 14-39, there is no requirement a person must know his or her victim is under the age of sixteen and was removed without the parent's consent in order to be convicted of second-degree kidnapping. We also note that here defendant is charged as the *principal* for second-degree kidnapping. However, in the charge of aiding and abetting statutory rape discussed *supra*, defendant was not charged as a principal for aiding and abetting statutory rape. Instead, defendant was charged with aiding and abetting the underlying crime of statutory rape which was committed by another person. Since defendant was charged as a principal for second-degree kidnapping, the State must only prove the elements provided under N.C. Gen. Stat. § 14-39. Therefore, since N.C. Gen. Stat. § 14-39 does not require that a person know the victim is under

the age of sixteen, we determine the trial court did not err in its jury instruction regarding the charge of second-degree kidnapping. This assignment of error is overruled.

VI. Conclusion

After reviewing the entire record and transcript, we determine the trial court erred in admitting into evidence defendant's certified convictions for sexual battery and testimony concerning the alleged emotional impact defendant's prior misconduct had upon others. We also conclude the trial court erred in its instructions to the jury regarding the crime of aiding and abetting statutory rape. We determine the trial court did not commit error in admitting Daniel's testimony regarding defendant's prior conviction for sexual battery. We also hold the trial court did not commit error in its instructions to the jury concerning the crime of second-degree kidnapping. Therefore, we grant defendant a new trial on all convictions except for his conviction for second-degree kidnapping. In light of our holding, we need not address defendant's remaining assignments of error.

New Trial.

Judges HUNTER and TYSON concur.

THE NORTH CAROLINA STATE BAR v. JAMES B. ETHRIDGE, ATTORNEY, DEFENDANT

No. COA07-802

(Filed 19 February 2008)

1. Attorneys— discipline—handling of client funds—intent to misappropriate

Substantial evidence in the whole record supported a DHC finding that an attorney had engaged in professional misconduct in his handling of the funds of a client with dementia. Although defendant argued otherwise, the record showed that defendant had the requisite intent to misappropriate the funds.

2. Attorneys— discipline—handling of client funds—failure to deliver funds to guardian

The DHC did not err by concluding that an attorney violated the Rules of professional Conduct in his handling of the funds

of a client suffering from dementia after a guardian was appointed. Defendant's conduct in failing to immediately deliver all of the client's funds to her guardian and requiring the guardian to sign a release shows an intent to hide the client's funds from the guardian.

3. Attorneys— discipline—transfer of property to himself—deceitful act

The evidence supported the DHC's findings and those finding supported conclusions that an attorney violated the Rules of Professional Conduct by placing tax stamps on a deed indicating an erroneous value for property he transferred from a client with dementia to himself. Although defendant's statements contradicted the State Bar's evidence, the DHC had the opportunity to observe defendant and judge his credibility. Moreover, even if defendant's statements are taken as true, he was still engaged in an inherently deceitful act.

4. Attorneys— discipline—consideration of remorse

Consideration of remorse as a mitigating factor for an attorney being disciplined was within the discretion of the DHC, which did not abuse its discretion in this case by not considering defendant's remorse.

5. Attorneys— discipline—weighing aggravating and mitigating factors

Even if an attorney had not abandoned his assignments of error concerning aggravating and mitigating factors, the record shows that those facts were weighed by the DHC and it cannot be said that its valuation of these factors was arbitrary.

6. Attorneys— discipline—disbarment—protection of public

The DHC did not err by concluding that disbarment of an attorney being disciplined was the only sanction that can adequately protect the public in a case that involved transferring money and property from a woman with dementia to the attorney. The DHC's conclusions had a rational basis in the evidence.

Judge Wynn concurs in result only.

Appeal by defendant from order by the Disciplinary Hearing Commission of the North Carolina State Bar entered 16 November 2006. Heard in the Court of Appeals 15 January 2008.

The North Carolina State Bar, by Counsel Katherine Jean and by Deputy Counsels A. Root Edmonson and David R. Johnson, for plaintiff-appellee.

Woodruff, Reece & Fortner, by Michael J. Reece, for defendant-appellant.

CALABRIA, Judge.

James B. Ethridge ("defendant") appeals the order of a panel of the Disciplinary Hearing Commission ("DHC") disbarring him from the practice of law. We affirm.

Defendant received a license to practice law in the State of North Carolina in 1973. In 2004, after practicing law for over thirty years in North Carolina, defendant was elected district court judge. On 16 August 2001, Rosalind W. Sweet ("Ms. Sweet") met with defendant in his law office in Smithfield, North Carolina for assistance to safeguard property she owned. At the time of this meeting, Ms. Sweet was 69 years old and was suffering from dementia. After the meeting, defendant prepared a deed describing Ms. Sweet's property as lot number eleven Old Mill Property ("Ms. Sweet's property" or "the property"). The grantor on the deed for the property was Ms. Sweet and defendant was the grantee. The next day, on 17 August 2001, defendant drove Ms. Sweet to the State Employees Credit Union, where Ms. Sweet maintained a savings account. Ms. Sweet withdrew $14,249.11 from her account and obtained a money order made payable to her in the amount of $14,249.11. Defendant and Ms. Sweet then took the money order to Four Oaks Bank where defendant opened a new, personal account in his name only with the account number ending 706 ("account No. 706"). After endorsing the money order, defendant deposited the entire proceeds into his new account.

Also on 17 August 2001, defendant recorded the deed in the Register of Deed's Office of Johnston County that transferred Ms. Sweet's property to defendant. He then attached $24 in revenue stamps to the deed. Defendant mistakenly believed that the $24 value of revenue stamps would reflect that a purchase price of $48,000 had been paid for the property. However, the $24 in revenue stamps represented on the public record only $12,000, not $48,000 of consideration for the property.

On 28 August 2001, Ms. Sweet was placed in a family care home. On 20 September 2001, defendant withdrew $750 from account No.

706. On 24 September 2001, defendant wrote a check payable to the Four Oaks Bank in the amount of $13,499.11, that was drawn on account No. 706, and opened another personal checking account at the Four Oaks Bank in his name only, with the account number ending in 606 ("account No. 606"). Defendant deposited the $13,499.11 into his personal account No. 606.

Between 24 September 2001 and 28 September 2001, defendant paid a contractor, Broderick Parrott ("Parrott"), $3,000 in cash from his personal funds as a deposit for repairs to the property. Specifically, Parrott replaced siding, windows, and doors on the property Ms. Sweet deeded to defendant. Between 24 September 2001 and 18 October 2001, defendant wrote three checks, drawn on account No. 606, to himself, his wife, and a third party. The sum of these three checks totaled $850.

On 2 October 2001, attorney Thomas S. Berkau ("Berkau") filed a petition, on behalf of Ms. Sweet's nephew, Roosevelt Williams, Jr. ("Williams"), to have Ms. Sweet adjudicated as incompetent because she suffered from dementia and Alzheimer's disease. On 18 October 2001, Ms. Sweet was adjudicated as incompetent and Williams was appointed as her general guardian.

On 30 October 2001, defendant went to Berkau's office. Berkau told defendant that he was the attorney for William, Ms. Sweet's general guardian. Defendant acknowledged to Berkau that Ms. Sweet had conveyed her real property to him and that she had withdrawn funds from her account with the State Employees Credit Union. Defendant agreed to return Ms. Sweet's property and Berkau told defendant he would send Williams to get Ms. Sweet's funds from defendant. On 31 October 2001, defendant reconveyed the property to Ms. Sweet, wrote a check payable to cash in the amount of $8,000, drawn on account No. 606, and deposited the check into his trust account.

On 16 November 2001, Williams went to defendant's office to retrieve Ms. Sweet's funds. Defendant wrote a check from his trust account in the amount of $8,000 and gave the check to Williams. On 21 December 2001, defendant wrote a check in the amount of $500 payable to cash from account No. 606. Later, on an undetermined date, prior to 2 January 2002, Parrott returned the $3,000 deposit to defendant that defendant previously gave him.

On 2 January 2002, Williams went to defendant's office demanding that defendant return the remainder of Ms. Sweet's money. De-

fendant subsequently wrote a check, from a personal account ending in number 364 ("account No. 364"), in the amount of $4,000 to Williams as guardian ad litem for Ms. Sweet. In addition, defendant prepared a written release for Williams' signature that "releases and discharges [defendant] from all claims, damages or money that maybe [sic] owed to [Ms. Sweet] arising out of a disputed amount of money that was given to [defendant] to hold for her." Williams signed the release and received the check.

On 17 January 2001, defendant wrote a check payable to cash, drawn on account No. 606, in the amount of $85. On 4 February 2002, defendant wrote a check to himself in the amount of $3,700 that was drawn on account No. 606, and on the same day deposited this check into his personal bank account No. 364. On 11 August 2003, defendant closed account No. 606 at the Four Oaks Bank by withdrawing the balance in the amount of $243.01.

On 17 May 2006, the State Bar filed a complaint with the DHC against defendant. The State Bar alleged defendant's conduct violated Rules 8.4, 1.17, and 1.15(a) of the Revised Rules of Professional Conduct. Based on the evidence presented above, the DHC concluded that defendant had violated each of the Rules of Professional Conduct the State Bar claimed. The DHC's conclusions of law were stated as follows:

a. by depositing the entrusted funds of Ms. Sweet into his own personal checking account, by writing checks from this account to himself and others, by taking cash from this account, and by failing to return portions of Ms. Sweet's funds to the rightful owner, Defendant misappropriated Ms. Sweet's funds that had been entrusted to him in a fiduciary capacity to his own use, and thus engaged in criminal acts reflecting on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 8.4(b), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) and prejudiced or damaged his client during the course of the professional relationship in violation of Rule 8.4(g).

b. by depositing the $14,249.11 of Ms. Sweet's funds into his own personal bank account, Defendant failed to maintain fiduciary funds separate from his property in violation of Rule 1.15-2(a) and failed to deposit funds belonging to another received by him as a lawyer in a trust or fiduciary account in violation of Rule 1.15-2(c);

c. by disbursing funds belonging to Ms. Sweet for the benefit of himself and third parties, Defendant used entrusted property for his own personal benefit and the benefit of other persons other than the legal or beneficial owner of the property in violation of Rule 1.15(j);

d. by preparing and recording a deed conveying Ms. Sweet's 11 Old Mill property to himself when it was never Ms. Sweet's intent for him to own the property, Defendant failed to maintain fiduciary property identified separately from the property of the lawyer in violation of Rule 1.15-2(a); engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d); prejudiced or damaged his client during the course of the professional relationship in violation of Rule 8.4(g); and engaged in a conflict of interest in violation of Rule 1.7(a)(2); and

e. by falsely representing on the public record that he had given Ms. Sweet $48,000 in consideration for the property she deeded to him on August 17, 2001, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

Based on its conclusions, and the evidence presented, the DHC ultimately concluded disbarment was the only appropriate sanction for defendant. From the order of discipline, defendant appeals.

On appeal, defendant argues (i) the DHC erred in finding that defendant had engaged in conduct that violated Rule 8.4(c), 8.4(d), and 8.4(g); (ii) the DHC erred in improperly weighing the aggravating and mitigating factors; and (iii) the DHC erred in concluding that disbarment rather than a lesser punishment is the only sanction that can adequately protect the public.

I. Standard of review

Our standard of review is "the whole record test, which requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law." *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 437, 632 S.E.2d 183, 187 (2006) (internal quotation marks omitted) (citations omitted). After reviewing the whole record, this Court "must determine whether the

DHC's decision has a rational basis in the evidence." *Id.* (internal quotation marks omitted) (citations omitted).

> [T]he following steps are necessary as a means to decide if a lower body's decision has a 'rational basis in the evidence': (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision? We note, too, that in cases such as the one at issue, e.g., those involving an 'adjudicatory phase' (Did the defendant commit the offense or misconduct?), and a 'dispositional phase' (What is the appropriate sanction for committing the offense or misconduct?), the whole-record test must be applied separately to each of the two phases.

N.C. State Bar v. Talford, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003).

II. Rule 8.4 of the North Carolina Rules of Professional Conduct

[1] We first address defendant's argument that the DHC erred in finding that defendant's conduct violated Rule 8.4 of the North Carolina Rules of Professional Conduct. Specifically, defendant contends that the DHC erred in concluding that defendant (i) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c), (ii) intentionally prejudiced or damaged his client during the course of the professional relationship in violation of Rule 8.4(g), and (iii) engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d). Defendant also contends the DHC erred in its finding of fact:

> 44. [Defendant's] handling of Ms. Sweet's funds subsequent to the initial transfer of August 17, 2001, and his own conflicting explanations relating to the handling of the funds, however, compel the hearing committee to find that *he had an intent to misappropriate* and did in fact misappropriate funds of Ms. Sweet by the time he wrote checks from entrusted funds to himself and others and took cash from the account containing Ms. Sweet's entrusted funds.

Defendant contends this finding was not supported by clear, cogent, and convincing evidence. We disagree.

"Adequate evidence in this circumstance is synonymous with substantial evidence, and evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept [it] as adequate to support a conclusion." *Leonard*, 178 N.C. App. at 438, 632 S.E.2d at 185 (alteration in original) (internal quotation marks omitted) (citations omitted). "The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310. However, the 'whole-record test' does not require this Court to reverse the DHC's decision for the mere existence of contradictory evidence in the record. *See Leonard*, 178 N.C. App. at 439, 632 S.E.2d at 187. Rather, "the whole record rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence." *Id.* (internal quotation marks omitted) (quoting *Elliott v. North Carolina Psychology Bd.*, 348 N.C. 230, 237, 498 S.E.2d 616, 620 (1998)).

In the instant case, defendant argues he lacked the intent to deceive or defraud Ms. Sweet; therefore, his lack of intent renders the DHC's finding that he had engaged in professional misconduct pursuant to Rule 8.4 erroneous.

The intent element for misappropriation is essentially the same as the crime of embezzlement. *See State v. Foust*, 114 N.C. 842, 843, 19 S.E. 275, 275 (1894) ("To embezzle may mean to 'appropriate to one's own use,' but it embraces also the meaning 'to misappropriate.' Indeed, 'to misappropriate' is given as a synonym of 'to embezzle' . . . ."); *State v. Ellis*, 33 N.C. App. 667, 672, 236 S.E.2d 299, 303 (1977). This Court previously determined the requisite intent element for the crime of embezzlement is:

> the intent to willfully or corruptly use or misapply the property of another for purposes other than for which the agent or fiduciary received it in the course of his employment. It is not necessary, however, that the State offer direct proof of fraudulent intent, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred.

State v. Pate, 40 N.C. App. 580, 583-84, 253 S.E.2d 266, 269 (1979). In addition, a person who deposits funds into a personal account knowing that the money belongs to others is sufficient evidence to show embezzlement. *See generally State v. Melvin*, 86 N.C. App. 291,

298-99, 357 S.E.2d 379, 384 (1987) (where defendant knowingly deposited a check from the Veteran's Administration into his personal account was sufficient evidence to show embezzlement).

The State Bar presented the following evidence: On 16 August 2001, Ms. Sweet met with defendant in his law office to seek his advice and assistance in safeguarding her property from her relatives. At the time of the meeting, Ms. Sweet was 69 years old and suffered from dementia. On 28 August 2001, Ms. Sweet was placed in a family care home.

On 20 September 2001, defendant withdrew $750 from account No. 706 by check number 526 payable to cash. Defendant testified that he gave Ms. Sweet $350 of the cash from check number 526 when he visited her at the family care home. However, there is no evidence in the record to show Ms. Sweet ever received the $350. Defendant testified he paid Glenwood Carter $75 for lawn maintenance for Ms. Sweet's residence. Defendant then testified that he kept the remaining $325 as a partial reimbursement for the $3,000 deposit he had given to Parrott for repairs to be completed on Ms. Sweet's residence. However, both defendant and Parrott testified that Parrott later returned the $3,000 deposit to defendant. This was the same amount of money that defendant had previously given Parrott.

On 24 September 2001, defendant closed account No. 706 at the Four Oaks Bank. Defendant said the reason he initially closed the account was to open a new trust account and place the funds into the trust account. He then changed his mind and opened up a second personal account, No. 606, in his name only. He deposited the entire balance of $13,499.11 from the previous account No. 706 into account No. 606 at the Four Oaks Bank. Defendant then wrote three checks, totaling $850, that were drawn on account No. 606 to himself, his wife, and a third party. There is no evidence in the record to show any of these checks benefitted Ms. Sweet. Defendant testified that these three checks totaling $850 were intended as a partial reimbursement for the $3,000 he previously had paid to Parrott. However, assuming arguendo, defendant's testimony is true, his statements do not explain why he wrote a check to a third party that was drawn on his personal account which contained Ms. Sweet's funds if he was seeking partial reimbursement. Furthermore, as we noted earlier, Parrott testified he returned the $3,000 to defendant. There is no evidence in the record that defendant reimbursed either Ms. Sweet or Williams the funds previously taken from his personal

account containing Ms. Sweet's funds as a "partial reimbursement" for the deposit he gave Parrott.

Therefore, we find this evidence shows defendant had the intent to "willfully or corruptly use or misapply the property of another for purposes other than for which the agent or fiduciary received it in the course of his employment." *Pate*, 40 N.C. App. at 584, 253 S.E.2d at 269. Since we find defendant possessed the requisite intent to misappropriate Ms. Sweet's funds, we therefore hold DHC's finding of fact #44 is supported by substantial evidence in the whole record.

[2] Defendant argues that the DHC erred in concluding he violated Rule 8.4(c), 8.4(d), and 8.4(g). Rule 8.4 of the Rules of Professional Conduct states in relevant part:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> c. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> d. engage in conduct that is prejudicial to the administration of justice;
>
> . . . .
>
> g. intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3

N.C. Rev. R. Prof. Conduct 8.4 (2006).

In the instant case, Berkau said that when defendant came to his office on 30 October 2001, defendant told him that after he cashed Ms. Sweet's money order, he gave her $7,000 in cash and placed the remaining amount in an account until Ms. Sweet or her family could decide what to do with the money. Berkau also testified defendant later told Berkau that "if the $7,000 could not be found and [Williams] was insistent on all the money being returned, [defendant] would have to make arrangements to borrow the rest of the money to pay back the full $14,249.11." This statement implies defendant never gave Ms. Sweet the $7,000 since he apparently anticipated that the money would not be missed. Moreover, aside from defendant asserting he gave Ms. Sweet $7,000, there is no evidence in the record to show that he did, in fact, give Ms. Sweet her funds after he cashed the

money order. However, defendant testified that he never gave Ms. Sweet $7,000 in cash.

On 30 October 2001, defendant transferred $8,000 from his personal account No. 606 to his trust account. This was the account that held Ms. Sweet's funds. After this transfer, defendant still retained a balance of $4,633.36 of Ms. Sweet's funds in his personal account No. 606. Defendant then wrote a check for $8,000 drawn on his trust account and gave it to Williams. After receiving the check for $8,000, Williams continued to call defendant's office because he believed defendant had not given him all of Ms. Sweet's money. On 2 January 2002, defendant paid $4,000 to Williams. Defendant contends he did not give Williams the entire balance of Ms. Sweet's funds because he had promised Ms. Sweet that he would hold her money for her because she told him not to allow her relatives to have all her money. Defendant required Williams to sign a handwritten release that asserted there was a "disputed" claim for the funds, but that Williams discharges defendant "from all claims, damages or money maybe [sic] owed to [defendant]."

However, the record shows defendant owed more than $4,000 to Williams. After defendant gave Williams the check for $4,000, defendant had paid Williams a total amount of $12,000. However, defendant initially received a money order from Ms. Sweet that totaled $14,249.11. Thus, after 2 January 2002, defendant still owed Williams $2,249.11. Yet, although defendant still owed Williams money, defendant required Williams to sign a release discharging defendant from any liability.

Moreover, the record shows defendant used Ms. Sweet's funds in account No. 606 for purposes other than for Ms. Sweet's benefit. The 27 November 2001 bank statement for account No. 606 revealed a balance of $4,633.36. On 21 December 2001, defendant wrote a check for $200 that was drawn on account No. 606. The 26 December 2001 bank statement for account No. 606 showed a balance of $4,133.36, with $500 of debits. There is no evidence in the record to show the $500 worth of debits was used to benefit Ms. Sweet. On 17 January 2001, defendant wrote a check for $85 that was drawn on account No. 606. The 25 January 2002 bank statement revealed a balance of $4,048.36 in account No. 606. On 31 January 2002, defendant wrote a check to himself for $3,700 that was drawn on account No. 606. The 26 February 2002 bank statement for account No. 606 showed a balance of $348.36. Between February 2002 and July 2003, Four Oaks Bank removed monthly service charges from account No. 606. On 11 Au-

gust 2003, defendant closed his personal account No. 606 by withdrawing the balance of $243.01. Thus, the record reveals defendant used his client's own funds for purposes other than her benefit.

Defendant contends Ms. Sweet wanted him to hold her funds for her in order that her relatives, particularly Williams, could not steal her money. Defendant argues that as soon as Williams was appointed as guardian for Ms. Sweet, he began to take Ms. Sweet's money for his own benefit, and not for the benefit of Ms. Sweet. Defendant's argument is without merit. Pursuant to N.C. Gen. Stat. § 35A-1241 (2006), once a guardian has been appointed, the guardian has various powers and duties including making provisions for the incompetent person's "care, comfort, and maintenance." While the guardian has statutory powers, the guardian is supervised by the clerk of the superior court. *In re Caddell*, 140 N.C. App. 767, 769, 538 S.E.2d 626, 627-28 (2000) ("The Clerk of Superior Court has original jurisdiction over matters involving the management by a guardian of her ward's estate."). Furthermore, if Williams failed to use Ms. Sweet's money for her benefit, he would be held liable for any loss Ms. Sweet incurred as a result of Williams' actions. *See generally Kuykendall v. Proctor*, 270 N.C. 510, 155 S.E.2d 293 (1967) (a guardian is liable to the ward's estate for any loss incurred as a result of the guardian's failure to act in due diligence).

Thus, assuming arguendo, defendant's statements are true, defendant could have and should have requested a hearing with the clerk of the superior court to hold Williams liable for misusing Ms. Sweet's funds. Defendant's conduct in failing to immediately deliver all of Ms. Sweet's funds to her guardian and requiring her guardian to sign a release before giving him Ms. Sweet's funds shows defendant's intent to hide Ms. Sweet's funds from the guardian.

[3] Regarding Ms. Sweet's deed, defendant contends that he mistakenly placed stamps on the deed that he thought showed a value of $48,000 instead of the actual value in the amount of $12,000. However, on 12 September 2001, defendant called Wendy Whitfield ("Ms. Whitfield"), a Johnston County social worker, to inform her of his intent to safeguard Ms. Sweet's property since she had been placed in a family care home. Ms. Whitfield's written notes of the telephone conversation state in relevant part:

> [Defendant stated] that he want[ed] to know what was happening with [Ms. Sweet] because the property that she use to live on was deeded to him. . . . He [stated] that property was deeded on

> 8/17/01 and that [Ms. Sweet] decided to do this because she owed him for past representation. . . . [Defendant stated] that he just wanted to know if [Ms. Sweet] was going to return home so that he could do something with her things such as putting them into storage. [Social worker] inquired if it was an option for [Ms. Sweet] to return home. [Defendant stated] that he felt like [Ms. Sweet] was where she needed to be and that he does not think he would allow her to return to the home.

Defendant avers that although he mistakenly placed an incorrect number of stamps on the deed, he did not engage in conduct involving dishonesty, deceit, fraud or misrepresentation in violation of Rule 8.4(c) and 8.4(d). Defendant contends it was Ms. Sweet's idea to hide the nature of the transaction from her family by placing the revenue stamps on the deed. If we take defendant's statements as true, defendant is still admitting that he engaged in an inherently deceitful act.

While defendant's statements contradict the State Bar's evidence, this evidence does not support reversal. We note the role of an administrative agency:

> it is the prerogative and duty of that administrative body, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness.

Woodlief v. North Carolina State Bd. of Dental Examiners, 104 N.C. App. 52, 57-58, 407 S.E.2d 596, 599-600 (1991) (internal quotation marks omitted) (citation omitted).

Thus, the DHC had the opportunity to observe defendant and judge his credibility and "the probative value" of his testimony. *Id.* As such, we find the DHC's findings of fact are supported by adequate evidence and those findings support the DHC's conclusions of law that defendant violated Rule 8.4(c), 8.4(d), and 8.4(g). These assignments of error are overruled.

III. Aggravating and Mitigating Factors

[4] Defendant next argues that although he presented substantial evidence of his remorse, the DHC erred in failing to consider defendant's

remorse as a mitigating factor, and improperly weighed the aggravating and mitigating factors. We disagree.

During a disciplinary hearing, the DHC considers the following evidence:

> (w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction *and any evidence in aggravation or mitigation of the offense.*
>
> . . . .
>
> (2) The hearing committee *may* consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:
>
> (A) absence of a prior disciplinary record;
>
> (B) absence of a dishonest or selfish motive;
>
> (C) personal or emotional problems;
>
> (D) timely good faith efforts to make restitution or to rectify consequences of misconduct;
>
> (E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;
>
> (F) inexperience in the practice of law;
>
> (G) character or reputation;
>
> (H) physical or mental disability or impairment;
>
> (I) delay in disciplinary proceedings through no fault of the defendant attorney;
>
> (J) interim rehabilitation;
>
> (K) imposition of other penalties or sanctions;
>
> (L) remorse;
>
> (M) remoteness of prior offenses.

N.C. Admin. Code tit. 27, r. 1B.0114(w) (August 2006) (emphasis added).

In reviewing the DHC's consideration of mitigating and aggravating factors prior to imposing discipline, our standard of review is abuse of discretion. *Leonard*, 178 N.C. App. at 444, 632 S.E.2d at 191. "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

In the instant case, defendant argues that pursuant to N.C. Admin. Code tit. 27, rule 1B.0114(w), the DHC was required to "consider any evidence relevant to the discipline imposed." Therefore, because the evidence was clear defendant deeply regretted how he handled Ms. Sweet's property and finances, the DHC should have considered his remorse as a mitigating factor. Defendant's interpretation of the administrative code is mistaken. Section 1B.0114(w) of the Code states that the DHC "will consider any evidence relevant to the discipline imposed" and included in this evidence is "any evidence in aggravation or mitigation of the offense." However, N.C. Admin. Code tit. 27, r. 1B.0114(w)(2) states, "[t]he hearing committee *may* consider mitigating factors in imposing discipline[.]" Therefore, it is in the discretion of the DHC whether to consider the mitigating factor of remorse before imposing discipline.

Because it was in the DHC's discretion whether to consider the mitigating factor of remorse, the DHC was not required to consider defendant's remorse. Thus, we cannot say the DHC abused its discretion in not considering defendant's remorse before imposing discipline.

[5] Defendant also contends the DHC erred in failing to properly weigh the aggravating and mitigating factors. The DHC found the following aggravating and mitigating factors:

1. [Defendant's] misconduct is aggravated by the following factors:
   (a) A dishonest or selfish motive; and
   (b) Substantial experience in the practice of law.
2. [Defendant's] misconduct is mitigated by the following factors:
   (a) Absence of a prior disciplinary record;
   (b) Good character and reputation; and
   (c) Delay in the disciplinary proceedings not attributable to him.

Defendant avers that although the DHC found "substantial experience in the practice of law," as an aggravating factor, defendant's substantial experience in the practice of law was not in the area of trusts and estates but rather, criminal law. Defendant contends that the DHC should have assigned greater weight to defendant's lack of a previous disciplinary record. In addition, defendant argues the DHC should have given more weight to the fact that there was a delay in the disciplinary proceedings not attributable to him.

We first note that defendant fails to cite any authority for his assignments of error regarding DHC's failure to properly weigh the aggravating and mitigating factors. As such, these assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Moreover, even if defendant did not abandon these assignments of error, we cannot say that the DHC improperly weighed the aggravating and mitigating factors. The record shows the DHC weighed mitigating and aggravating factors. We cannot say that the DHC's valuation of the aggravating and mitigating factors was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Group Int'l*, 151 N.C. App. at 566, 566 S.E.2d at 161. Therefore, these assignments of error are overruled.

IV. Sanctions

[6] Defendant lastly argues the DHC erred in concluding disbarment, rather than a lesser punishment, is the only sanction that can adequately protect the public.

Regarding the punishment of disbarment, our Supreme Court has held:

> in order to merit the imposition of 'suspension' or 'disbarment,' there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to the entities listed in the statute, and there must be a clear showing of why 'suspension' and 'disbarment' are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question.

Talford, 356 N.C. at 638, 576 S.E.2d at 313.

Defendant contends that the DHC's conclusions of law that defendant's actions "caused significant harm to his client," and "[de-

fendant's] violation of his duty to preserve his clients' entrusted funds caused significant harm to the legal profession" are not supported by any evidence in the record. Defendant contends there is no evidence that Ms. Sweet was harmed. Defendant avers Ms. Sweet ultimately received all of her money and without significant harm to her, there can be no significant harm to the legal profession.

We disagree with defendant's arguments that Ms. Sweet was not harmed and ultimately received all her money. First, there is conflicting evidence in the record that Ms. Sweet did, in fact, receive all her money. As stated earlier, on 16 November 2001, defendant gave Williams a check for $8,000. On 2 January 2002, defendant gave Williams a check for $4,000 and required Williams to sign a release and a receipt for receiving all the funds. On 17 August 2001, the initial deposit into defendant's personal account No. 706 was $14,249.11. However, on 2 January 2002, the total amount of money Williams had received from defendant was $12,000. Thus, defendant still owed Williams a balance of $2,249.11.

Defendant said he did not give Williams the $2,249.11 because Ms. Sweet did not want him and other relatives to have the money. However, once Williams was appointed as Ms. Sweet's guardian, defendant was not able to decide whether he should give the money to Williams or abide by Ms. Sweet's wish. *See generally* N.C. Gen. Stat. § 35A-1241. Defendant testified he placed the remaining cash balance of $2,249.11 in a sealed envelope that he gave to Rev. Johnny B. Woodhouse ("Rev. Woodhouse"). Rev. Woodhouse testified he put the envelope in a safe deposit box and it remained there from January 2002 until January 2006. Defendant said he received the $2,249.11 from Parrott, who returned the $3,000 he had received as a deposit for work on Ms. Sweet's residence. However, on 20 September 2006, defendant met with Berkau at the clerk of court's office to give Berkau the remaining $2,249.11 of Ms. Sweet's funds. Defendant gave Berkau an envelope containing $2,250 in cash consisting of twenty dollar bills. Defendant testified that this was the same money that Parrott had paid him in late 2001. Defendant's testimony conflicts with Parrott's testimony. Parrott testified he returned the money to defendant in one hundred dollar bills in cash. Moreover, there is no evidence in the record to show defendant paid either Ms. Sweet or her guardian the funds he kept as "partial reimbursement" for the deposit he paid to Parrott after Parrott returned the deposit. Thus, we conclude that defendant kept some of Ms. Sweet's funds, and as such, defendant's conduct did harm Ms. Sweet.

In addition, aside from the fact defendant did not return all of Ms. Sweet's or her guardian's funds, defendant's conduct further harmed Ms. Sweet. Between January 2002 and January 2006, Ms. Sweet's funds totaling $2,249.11 simply remained in Rev. Woodhouse's safe deposit box. Defendant did not invest the funds on behalf of Ms. Sweet. Furthermore, between January 2002 and January 2006, the $2,249.11 balance of Ms. Sweet's funds were not used for Ms. Sweet's benefit. Berkau testified the funds were needed to support Ms. Sweet in her assisted living status.

Therefore, based upon our review of the evidence, findings, and conclusions, we hold the DHC's conclusions of law declaring defendant's conduct posed significant harm to his client and the legal profession has a rational basis in the evidence. These assignments of error are overruled.

V. Conclusion

After reviewing the DHC's order under the whole-record standard of review, we find adequate and substantial evidence supporting the DHC's findings and those findings support its conclusions that defendant violated Rule 8.4(c), (d), and (g) of the Rules of Professional Conduct. We determine that the DHC properly weighed the mitigating and aggravating factors before imposing discipline. We further find that the DHC's findings and conclusions support its ultimate decision to disbar defendant.

Affirmed.

Judge McGEE concurs.

Judge WYNN concurs in the result only.

BLUEBIRD CORPORATION AND ANTHONY A. SUSI, PLAINTIFFS v. LOIS A. AUBIN, DEFENDANT

No. COA07-282

(Filed 19 February 2008)

1. Conflict of Laws— relitigation of claim—procedural rights—law of the forum

North Carolina law applied in an action concerning operation of a commercial property business in North Carolina and New York because North Carolina is the forum state. The North Carolina conflict of laws rule is that procedural rights are determined by the law of the forum, and whether a claim is being relitigated is a procedural issue.

2. Collateral Estoppel and Res Judicata— counterclaims—no final judgment in prior action

Plaintiff did not establish collateral estoppel or res judicata concerning counterclaims in an action arising from a commercial property business in North Carolina and New York. There was not a final judgment on the merits for those counterclaims in the prior N.Y. action.

3. Constitutional Law— Full Faith and Credit Clause—counterclaims not addressed in New York

The Full Faith and Credit clause of the U.S. Constitution did not arise from a North Carolina court addressing counterclaims for breach of fiduciary duty and constructive fraud after a New York court order approved the sale of New York properties owned by plaintiff corporation. The New York court did not dispose of those counterclaims.

4. Conflict of Laws— internal affairs doctrine—correct application of N.Y. law

There was no merit to plaintiff Susi's argument that the internal affairs doctrine rendered North Carolina courts devoid of jurisdiction to render a decision in an action arising from a New York corporation which had a property business in North Carolina and New York. The internal affairs doctrine is a conflict of laws issue; conflict of laws did not arise here because the North Carolina court plainly and correctly used New York law to render its judgment.

5. Corporations— fiduciary duties—not addressed in prior action

A North Carolina trial court did not err in an action arising from a commercial property business in New York and North Carolina by addressing the conduct of plaintiff Susi in the sale of New York properties and awarding damages. A New York court had approved the sale of the New York properties, but did not address the conduct which defendant claims depreciated the properties.

6. Evidence— discrepancies—two separate actions—credibility rather than admissibility

The trial court did not abuse its discretion by admitting defendant's testimony about the value of corporate property in New York which had been sold in a dispute between the corporation's two shareholders. Defendant had given a deposition in an earlier New York action which arrived at a different conclusion about those values and included different properties, but she was contending that plaintiff Susi had deliberately suppressed the value of the properties, accounting for the change in value, and the New York action involved the sale of specific properties while the North Carolina addressed an alleged breach of fiduciary duty to the corporation and constructive fraud.

7. Corporations— breach of fiduciary duty by officer—no assignment of error to findings

Based on the unchallenged findings, the trial court did not err by determining in a dispute between the two shareholders of a commercial property company that defendant had not breached her fiduciary duty by refusing to reveal the identity of a prospective buyer or by refusing to attend board meetings. Plaintiff did not assign error to the trial court's conclusion as to the lack of evidence of damage to the corporation, or to the finding that defendant's absence was excusable under the circumstances.

Appeal by plaintiff Anthony A. Susi from judgment entered 7 December 2006 by Judge Larry G. Ford in Superior Court, Davidson County. Heard in the Court of Appeals 18 September 2007.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. by Reid L. Phillips and Andrew J. Haile for plaintiff-appellant Anthony A. Susi.

Brinkley Walser, PLLC by G. Thompson Miller for defendant-appellee Lois A. Aubin.

STROUD, Judge.

Plaintiff Susi and defendant Aubin are each fifty percent shareholders in Bluebird Corporation. Bluebird Corporation and Susi sued Aubin for breach of fiduciary duty, constructive fraud, and breach of contract. Aubin counterclaimed for breach of fiduciary duty, constructive fraud, and requested a declaratory judgment to determine whether certain loans were the lawful obligations of Bluebird Corporation. The trial court ordered, *inter alia*, all Susi's claims against Aubin dismissed with prejudice and that Bluebird Corporation should recover $1,175,000.00 from Susi for his breach of fiduciary duty. Susi appeals. For the following reasons, we affirm.

I. Background

The parties involved in this action have had a contentious and litigious relationship over the past decade. Recitation of the entire history of the parties' previous and current lawsuits in both North Carolina and New York is not necessary to the determination of this action, and thus only the relevant facts are summarized below:

> [Aubin] and Susi are each fifty percent shareholders of Bluebird [Corporation], a New York corporation formed in 1997 to purchase and sell commercial property. *[Aubin] and Susi had a written agreement whereby Susi would loan money to Bluebird to acquire or improve property, and [Aubin] would assist in day to day business operations, including the marketing of Bluebird properties.* [Aubin] alleged that in January 1998, she discovered the Harborgate development as a potential property for Bluebird to acquire. Both [Aubin] and Susi visited the property, and negotiations for Bluebird's purchase of Harborgate commenced. In July 1998, Bluebird purchased four lots in Harborgate, and retained an option to purchase the remaining lots.
>
> . . . .
>
> A closing for the purchase of Harborgate was set for 15 January 1999. [Aubin] alleged that when she arrived at the clos-

> ing, Susi and Bluebird's attorney explained to her that they were going to close the property through a new North Carolina corporation, The Susi Corporation, which had been formed at the last minute. They explained that Bluebird would execute the purchase agreement, which would then be assigned to The Susi Corporation. [Aubin] did not object, although there was no discussion as to what the distribution of shares would be in the new corporation. [Aubin] assumed The Susi Corporation would either be owned by Bluebird, or that she and Susi would be fifty-fifty owners of The Susi Corporation. Susi advanced the entire purchase price for acquisition of Harborgate.
>
> In reality, [Aubin] had no interest in The Susi Corporation, and thus, no interest in Harborgate. [Aubin] alleged she did not discover that Susi was the sole owner of The Susi Corporation until 1 March 1999. According to [Aubin], Susi never mentioned before the day of closing that Harborgate would be purchased by a North Carolina corporation, and Susi never told her she was not a fifty percent share[]holder in The Susi Corporation. Susi refused [Aubin's] demand to immediately give her a fifty percent ownership interest in The Susi Corporation.

Aubin v. Susi, 149 N.C. App. 320, 321-22, 560 S.E.2d 875, 877, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002) (emphasis added).

On 19 March 1999, Aubin brought an action in North Carolina against Susi, New Harborgate Corporation, and Bluebird Corporation ("Bluebird"). *Id.* at 322, 560 S.E.2d at 877. Aubin's amended complaint "alleged claims of conversion, constructive fraud, usurpation of corporate opportunity, fraud, unfair and deceptive practices, and breach of contract.[1] [Aubin's] amended complaint averred that she was filing the suit both in an individual capacity and derivatively in her capacity as a shareholder of Bluebird." *Id.* at 322-23, 560 S.E.2d at 878.

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1. At various times throughout the history of this lawsuit and the parties' other lawsuits, both Susi and Aubin have alleged that the other has breached their "agreement" or "contract." The law of the case, based upon this Court's last opinion arising from this dispute, is that "[Aubin] and Susi had a written agreement whereby Susi would loan money to Bluebird to acquire or improve property, and [Aubin] would assist in day to day business operations, including the marketing of Bluebird properties." *See Aubin* at 321, 560 S.E.2d at 877. Both Susi and Aubin allege that they did enter a "Shareholder's Agreement" with these terms, though there are also allegations of oral modifications. However, when we use the term "contract" or "agreement," we are referring to the "Shareholder's Agreement" as recognized by this Court in our prior opinion. *See Aubin v. Susi*, 149 N.C. App. 320, 560 S.E.2d 875 (2002).

In May 2000, before trial had begun, Susi transferred the Harborgate property to Bluebird. *Id.* at 323, 560 S.E.2d at 878. As a result of the transfer Aubin abandoned most of her derivative claims. *Id.* The trial court, *inter alia*, granted a directed verdict in favor of defendants. *Id.* Aubin appealed. *Id.* Among other things this Court determined that "[Aubin] . . . ha[d] failed to show that any damage which she ha[d] sustained as a result of Susi's actions [were] different from that sustained by Bluebird, and therefore, [Aubin] [did] not have standing to maintain a direct action against defendants for individual recovery." *Id.* at 324, 560 S.E.2d at 878.

Concurrent with the North Carolina litigation described above, on or about 7 October 1999, in New York, Susi initiated an action against Aubin, Red Aves Corporation ("Red Aves"), and Bluebird. On or about 10 November 1999, Aubin, Red Aves, and Bluebird counterclaimed for breach of agreement because Susi had failed "to sign checks for payment of invoices associated with the repair, maintenance and administrative costs of the properties[;]" and these actions put the New York properties[2] into jeopardy. The New York litigation resulted in several intermediary procedural decisions. Both parties stipulated to the appointment of a receiver. At the conclusion of the New York litigation on the trial level, the New York court had addressed Susi's claims and approved the sale of certain New York properties owned by Bluebird. However, no judgment, order, stipulation, or other document prior to this case and presently in the record before us explicitly addressed and disposed of Aubin's New York counterclaim against Susi for breach of agreement.

On 30 August 2004, at the time of the filing of this action, the Harborgate property was subject to a consent judgment, modified consent judgment, and order (collectively hereinafter referred to as "Homeowners' Judgment") from North Carolina. Bluebird and Susi have also been sued in North Carolina for damages for failing to meet the requirements of the Harborgate Homeowners' Judgment.

In the present case, Susi alleged in his 26 January 2006 verified amended complaint the following: "Bluebird has not been able to timely fulfill all of the obligations set out in the Homeowners' Judgment because it has not had sufficient funds to do so. Bluebird has been unable to meet its current financial obligations to creditors."

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2. Bluebird owned several commercial properties in New York, including a warehouse, residential lots, a restaurant, and an office building. We will refer to these properties collectively as the "New York properties".

On 23 August 2004, an attorney in a separate action announced in open court that Aubin had received an offer to purchase Harborgate.

On or about 24 August 2004, Aubin's counsel contacted Susi and Bluebird's counsel to report that Aubin had secured an offer to purchase Harborgate for $5 million, plus $800,000.00 to meet the requirements of the Homeowners' Judgment. Aubin's counsel also stated that Aubin would not reveal the identity of the party making the offer or "pursue delivery of a proposed contract of sale" unless Susi first agreed to pay her $1 million from the sale. Susi declined Aubin's proposal and offered that upon payment of Bluebird's debts the remaining amount would be split between them evenly. Susi and Aubin failed to reach any agreement.

Bluebird and Susi claimed that Aubin had breached her fiduciary duty, committed constructive fraud, and breached her contract. Bluebird and Susi also brought an alternative derivative claim. Bluebird and Susi requested that the trial court, *inter alia*, issue a temporary restraining order and a preliminary injunction against Aubin to prevent her from breaching her fiduciary duties and remove her as a director of Bluebird.

In her answer and counterclaim Aubin claimed that when she found out that Susi was the sole shareholder of the Susi Corporation, she requested that he transfer fifty percent of the stock to her. When Aubin said that she would obtain legal counsel to pursue her rights in the Harborgate property, Susi "threatened that if she did, everything would come to a screeching halt, he would foreclose on all his demand notes on the New York properties, and he would dry her up." Aubin claims Susi "set out on a course of conduct with the specific intent to depreciate the value of the New York properties. He caused the New York properties to be placed into receivership and sold. He then purchased those properties at a price substantially less than they were worth."[3] Aubin and Susi had an oral agreement whereby she would receive a $5,000.00 draw against her share of future profits. Susi cut off Aubin's draw which forced her to seek other employment. When Susi did finally transfer the Harborgate property to Bluebird, he had wrongfully placed a $926,000.00 deed of trust in his own favor on the Harborgate property. On these alleged facts, Aubin

3. On 20 March 2002, after the New York court approved a purchase price for the New York properties of $450,000.00, the receiver's deed was recorded which named the grantees as Earl Fitzhugh and Marianne S. McGonagle, who were trustees of the Watertown Properties Trust. Susi is the sole beneficiary of the Watertown Properties Trust.

counterclaimed against Susi in the present case as a derivative action for, *inter alia*, breach of fiduciary duty, constructive fraud, dissolution and appointment of receiver.

The North Carolina trial court ordered, *inter alia*, that all claims against Aubin be dismissed with prejudice and that Bluebird recover $1,175,000.00 from Susi for his breach of fiduciary duty and constructive fraud. Susi appeals. Susi presents four questions before this Court: (1) Whether the North Carolina trial court erred in "overturning" the decision of a New York court which approved the sale of New York properties owned by Bluebird Corporation when the issues raised by Aubin at trial in North Carolina in reference to that sale were barred from reconsideration in North Carolina by collateral estoppel, *res judicata*, the Full Faith and Credit Clause, and the internal affairs doctrine; (2) whether the North Carolina trial court erred in finding Susi liable to Bluebird when the sale of New York properties was determined to be fair to Bluebird and was approved by a New York court; (3) whether the North Carolina trial court erred in awarding damages based on the sale of the New York properties when Aubin presented no admissible evidence as to a different value for the New York properties; and (4) whether the North Carolina trial court erred in finding that Aubin did not breach her fiduciary duty to Bluebird Corporation.

II. Reconsideration of Approved Sale

[1] Susi assigns error to the trial court "overturning" the New York court's decision which approved the sale of New York properties owned by Bluebird because reconsideration of the sale was barred by collateral estoppel, *res judicata*, the Full Faith and Credit Clause, and the internal affairs doctrine. We disagree.

We must first address which state's law should be applied to determine whether the North Carolina trial court improperly reconsidered the New York court's decision. "A trial court's application of North Carolina's conflict of law rules is a legal conclusion which this Court reviews under a *de novo* standard." *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 579 (2004).

North Carolina's "traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by . . . the law of the situs of the claim, and remedial or procedural rights are determined by . . . the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). A substantial right 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 [person] is entitled to have preserved and protected by law: a material right." *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (internal quotations omitted). Whether a claim or issue is being relitigated is a procedural issue and is not "a legal right affecting or involving a matter of substance[,]" *see id*, and thus North Carolina law applies to procedural issues as it is the forum state. *See Boudreau* at 335, 368 S.E.2d at 853-54; *Oestreicher* at 130, 225 S.E.2d at 805.

A. Collateral Estoppel

[2] Whether a North Carolina court is barred from hearing a specific claim or issue is a question of law unrelated to any specific facts of a case. Questions of law are reviewed *de novo*. *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 9-10, 647 S.E.2d 651, 657, *disc. rev. denied*, 361 N.C. 692, ––– S.E.2d ––– (2007).

> The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.

McDonald v. Skeen, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. rev. denied*, 356 N.C. 437, 571 S.E.2d 222 (2002) (citing *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986)). The burden of establishing that a claim is barred by collateral estoppel is on the party relying upon the doctrine. *See Morris v. Moore*, 186 N.C. App. 431, 435-36, 651 S.E.2d 594, 598 (2007).

In the present case Susi failed to establish the requisite elements required for a valid defense of collateral estoppel. Susi contends that the New York decision which approved the sale of New York properties owned by Bluebird effectively disposed of Aubin's counterclaims in that lawsuit, which he argues are identical to her counterclaims in the present case. Although the record before us does not contain all of the documents from the New York litigation, it does contain many of them, presumably those counsel deemed necessary for the Court's understanding of this issue. However, upon careful review of the orders entered in the New York litigation, we find no indication of "a final judgment on the merits" of the issues in Aubin's New York

counterclaims, which would demonstrate that Aubin's issues were "actually litigated and necessary to the judgment" or that "the issue was actually determined." *See McDonald* at 230, 567 S.E.2d at 211. In fact, the only place Aubin's New York counterclaims are ever mentioned within the record before us is in her answer to the New York complaint.

It is possible that Aubin failed to prosecute her counterclaim in New York or that the New York court simply failed to mention that by approving the sale of the New York properties it was implicitly denying Aubin's claims as to improper conduct on the part of Susi. However, this sort of speculation as to what may have or could have happened in the New York litigation is not sufficient for us to conclude that the elements of collateral estoppel have been established. Based upon the record before us, Susi has failed to demonstrate that Aubin's claims are collaterally estopped by the New York orders.

B. *Res Judicata*

Res judicata is also a procedural question of law to be reviewed *de novo* pursuant to North Carolina law. *See Stetser* at 14, 598 S.E.2d at 579; *Boudreau at* 335, 368 S.E.2d at 853-54; *see also Oestreicher* at 130, 225 S.E.2d at 805. "The essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. rev. denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). As with collateral estoppel, the burden of establishing *res judicata* is on the party relying upon the doctrine. *See Beall v. Beall*, 156 N.C. App. 542, 545, 577 S.E.2d 356, 359 (2003). However, just as we determined in our collateral estoppel analysis, the record contains no final judgment on the merits as to Aubin's counterclaim in New York. Therefore, we conclude Susi has failed to establish the elements of *res judicata*.

C. Full Faith and Credit Clause

[3] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. "[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Nat. Assur. v. N.C. Life & ACC, Etc.*, 455 U.S. 691, 704, 71 L. Ed. 2d 558, 570 (1982) (citation and internal quotations omitted).

The record in this case includes an order issued by New York Supreme Court Justice Hugh A. Gilbert on 15 February 2002. Judge Gilbert

> [o]rdered that the Plaintiff's Motion for approval of the purchase offer of all assets of Bluebird Corporation and Red Aves Corporation located in New York State [be] granted; and . . . further
>
> [o]rdered that the Receivership established by Order of the Honorable Hugh A. Gilbert dated January 14, 2000 and modified by Stipulation and Order entered with the Jefferson County Clerk on April 19, 2000 be further modified to authorize the Receiver, Joseph Rizzo to execute such documents as are required, including a Receiver's Deed, to effect the sale of the property described at Schedule "A" to the Order filed with the Jefferson County Clerk's Office on February 1, 2000 as described in the Motion.

Though we agree with Susi's contention that this New York order approves the sale of New York properties, we do not agree that the North Carolina trial court has "overturned" this order by addressing Aubin's counterclaims of breach of fiduciary duty and constructive fraud and awarding Bluebird damages pursuant to those findings. The New York court approved the sale of New York properties, but did not dispose of or address Aubin's counterclaims. As we have no indication in the record that the North Carolina trial court addressed a claim which was previously addressed by the New York court, Susi's argument as to violation of the Full Faith and Credit Clause is without merit.

D. Internal Affairs Doctrine

[4] The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Edgar v. MITE Corp. 457 U.S. 624, 645, 73 L. Ed. 2d 269, 285 (1982). "States normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care." *Atherton v. F.D.I.C.*, 519 U.S. 213, 224, 136 L. Ed. 2d 656, 668 (1997).

A rule of law similar to the internal affairs doctrine can be found at North Carolina General Statute § 55-7-47 which provides that

> [i]n any derivative proceeding in the right of a foreign corporation, the matters covered by this Part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for the matters governed by G.S. 55-7-43, 55-7-45, and 55-7-46.

N.C. Gen. Stat. § 55-7-47 (2003). Accordingly, the trial court applied New York law in its judgment.

Susi argues the "internal affairs doctrine" as a jurisdictional issue which would leave North Carolina courts devoid of authority to render a decision in this case. Since Susi and Bluebird are the parties who brought this lawsuit in North Carolina, it seems odd that Susi would then argue that North Carolina does not have jurisdiction to decide the case. Yet we also recognize that parties cannot confer jurisdiction upon the court, even by agreement. *See Degree v. Degree*, 72 N.C. App. 668, 670, 325 S.E.2d 36, 37, *disc. rev. denied*, 313 N.C. 598, 330 S.E.2d 607 (1985). However, the internal affairs doctrine as defined by the United States Supreme Court is a "conflict of laws principle[.]" *Edgar* at 645, 73 L. Ed. 2d at 285. It is not a jurisdictional principle. Here the trial court plainly and correctly used New York law to render its judgment. The trial court did not use North Carolina law to determine this case involving a New York corporation. In this case we have no conflict of laws issue, so Susi's argument as to the internal affairs doctrine is without merit.

Susi's argument that the North Carolina trial court erred by "overturning" a New York court decision is therefore without merit, as the North Carolina trial court did not "overturn" the New York Court's decision. Accordingly, these assignments of error are overruled.

III. Fairness of New York Properties Sale

[5] Susi next argues that the North Carolina trial court erred in determining that the sale of the New York properties was unfair when the New York court had already determined the sale to be fair and the evidence established the fairness of the sale. Susi specifically directs this Court's attention to the language of the North Carolina judgment where the trial court found that

> Susi's conduct in this case, i.e., the timing and manner of his debt enforcement at a time with [sic] the New York properties

> were cash flow positive and there was, by his own statement, a lot of equity in the properties for no other reason than to deprive Aubin of any possibility of realizing any profit for her work in finding and managing the properties, and in taking actions to depreciate the properties and acting in collusion to buy the properties at a private sale go far beyond common decency and honesty.

We note that the North Carolina judgment does not in any way question the *fairness* of the New York sale, but instead the trial court addresses Susi's conduct, which depreciated the properties, contributing to the low sales price as approved by the New York court. The North Carolina trial court's judgment does not analyze the fairness of the sale of the New York properties, but only Susi's conduct in relation to it. Based upon the record before us, as noted above, the New York court only approved the sale of the New York properties and did not address Susi's conduct which Aubin claims depreciated the properties, thus making it necessary to sell the properties for less. The New York court approved the sale and the North Carolina trial court addressed Susi's fiduciary duties to the corporation; the North Carolina court did not address the "fairness" of the sale. Susi's argument is meritless.

IV. Award of Damages

Next Susi argues that the trial court erred by awarding damages to Bluebird because (1) the New York court had already determined the price for the sale of the New York properties to be fair and therefore Bluebird was not damaged by the sale, and (2) Aubin did not introduce any competent evidence establishing a sales price for the New York properties other than what the New York court found to be "fair".

A. Bluebird Not Damaged by Sale

As we have previously stated, the trial court did not award Bluebird damages because it determined the sales price of the New York properties to be "unfair", but instead awarded damages to Bluebird because Susi breached his fiduciary duties and committed constructive fraud upon the corporation in his dealings with the New York properties. In other words, the sale of the New York properties did not damage Bluebird; Susi's breach of fiduciary duties and constructive fraud damaged Bluebird.

B. Admission of Aubin's Testimony

[6] Susi's argument as to the inadmissability of Aubin's testimony is based upon his contention that during the course of the New York litigation Aubin gave a different number in her affidavit as to the value of the New York properties than she did in her trial testimony in North Carolina. On 15 August 2000, Aubin submitted an affidavit during the New York litigation stating that the total fair market value of the New York properties was $1,215,000.00 at the time of the affidavit. During the North Carolina trial in September of 2006 Aubin was asked to give an opinion on the "reasonable fair market value of . . . [the] property immediately prior to the disputes with Mr. Susi and his withdrawing payments for the on-going maintenance[.]" Aubin testified to the value of each parcel of the New York properties individually, and the trial court found that the total value of the New York properties was $1,625,000.00, or $410,000.00 more than Aubin had stated in her New York affidavit approximately six years earlier. Susi argues that this discrepancy in numbers evidences Aubin's self-serving bias and unreliability in testifying, rendering her testimony as to the value of the properties inadmissible. Susi also argues that because of Aubin's testimony the trial court improperly included certain New York properties in the total property value, though not all of the New York properties owned by Bluebird were included in the sale approved by the New York court. We do not agree with Susi's contentions.

"The balance struck by the trial court regarding the admissibility of evidence will not be disturbed on appeal absent a clear showing the court abused its discretion by admitting, or excluding, the contested evidence. A trial court abuses its discretion when its decision lacks any basis in reason." *City of Charlotte v. Ertel*, 170 N.C. App. 346, 348, 612 S.E.2d 438, 441 (2005) (internal citation and internal quotations omitted).

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701. "Any witness, not necessarily an expert, may give h[er] opinion of the value of specific real property if [s]he has knowledge gained from experience, information, and observation." *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d 273, 275, *disc. rev. denied*, 303 N.C. 180, 280 S.E.2d 452 (1981).

At trial, Aubin was asked to give an opinion as to the values of the New York real properties owned by Bluebird. Aubin and Susi had been managing these properties for approximately a decade by the time of trial in North Carolina. In addition, Aubin was licensed in real estate sales in the state of New York in 1985 and received her broker's license in 1988. Aubin testified that she had been selling real estate since 1985. Aubin did not testify as an expert witness, but rather as a lay witness as to her opinion of the value of the properties. The trial court did not abuse its discretion in admitting the testimony of Aubin as to her opinion of the value of the New York properties, considering her extensive real estate background and specific knowledge of the properties owned by a corporation in which she is a fifty percent shareholder. *See id.* The trial court did not abuse its discretion in determining Aubin's testimony was "rationally based on the perception of the witness and . . . helpful to a clear understanding of h[er] testimony or the determination of a fact in issue." *See* N.C. Gen. Stat. § 8C-1, Rule 701.

As to the discrepancy in the amount of the total values of the New York properties as stated in the 2000 affidavit and in Aubin's trial testimony, the New York affidavit is clearly worded that the totals were determined "at this time" which was 15 August 2000. At the trial in North Carolina Aubin was asked to render an opinion as to the value of the properties before her dispute with Susi. The dispute about Harborgate arose in March of 1999 when Aubin discovered she had no interest in Harborgate, and thus Aubin's trial testimony related to the value of the properties prior to March of 1999. Assuming Aubin's contentions are true, and Susi was depreciating the value of the New York properties by refusing to properly maintain them, it would make sense that her opinion as to the value of the properties would change from March of 1999 to August of 2000, and indeed that the value of the properties would continue to decline as time went on, to the amount for which it was ultimately sold by the receiver. Furthermore, discrepancies in testimony are not an issue of admissibility, but rather of credibility. *See Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) ("Credibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness."). We therefore do not find the trial court's admission of Aubin's testimony as to the value of the properties to be an abuse of discretion.

As to the specific New York properties which Susi claims the trial court improperly included in its award for damages because they were not part of the properties approved for the sale in New York, we once again note that the North Carolina trial court was not reassessing the sale as approved by the New York court, but instead addressing whether Susi had breached his fiduciary duty or committed constructive fraud upon Bluebird. Whether the properties were sold or not does not change the fact that the properties may have been damaged due to Susi's breach of his fiduciary duties.

This argument is overruled.

V. Aubin's Fiduciary Duty

[7] Lastly, Susi argues the trial court erred in determining Aubin did not breach her fiduciary duty when she refused to reveal the identity of a prospective buyer to Bluebird and by failing to attend board meetings. We disagree.

A. Refusing to Reveal Prospective Purchaser's Identity

The trial court determined that Aubin did not breach her fiduciary duty by failing to disclose the identity of a prospective buyer for Harborgate, but that "[i]n any event, the matter became moot when Aubin put the prospective purchaser in touch with Susi and there is no evidence of any damage to Bluebird." Susi failed to assign error to the trial court's conclusion as to the lack of evidence of damage to Bluebird.

"The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999). In *Parametric Capital Mgmt., LLC v. Lacher*, the court determined that a claim for breach of fiduciary duty only "ripens" when damages are alleged. 15 A.D.3d 301, 302 (N.Y. App. Div. 2005) (determining plaintiffs who brought a cause of action for breach of fiduciary duty against their defendant attorney who had withdrawn from representation needed to plead damages for a valid claim). Based upon the unchallenged finding of the trial court that there was "no evidence of any damage to Bluebird", there is no valid claim for breach of fiduciary duty by Aubin. *See Parametric Capital Mgmt., LLC*, 15 A.D.3d at 302; *Fran's Pecans, Inc.* at 112, 516 S.E.2d at 649.

B. Attending Meetings

Susi also argues that Aubin breached her fiduciary duty because she failed to attend several of Bluebird's board meetings. The trial court made a conclusion of law that "Aubin's absence from meetings is excusable under all the circumstances." Susi again failed to assign error to this conclusion. His failure to assign error means this Court takes this conclusion as conclusive on appeal. *Fran's Pecans*, *Inc.* at 112, 516 S.E.2d at 649.

This argument is overruled.

VI. Conclusion

For the reasons stated above, we affirm the judgment of the trial court.

AFFIRMED.

Chief Judge MARTIN and Judge ARROWOOD concur.

EDDIE R. KYLE, EMPLOYEE-PLAINTIFF v. HOLSTON GROUP, EMPLOYER-DEFENDANT, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA07-364

(Filed 19 February 2008)

1. Workers' Compensation— settlement agreement—failure to include required biographical and vocational information

The Industrial Commission erred in a workers' compensation case by failing to set aside a compromise settlement agreement based on a failure to comply with Industrial Commission Rule 502, and the case is reversed and remanded to the full Commission to enter an order vacating the approval of the agreement and for further proceedings as necessary, because: (1) plaintiff had not returned to work and was unrepresented at the time he entered into the agreement on 1 November 2004, and thus, the more specific requirements of Rule 502(2)(h) applied to the agreement; (2) defendants admit the agreement did not contain the required information including plaintiff's age, educational level, past vocational training, or past work experience, nor did it contain a certification that plaintiff was not claiming total wage

loss due to his injury; (3) it was statutorily impermissible for the Commission to approve the agreement without the required biographical and vocational information when the statute states the required terms must be in the agreement itself in order to be approved; (4) while one purpose of Rule 502(2)(h) may be, as defendants contend, to make sure the Industrial Commission is privy to the information required by the rule, the rule also serves to ensure that an injured worker understands what he is signing off on and agreeing to; (5) the special deputy commissioner did not have all the information required by Rule 502(h)(2) when she did not receive a reply from plaintiff and did not verify with plaintiff the information contained in defense counsel's memo before approving the agreement; and (6) although the Commission could have approved the agreement without the language concerning plaintiff's biographical and vocational information had plaintiff certified in the agreement that he was not claiming total wage loss due to his injury, neither party disputed that the agreement contained no such certification. Further, the Court of Appeals did not need to determine whether the agreement should have been set aside under Rule 502(3)(a) based on the omission of medical records since the agreement should have been set aside for failure to contain all of the requirements of Rule 502(2)(h).

2. Workers' Compensation— settlement agreement—Commission's failure to undertake full investigation to determine fairness

The Industrial Commission erred in a workers' compensation case by failing to set aside a compromise settlement agreement based on the full Commission's failure to undertake a full investigation to determine if it was fair and just as required by N.C.G.S. § 97-17, and the case is reversed and remanded to the full Commission to enter an order vacating the approval of the agreement and for further proceedings as necessary, because: (1) plaintiff was unrepresented and unaware at the time of settling of his case that, under the law, he was entitled to the most favorable remedy available to him including total disability benefits if he was totally disabled; (2) the special deputy commissioner assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits, and particularly, his potential right to claim ongoing total disability benefits during the vocational rehabilitation process even beyond the 300 weeks or permanent total disability compensation under

N.C.G.S. § 97-29 if he were never able to return to suitable employment; (3) while it is not incumbent upon an insurance adjuster to explain the law to an unwitting claimant, the Industrial Commission must stand by to assure fair dealing in any voluntary settlement; (4) a full investigation into the fairness of the agreement necessarily required the special deputy commissioner to verify defense counsel's assertions regarding plaintiff's position on vocational rehabilitation and ability to return to work since the criterion for compensation in cases covered by N.C.G.S. §§ 97-29 or 97-30 is the extent of the claimant's incapacity for work; and (5) although defendants contend there was no evidence that plaintiff is totally disabled other than plaintiff's contentions regarding his inability to work, the evidence revealed otherwise.

Appeal by Plaintiff from Opinion and Award entered 10 January 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2007.

Maynard & Harris, PLLC, by Celeste M. Harris, for Plaintiff.

Davis and Hamrick, L.L.P., by Shannon Warf Beach, for Defendants.

STEPHENS, Judge.

I. FACTS and PROCEDURE

Plaintiff Eddie R. Kyle suffered a work-related back injury on 6 August 2001 while employed as a truck driver by Defendant Holston Group. He was 46 years old at the time and his average weekly wages were $838.53. Defendant accepted responsibility for the injury, and Plaintiff did not retain legal counsel.

Following the injury, Plaintiff received medical treatment, including lumbar spinal fusion surgery performed 31 October 2001. Based on the results of a functional capacity evaluation performed 22 October 2002, Plaintiff was provided permanent, light-duty work restrictions which precluded his return to work as a truck driver, and the permanent partial impairment to his back was estimated to be 25 percent.

On or about 31 October 2003, Defendant Liberty Mutual Insurance Company, the Holston Group's insurance carrier, sent Plaintiff a letter offering $24,480.10 to settle the case. This sum represented per-

manent partial disability benefits based on a 10 percent rating to Plaintiff's back; three months' temporary total disability benefits; and $1,000 for future medical expenses. Plaintiff had sustained an earlier injury to his back with a different employer that also required surgical treatment, and he received a 15 percent permanent partial disability rating for that injury. Plaintiff's previous employer was also insured by Liberty Mutual, and Plaintiff negotiated a settlement of that earlier claim *pro se*. Plaintiff told Liberty Mutual, however, that he did not want to settle this case for anything less than the value of the full 25 percent rating.

On 17 August 2004, Amanda Price, an insurance adjuster assigned to Plaintiff's case, had telephone contact with Plaintiff. Claim file notes indicate that Ms. Price gave Plaintiff "specific information about [temporary partial disability] benefits remaining to him." Plaintiff testified he was advised by Ms. Price that he was entitled to receive a maximum of 300 weeks of benefits, and that at the time of their conversation, there were approximately 140 of those weeks remaining. Total disability benefits were never discussed.

Plaintiff contacted Ms. Price on 23 August 2004 to review temporary partial disability benefit calculations again. Plaintiff testified that Ms. Price offered to have someone meet with him for vocational testing, but no vocational services were ever initiated.

Ultimately, Plaintiff offered to settle for $63,000, basing this offer on work in a part-time capacity earning $100-$140 per week for the remaining weeks of temporary partial disability benefits. Ms. Price counter-offered with $60,000, and Plaintiff accepted.

A Compromise Settlement Agreement ("Agreement") was then drafted, signed, notarized, and submitted to Special Deputy Commissioner Maddox ("SDC Maddox") for approval. After reviewing the Agreement, SDC Maddox sent a memo to the parties requesting "documentation of any vocational rehabilitation efforts or a description of [Plaintiff's] work, educational or vocational training history." SDC Maddox also asked for clarification regarding Plaintiff's permanent partial disability rating, and asked that an addendum to the Agreement be drawn up to include social security disability offset language.

Defense counsel faxed a memo back to SDC Maddox stating that there were no vocational rehabilitation records because Plaintiff "decided to settle his claim and pursue future job placement on his

own when he feels he is ready to do so." The memo also stated that Plaintiff graduated from high school in 1973 and had worked in farming or as a truck driver ever since, and clarified Plaintiff's permanent partial disability rating. Defense counsel subsequently drafted an addendum, which Plaintiff signed and had notarized, regarding the social security disability offset, and submitted it to SDC Maddox.

Plaintiff testified that defense counsel contacted him regarding the memo from the Industrial Commission and told him that there were going to be some revisions to the Agreement. Although Plaintiff received the Addendum, he testified he never saw the memo defense counsel submitted to SDC Maddox.

SDC Maddox did not verify with Plaintiff the information contained in defense counsel's memo, and neither the memo, nor the information contained therein, was incorporated into the Addendum or the Agreement. An Order Approving Compromise Settlement Agreement was entered on 8 December 2004.

Shortly thereafter, Plaintiff sought legal representation for a social security disability claim he had filed. Upon discussing the case with his attorney, Plaintiff learned that he might have been mistaken about the benefits he was entitled to receive under the Workers' Compensation Act. He also learned that the Agreement submitted to the Industrial Commission may have lacked certain information required by Industrial Commission Rule 502 when it was approved.

Upon learning this, Plaintiff filed a claim with the Industrial Commission seeking to set aside the Agreement and to vacate the order approving the Agreement. After a hearing on 19 July 2005, Deputy Commissioner Myra L. Griffin entered an Opinion and Award denying Plaintiff's claim. Plaintiff appealed to the Full Commission and on 10 January 2007, the Full Commission entered an Opinion and Award affirming Deputy Commissioner Griffin's decision. From the Opinion and Award of the Full Commission, Plaintiff appeals.

II. DISCUSSION

Appellate review of an Industrial Commission Opinion and Award 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). "Findings of fact not sup-

ported by competent evidence are not conclusive and will be set aside on appeal." *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 600, 468 S.E.2d 420, 422, *disc. review denied*, 343 N.C. 306, 471 S.E.2d 71 (1996) (quotation marks and citation omitted). The Full Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Lab. Corp.*, 158 N.C. App. 341, 581 S.E.2d 778 (2003).

A. Compliance with Industrial Commission Rule 502

[1] Plaintiff first argues that the Full Commission erred by not setting aside the Agreement for failure to comply with Industrial Commission Rule 502. We agree.

Industrial Commission Rule 502 reads in relevant part:

> (2) No compromise agreement will be approved unless it contains the following language or its equivalent:
>
> . . . .
>
> (h) Where the employee has not returned to a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease, the agreement shall summarize the employee's age, educational level, past vocational training, [and] past work experience . . . . This subsection of the Rule shall not apply . . . if the employee is not represented by counsel, where the employee certifies that total wage loss due to an injury or occupational disease is not being claimed.

I.C. Rule 502(2)(h) (2000).

In *Smythe v. Waffle House*, 170 N.C. App. 361, 612 S.E.2d 345, *disc. review denied*, 360 N.C. 66, 621 S.E.2d 876 (2005), *appeal after remand*, 182 N.C. App. 754, 643 S.E.2d 407 (2007), a compromise settlement agreement between the parties indicated that the plaintiff, who was not represented by counsel, had not returned to work when she entered into the agreement. However, the settlement agreement contained no mention of the plaintiff's age, educational level, past vocational training, or past work experience, as required under Rule 502(2)(h). This Court concluded that "it was statutorily impermissible for the Commission [] to approve the settlement agreement without the required biographical and vocational information, and the Commission should have set aside its order of approval." *Id.* at 366, 612 S.E.2d at 349.

Likewise, here, Plaintiff had not returned to work and was unrepresented at the time he entered into the Agreement on 1 November 2004. Thus, the more specific requirements of Rule 502(2)(h) applied to the Agreement. However, as Defendants admit, "the [A]greement itself did not contain this information." It contained no mention of Plaintiff's age, educational level, past vocational training, or past work experience, nor did it contain a certification that Plaintiff was not claiming total wage loss due to his injury. Thus, as in *Smythe*, it was statutorily impermissible for the Commission to approve the Agreement without the required biographical and vocational information, and the Commission should have set aside its order of approval.

Defendants contend, however, that because SDC Maddox requested and received information regarding Plaintiff's age, education, vocational training, and past work experience prior to approving the Agreement, this was sufficient to comply with Rule 502 since "the purpose of the Rule is to make sure the Industrial Commission is privy to the information required by the Rule" and "all of the information required to approve an agreement was in the Industrial Commission file prior to the Order of Approval being entered." We do not find Defendants' argument persuasive.

While one purpose of Rule 502(2)(h) may be, as Defendants contend, "to make sure the Industrial Commission is privy to the information required by the Rule[,]" the Rule undoubtably also serves to ensure that, as SDC Maddox testified, "an injured worker [] understand[s] what he or she is signing off on and agreeing to." Furthermore, according to the rules of statutory construction, "[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 396, 298 S.E.2d 681, 683 (1983) (quotation marks and citations omitted). "[I]t is a cardinal rule of statutory construction that significance and effect should . . . be accorded every part of the [statute], including every section, paragraph, sentence or clause, phrase, and word." *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975) (quotation marks and citation omitted). Our Supreme Court has applied the rules of statutory construction to administrative regulations as well as statutes. *See States' Rights Democratic Party v. State Bd. of Elections*, 229 N.C. 179, 49 S.E.2d 379 (1948) and *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980) (applying rules of statutory construction to regulations in both cases).

Here, the language of Rule 502(2)(h) clearly and unambiguously states that "[n]o compromise agreement will be approved unless *it contains* the following *language or its equivalent*: . . . *the agreement* shall summarize the employee's age, educational level, past vocational training, [and] past work experience . . . ." (Emphasis added). Thus, according to the plain meaning of the regulation, the required terms must be in the agreement itself in order for the agreement to be approved by the Commission. Had the Industrial Commission intended that the specified information simply be submitted by defense counsel to the Commission prior to the approval of an agreement, as was the case here, the regulation would have been drafted similarly to Rule 502(3) which states: "All medical, vocational, and rehabilitation reports known to exist . . . must be *submitted with the agreement* to the Industrial Commission by the employer . . . ." Accordingly, as SDC Maddox correctly testified, since Rule 502 "does say that the agreement shall summarize" the factors identified in the Rule, the memo she received from defense counsel "wouldn't necessarily meet the specific requirements of that rule."

Furthermore, SDC Maddox did not have *all* the information required by Rule 502(2)(h) before approving the Agreement. While SDC Maddox requested the required information from the parties and received a reply memo from defense counsel, SDC Maddox did not receive a reply from Plaintiff and did not verify with Plaintiff the information contained in defense counsel's memo before approving the Agreement.

In the memo, defense counsel stated that "[t]here are no vocational rehabilitation reports. [Plaintiff] decided to settle his claim and pursue future job placement on his own when he feels ready to do so." However, Plaintiff testified that, contrary to defense counsel's assertions, he never told anyone that he would look for work on his own or that he thought he would be able to work after he settled his case. Although defense counsel sent Plaintiff the Addendum with the social security offset language, there is no competent evidence in the record before us that she sent Plaintiff a copy of the memo she faxed to SDC Maddox.[1] Further, it is undisputed that defense counsel did

1. On cross-examination, defense counsel asked Plaintiff questions tending to suggest that his insistence he never received a copy of the memo was not credible. It is well settled, however, that "questions asked by an attorney are not evidence." *State v. Taylor*, 344 N.C. 31, 41, 473 S.E.2d 596, 602 (1996). Here, the record contains no evidence to contradict Plaintiff's consistent and repeated testimony that he did not receive a copy of the memo, and that he "didn't talk to [defense counsel] about hunting [a] job." Morever, we note that, unlike the memo that SDC Maddox sent to the parties,

not incorporate the information from the memo into the Addendum, and did not revise the Agreement itself to incorporate the information contained therein. Consequently, neither Plaintiff nor SDC Maddox knew that the information SDC Maddox received contradicted Plaintiff's contentions.[2]

Accordingly, as Plaintiff's and defense counsel's responses regarding Plaintiff's vocational activities differed, and since SDC Maddox possessed only defense counsel's response, it cannot be accurately asserted that "[SDC] Maddox had every piece of information required by the Rules in front of her prior to her making the determination that the [A]greement should be approved."

Nevertheless, the Commission could have approved the Agreement without the language concerning Plaintiff's biographical and vocational information had Plaintiff certified in the Agreement that he was not claiming total wage loss due to his injury.[3] However, neither party disputes that the Agreement contained no such certification.

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which specifically shows a "cc" to Plaintiff at his mailing address, the memo faxed to SDC Maddox by defense counsel contains no indication of any kind that a copy had been sent by any means to Plaintiff.

2. It cannot be credibly contended that the representation made in defense counsel's memo was insignificant to SDC Maddox's decision to approve the Agreement. She testified that such information "indicated to me that [Plaintiff] had made a decision to settle his claim . . . and that therefore it was time to close the claim." Likewise, it is undisputed that the information in defense counsel's memo caused SDC Maddox to believe that Plaintiff "was not interested in participating in vocational rehabilitation." This belief is belied not only by Plaintiff's testimony, but also by Liberty Mutual's claim file notes, admitted into evidence at the hearing, which document that (1) upon initially being advised by a Liberty Mutual adjuster that someone would be sent to meet with him for vocational testing, Plaintiff invited that person to come to his home for the meeting, and (2) during Ms. Price's discussions with Plaintiff regarding settlement, he told her he was still trying to decide if he should settle or "try voc." This was in late August 2004 when Ms. Price described Plaintiff as being "still very confused and concerned. . . ." Ms. Price told Plaintiff he "need[ed] to make a choice . . . before September is out." When she next spoke with Plaintiff on 13 September 2004, he was "still trying to do some 'figuring' to come up with a number to give [her]." He also told her that "many of the places he was interested in working" had told him he would not be able to work in "those fields" because of his narcotic medication. This evidence does not support SDC Maddox's belief, formed on the basis of the representation in defense counsel's memo, that Plaintiff had no interest in vocational rehabilitation.

3. It is likely that Plaintiff would have so certified because, based on his review of the Industrial Commission's website and his discussions with Ms. Price, he believed he was only entitled to the remaining weeks available for temporary partial disability. As he testified, "[A]fter 300 weeks [from the date of injury], I was through with it. . . . That was all. . . . [T]he total thing."

Therefore, because the Agreement did not contain all the terms required by Rule 502(2)(h), the Commission erred by not setting aside the Agreement.

Plaintiff further contends that the Commission erred by not setting aside the Agreement for failure to comply with Industrial Commission Rule 502(3)(a). Pursuant to Rule 502(3)(a), "[n]o compromise agreement will be considered unless . . . all medical, vocational, and rehabilitation reports known to exist . . . [are] submitted with the agreement to the Industrial Commission . . . ." I.C. Rule 502(3)(a) (2000).[4] Since we hold that the Agreement should have been set aside because it did not contain all of the terms required by Industrial Commission Rule 502(2)(h), we need not determine whether the Agreement should have been set aside because medical records were omitted.

B. Full Investigation

[2] Plaintiff next argues that the Agreement should have been set aside because the Full Commission failed to undertake a full investigation to determine if the Agreement was fair and just, as required by N.C. Gen. Stat. § 97-17. Under the circumstances, we agree.

All settlement agreements[5] must be filed with and approved by the Commission. N.C. Gen. Stat. § 97-17(a) (2003). "The Commission shall not approve a settlement agreement . . . unless . . . [t]he settlement agreement is deemed by the Commission to be fair and just . . . ." N.C. Gen. Stat. § 97-17(b)(1) (2003). The Commission is required to undertake a "full investigation" to determine that a settlement agreement is fair and just "in order to assure that the settlement is in accord with the intent and purpose of the Act that an injured employee receive the disability benefits to which he is entitled . . . ." *Vernon*, 336 N.C. at 432, 444 S.E.2d at 195; *accord Smythe*, 170 N.C. App. at 364, 612 S.E.2d at 348.

The Workers' Compensation Act provides two basic categories of benefits as the result of an injury by accident: (1) indemnity ben-

4. Effective 1 August 2006, Rule 502(3)(a) was modified as follows: "The material medical, vocational, and rehabilitation reports known to exist . . . must be submitted with the agreement to the Industrial Commission by the employer . . . ." However, as the Agreement was signed 1 November 2004 and approved 8 December 2004, the previous version of Rule 502(3)(a) applies.

5. Pursuant to N.C. Gen. Stat. §§ 97-17 and 97-82, the Commission recognizes two forms of voluntary settlement agreements, namely, the compensation agreement in uncontested cases, and the compromise or "clincher" agreement in contested or disputed cases. *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994).

> efits for loss of wage-earning capacity under N.C.G.S. § 97-29 (total incapacity) or N.C.G.S. § 97-30 (partial incapacity) and (2) benefits for physical impairment, without regard to its effect on wage-earning capacity, under N.C.G.S. § 97-31 (schedule of injuries). N.C.G.S. §§ 97-29 and 97-30 are alternate sources of compensation for an employee who suffers an injury which is also included under the schedule of injuries found in N.C.G.S. § 97-31. The employee is allowed to select the more favorable remedy.

Effingham v. Kroger Co., 149 N.C. App. 105, 113-14, 561 S.E.2d 287, 293 (2002) (internal citations omitted).

In *Vernon*, the Supreme Court held that the Industrial Commission failed to conduct a full investigation to determine the fairness of a Form 26 compensation agreement. The plaintiff sustained a compensable back injury and received temporary total disability benefits. Upon reaching maximum medical improvement, the plaintiff's physician rated the plaintiff as having a 15 percent permanent disability to his back, but stated that he did not think the plaintiff could return to work. *Vernon*, 336 N.C. 425, 444 S.E.2d 191.

The defendant's insurance adjuster sent the plaintiff a Form 26 compensation agreement stating that the plaintiff was entitled to 45 weeks of compensation under N.C. Gen. Stat. § 97-31. The plaintiff, unrepresented and unaware at the time that he had any other choice, signed the agreement. Defendant submitted the agreement to the Commission for approval. An employee in the claims department compared the rating listed on the form against the physician's report attached thereto, verified the payment information, and approved the agreement. Our Supreme Court stated that the Commission employee "apparently assumed, rather than determined, that [the] plaintiff was knowledgeable about workers' compensation benefits, and, particularly, his right to claim permanent total disability compensation under section 97-29 rather than permanent partial disability compensation under section 97-31." *Id.* at 434, 444 S.E.2d at 195-96. Thus, the Court held that, in approving the agreement, the Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. *Vernon*, 336 N.C. 425, 444 S.E.2d 191.

Here, as in *Vernon*, Plaintiff was unrepresented and unaware at the time of settling his case that, under the law, he was entitled to the most favorable remedy available to him, including total disability benefits if he was totally disabled. At the time of Ms. Price's conversation with Plaintiff regarding settlement of his claim, claim file notes indi-

cated the following: the minimum settlement value of the claim was $18,448.65, representing the 10 percent permanent partial disability rating to Plaintiff's back; Plaintiff could be entitled to 300 weeks of temporary partial disability benefits, with approximately 143 weeks remaining; Plaintiff had not been vocationally rehabilitated; and "if [Plaintiff] fails voc[ational] rehab[ilitation] he could potentially receive lifetime benefits" valued at approximately $811,069.74. Plaintiff testified that Ms. Price advised him he was entitled to receive a maximum of 300 weeks of benefits, and that at the time of their conversation, there were only approximately 140 of those weeks remaining. Although Plaintiff had not returned to work, Ms. Price's settlement figure of $60,000 was based on an anticipated earning capacity in part-time work at minimum wage for those estimated remaining weeks.[6] At no point did Ms. Price indicate to Plaintiff that he would be entitled to benefits beyond 300 weeks under N.C. Gen. Stat. § 97-29 if he were unable to earn any wages as a result of his injury. Plaintiff, obviously unaware that he potentially had other remedies under the law, agreed to settle his claim based on the limited information provided by Ms. Price.

Furthermore, similar to *Vernon*, SDC Maddox apparently assumed, rather than determined, that Plaintiff was knowledgeable about workers' compensation benefits, and, particularly, his potential right to claim ongoing total disability benefits during the vocational rehabilitation process even beyond 300 weeks, or permanent total disability compensation under N.C. Gen. Stat. § 97-29 if he were never able to return to suitable employment.

SDC Maddox testified as follows:

> Q. . . . Would you have approved this compromise settlement agreement, Ms. Maddox, for the amount paid if you had known that [Plaintiff] was unaware of his right to 97-29 benefits?
>
> . . . .
>
> A. Probably not.
>
> Q. And why is that?
>
> A. I would have wanted to see, before I could have approved that—with that knowledge, specific knowledge, I would have

6. Apparently, neither Ms. Price nor Plaintiff questioned whether a part-time job paying $100-$140 per week to a man who was earning more than $800 per week when he was injured would legally constitute suitable employment.

> wanted to see what his lifetime benefits would have been on that and get a present value on this agreement.
>
> . . . .
>
> Q. . . . [I]f that lifetime benefit would yield $851,000, do you feel that this compromise settlement agreement for $60,000, assuming that he would never be able to return to work, is fair and just?
>
> . . . .
>
> A. Assuming that, it probably wouldn't be. But that wasn't my understanding of what was happening.[7]

While it is not incumbent upon an insurance adjuster to explain the law to an unwitting claimant, the Industrial Commission must stand by to assure fair dealing in any voluntary settlement. *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953). Thus, in this case, a full investigation to determine that the Agreement was fair and just required SDC Maddox to determine, rather than assume, that Plaintiff was aware of his remedies under the law.

Furthermore, "in order to assure that . . . an injured employee receive[s] the disability benefits to which he is entitled," *Vernon*, 336 N.C. at 432, 444 S.E.2d at 195, the Commission must scrutinize carefully a settlement agreement that provides for a claimant to accept the lesser of two remedies for which he may qualify. Here, since the Agreement stated that Plaintiff had not returned to work, SDC Maddox requested from the parties "information that would show what the likelihood was that [Plaintiff] would be able to [work] at some point in the future; and, if so, when." She received defense counsel's memo which indicated to her that Plaintiff "did not wish to participate in vocational rehabilitation[,]" and that Plaintiff felt he was capable of finding work in another occupation on his own. However, SDC Maddox did not contact Plaintiff to confirm defense counsel's information or her own assumptions based on that information. Since "the criterion for compensation in cases covered by G.S. 97-29 or -30 is the extent of the claimant's 'incapacity for work[,]' " *Little v. Anson Cty. Sch. Food Serv.*, 295 N.C. 527, 533, 246 S.E.2d 743, 747 (1978), a full investigation into the fairness of the Agreement necessarily required SDC Maddox to verify defense coun-

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7. When asked whether she was "pretty much looking at [Plaintiff's] case as a scheduled injury case versus a permanent and total disability case," SDC Maddox replied, "Uh-huh (yes). Yes."

sel's assertions regarding Plaintiff's position on vocational rehabilitation and ability to return to work.

Although Defendants contend that there is no evidence, other than Plaintiff's contentions regarding his inability to work, that Plaintiff is totally disabled, the undisputed evidence establishes the following: Plaintiff had not returned to work when he entered into the Agreement on 1 November 2004, approximately three years and three months after his compensable injury. Defendant Holston Group was unable to hold Plaintiff's truck driving position open, and terminated Plaintiff as an employee on 9 April 2002. A functional capacity evaluation performed 22 October 2002 indicated that Plaintiff's overall level of work capability was "light" and that "it is difficult to predict whether [Plaintiff] is capable of sustaining the Light level of work for an 8-hour day." The evaluation further indicated that Plaintiff "may be able to return to work if" he can avoid squatting, kneeling, and lifting more than 20 pounds, and if his work schedule is modified through shorter shifts.[8] Although Plaintiff was released by his treating physician, Dr. Daubert, to return to work under the permanent restrictions identified by the evaluation, Dr. Daubert stated it was "unlikely that [Plaintiff] can return to work as he did prior driving a truck." Before his injury, Plaintiff had worked only as a farmer and a truck driver.

On 9 September 2003, Dr. Daubert assigned a 25 percent permanent partial disability rating to Plaintiff's back. However, in light of Plaintiff's continued pain and inability to drive a car for any period of time, Dr. Daubert also recommended further surgery to remove the hardware in Plaintiff's back. Plaintiff was taking Ambien to help him sleep, Hydrocodone for his pain, and Celebrex and Bextra for inflammation. Although Plaintiff had researched jobs that he may have been qualified to do, including working at Wal-Mart or as a grocery store deli worker, because of his narcotic pain medication, he was worried about finding work where drug testing was required, and "many" employers he had contacted for work told him he was not eligible for employment with them because of his use of narcotic medication.

Defendant Liberty Mutual sent a field investigator to observe Plaintiff several times under the guise of completing a "[y]early activity check to verify [Plaintiff] is alive and receiving benefits checks."

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8. During testing, Plaintiff "required frequent rest periods due to increased radicular pain symptoms." Although rest initially decreased his symptoms, "with increased activity, [Plaintiff was] unable to resolve symptoms."

The field investigator's report from his visit to Plaintiff's residence on 24 March 2004 stated:

> In observing [Plaintiff] he appears to be walking very slowly and with a slight limp. On 2 occasions during our meeting he went back to his bedroom to get his medications to show me and on coming back to the living room appeared winded from the short walk down the hall. I could find no evidence that [Plaintiff] is currently active and no recommendations at this time.
>
> . . . .
>
> No red flag indicators found.

This evidence raises questions as to whether Plaintiff may have been entitled to total disability benefits under N.C. Gen. Stat. § 97-29 instead of benefits under N.C. Gen. Stat. §§ 97-30 or 97-31. While SDC Maddox testified that "the amount [of the Agreement] seemed to be a fair amount to cover a scheduled injury[,]" a full investigation into the fairness of this Agreement necessarily required SDC Maddox to inquire into the possibility that this case was a total disability case rather than a scheduled injury or partial disability case. This she could have accomplished by seeking to verify with Plaintiff the information in defense counsel's memo, particularly given the fact that the memo contains no indication it had been sent to Plaintiff.[9]

Accordingly, we hold that the Full Commission's determination that "Special Deputy Commissioner Maddox acted in a judicial capacity and made a full investigation in reviewing the Agreement submitted by the parties" is not supported by competent evidence. We conclude that it was statutorily impermissible for the Commission here to approve the Agreement, and the Commission should have set aside its order of approval.

For the above-stated reasons, we reverse and remand to the Full Commission to enter an order vacating the approval of the settlement agreement, and for further proceedings as necessary.

REVERSED.

Judges CALABRIA and ARROWOOD concur.

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9. The memo did, however, provide Plaintiff's telephone number if SDC Maddox "would like to speak with him directly."

STATE OF NORTH CAROLINA v. ANTHONY LENAIR CAMPBELL

No. COA07-903

(Filed 19 February 2008)

Search and Seizure— investigatory stop—reasonable suspicion—scope—handcuffs—frisking—probable cause for arrest

The trial court properly denied defendant's motion to suppress physical evidence found on defendant's person and in his backpack at the time of his investigatory stop and subsequent arrest where: (a) an officer had a reasonable suspicion that defendant was engaged in criminal activity so that her investigatory stop of defendant was lawful when she saw him riding his bicycle in the vicinity of a reported burglary at 3:40 a.m. and saw no other persons in the area; (2) the officers' act of handcuffing defendant and searching his person did not constitute an unreasonable seizure where one officer recognized defendant and believed that defendant posed a risk of flight, and a frisk of defendant for weapons was justified in light of the late hour and nature of the crime that had been committed; and (3) officers had probable cause to arrest defendant for possession of burglary tools when, during the frisk of defendant, an officer discovered a small flashlight and a Swiss army-type knife, an officer at the burglary scene reported that a window had been pried open with some type of screwdriver, the arresting officer believed that a part of that knife could have been used to open a window, and defendant had a backpack with him that contained unknown items.

Appeal by defendant from order entered 15 December 2006 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 13 December 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

JACKSON, Judge.

Anthony Lenair Campbell ("defendant") appeals from his convictions entered upon guilty pleas for possession of burglary tools and possession of drug paraphernalia. Specifically, he appeals from an

order of the trial court denying his motion to suppress. For the following reasons, we affirm.

At approximately 3:40 a.m. on 24 July 2006, Officer Thomas Coyle ("Officer Coyle") of the Carrboro Police Department responded to a report of a breaking and entering in progress at 109 South Peak Drive in Carrboro, North Carolina. Coyle was the first to respond and arrived within three minutes of the call. While driving toward the location of the alleged breaking and entering, Officer Coyle turned onto Old Pittsboro Road and observed someone riding a bicycle on the road. Old Pittsboro Road does not intersect with South Peak Drive, but is connected to it via Daffodil Lane, and Officer Coyle testified that Old Pittsboro Road is "close" to South Peak Drive. Officer Coyle observed that the rear of the bicycle had a flashing red light. At the time, Officer Coyle and the bicycle rider were within a quarter of a mile of the location of the alleged breaking and entering, and the trial court found that the bicyclist "was in the vicinity of 109 S[outh] Peak Drive." Officer Coyle did not observe anyone else in the area. He radioed other officers about the bicycle rider "[i]n case that person may be involved with the breaking and entering," and proceeded to the house at 109 South Peak Drive. During his investigation at the residence at 109 South Peak Drive, Officer Coyle observed that a window had been opened with "a small, flathead screwdriver or a pry tool," and he notified other officers of that information.

Officer Michelle Gandy ("Officer Gandy") of the Carrboro Police Department testified that she was on patrol in her police vehicle when she responded to the call concerning the alleged breaking and entering in progress at 109 South Peak Drive. Officer Gandy also received Officer Coyle's call concerning the bicyclist, and she observed defendant riding on a bicycle and turning from Old Pittsboro Road onto South Greensboro Street. Defendant had an illuminated light on his cap, and the bicycle had a headlight and two flashing rear reflectors. Officer Gandy testified that she recognized defendant "by face[,] not name." Officer Gandy drove past defendant, turned around, drove back past defendant, and pulled off the road into a parking lot. Officer Gandy watched as defendant took a right turn onto the uphill on-ramp of Highway 54 West Bypass. Defendant stopped at the top of hill, and Officer Gandy turned on her overhead lights and spotlights. She observed that defendant was wearing a backpack and was "playing with something in his backpack." Officer Gandy testified that she stopped defendant because he was "coming from the area that the burglary came out of."

As defendant stood with his bicycle, Officer Gandy exited her vehicle and approached defendant. Officer Gandy asked defendant for his name and identification, and he complied. Lieutenant Rodney Taylor ("Lieutenant Taylor") of the Carrboro Police Department then arrived at the scene. Lieutenant Taylor recognized defendant and "knew that he had an extensive history of breaking and enterings [sic] and crimes of that nature as well as being a substance abuser." Officer Gandy asked defendant "where he was coming from," and defendant replied that he was coming from a friend's house on Laurel Avenue. Officer Gandy was aware that Laurel Avenue is off of Jones Ferry Road.

Officer Gandy asked defendant to step off of the bicycle, and Lieutenant Taylor instructed Officer Gandy to place defendant in investigative detention because he knew defendant had "run before and things of that nature." Officer Gandy and defendant walked to the front of the patrol car, where she handcuffed him and frisked him for "officer safety." Officer Gandy testified that defendant had not done anything to make her feel nervous or scared, but noted that defendant could have been "carrying anything from a pen that has a knife enclosed in it to a small handgun." Lieutenant Taylor moved defendant's bicycle off of the road, and during the frisk, "Officer Coyle advised [Officer Gandy] and Lieutenant Taylor that it appeared that some type of screwdriver had been used to pry the window open." Officer Gandy noticed that defendant was wearing two pairs of shorts—a "sports" pair on top without pockets and another pair underneath that had pockets. She felt items in his pockets and asked what they were. Defendant told Officer Gandy to take the items out, and Officer Gandy observed that the items were "[a] small flashlight and a Swiss Army-type knife." No evidence was introduced about the size or shape of the knife, or whether or not the instrument could have be used for prying, but Officer Gandy testified that she "believed that he [defendant] could have used at least part of that Swiss Army knife to open that window." Upon Lieutenant Taylor's instruction, Officer Gandy placed defendant under arrest. While conducting a search incident to arrest, Lieutenant Taylor found in defendant's backpack "[a] lot of different things from jewelry to tools." Specifically, the officers seized from the backpack multiple tools, two crack pipes, rolling papers, a crowbar, and screwdrivers.

On 30 October 2006, defendant was indicted for first-degree burglary, possession of burglary tools, and possession of drug paraphernalia. Defendant moved to suppress the physical evidence seized dur-

ing his arrest, and on 15 December 2006, the trial court entered an order denying his motion. Defendant gave notice of his intent to appeal the trial court's denial of his motion to suppress. Defendant then pled guilty to possession of burglary tools and possession of drug paraphernalia. The trial court consolidated the convictions and sentenced defendant as a prior record level IV offender to seven to nine months imprisonment.

On appeal, defendant contends that the trial court erred by denying his motion on the grounds that (1) Officer Gandy stopped defendant without reasonable suspicion in violation of the Fourth Amendment; (2) the officers unreasonably seized and searched defendant after they stopped him in violation of the Fourth Amendment; and (3) the officers arrested defendant without probable cause in violation of the Fourth Amendment.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)). In addition, findings of fact to which defendant failed to assign error are binding on appeal. *See State v. Lacey*, 175 N.C. App. 370, 376, 623 S.E.2d 351, 355 (2006). " 'Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task "is to determine whether the trial court's conclusion[s] of law [are] supported by the findings." ' " *Brewington*, 352 N.C. at 498-99, 532 S.E.2d at 502 (alterations in original) (quoting *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001)). "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206, *appeal dismissed and disc. rev. denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

Defendant first contends that the evidence should have been suppressed because Officer Gandy lacked reasonable suspicion to stop him. We disagree.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, protects the right of people to be free from unreasonable searches and seizures. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). This protection "applies to seizures

of the person, including brief investigatory detentions." *Id.*[1] As our Supreme Court has explained,

> [o]nly unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.[2]
>
> A court must consider the totality of the circumstances—the whole picture [—] in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

Id. at 441-42, 446 S.E.2d at 70 (internal quotation marks and citations omitted). It is well-settled that the standard for reasonable suspicion is "less demanding than that for probable cause." *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10.

In the instant case, defendant contends that he was stopped without reasonable suspicion and offers various factors tending to diminish the State's assertion of reasonable suspicion. Specifically, defendant contends that the evidence demonstrates that (1) Officer Gandy had received no specific information about the alleged burglar or burglary; (2) defendant's conduct and appearance were not suspicious or unusual, and he would not have had so many lights on his bicycle if he had just committed a burglary; (3) the location was not in a high-crime, suspicious, or isolated area; (4) defendant's reaction was not suspicious, and he did not attempt to avoid the police; and (5) Officer Gandy recognized defendant's face but there is no evi-

1. "[S]topping a car and detaining its occupants constitute[s] a seizure within the meaning of the Fourth Amendment," *United States v. Hensley*, 469 U.S. 221, 226, 83 L. Ed. 2d 604, 610 (1985), and the principle applies to stopping and detaining a person riding a bicycle. *See Brooks v. Pembroke City Jail*, 722 F. Supp. 1294, 1298 (E.D.N.C. 1989).

2. Although defendant argues that the trial court applied the incorrect legal standard by concluding that "criminal activity was afoot," the trial court's conclusion tracks the language used by the United States Supreme Court. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) ("[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that *criminal activity 'may be afoot,'* even if the officer lacks probable cause." (emphasis added) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968))).

dence that Officer Gandy knew any specifics about defendant or his prior criminal record. The trial court's findings of fact include some of these factors, and the record supports several of the other factors asserted by defendant. The record also includes facts not specifically found by the trial court that would tend to support a showing of reasonable suspicion. For example, before Officer Gandy stopped defendant, he had stopped on the highway on-ramp and was "playing with something in his backpack" until "he turned around and looked at [Officer Gandy]." Such activity—particularly when viewed in connection with the time of day, absence of other persons in the area, and proximity to the scene of the crime—could be considered suspicious. Nevertheless, this Court's task is not to review the record *de novo* for every fact that may tend to support or defeat a showing of reasonable suspicion. Instead, our role is simply to determine whether the trial court's findings of fact are supported by the evidence and whether those findings support the court's conclusions of law. *See Brewington*, 352 N.C. at 498-99, 532 S.E.2d at 502.

Defendant attempts to refute the facts found by the trial court that tend to support a finding of reasonable suspicion, to wit: (1) proximity to the alleged burglary; (2) time of day; and (3) the absence of any other persons in the area.

First, defendant argues that proximity to a crime scene, time of day, and the absence of other persons in the vicinity of a crime scene are insufficient, in and of themselves, to establish reasonable suspicion. We agree. *See*, *e.g.*, *State v. Cooper*, 186 N.C. App. 100, 107, 649 S.E.2d 664, 669 (2007) (holding that proximity to a crime scene, without more, was insufficient to establish reasonable suspicion); *State v. Blackstock*, 165 N.C. App. 50, 58, 598 S.E.2d 412, 417-18 (2004) (noting that "activity at an unusual hour" may be considered but is not sufficient by itself to establish reasonable suspicion), *appeal dismissed and disc. rev. denied*, 359 N.C. 283, 610 S.E.2d 208 (2005).

However, it is well-settled that factors supporting reasonable suspicion are not to be viewed in isolation. *See United States v. Arvizu*, 534 U.S. 266, 274, 151 L. Ed. 2d 740, 750 (2002) ("The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase."). The proximity to a crime scene, the time of day, or the absence of other persons in and of themselves may be insufficient to establish reasonable suspicion, but taken together, such factors certainly may suffice. *See State v. Crenshaw*, 144 N.C. App. 574, 577, 551 S.E.2d 147, 150 (2001)

("[I]ndividually, any of the factors cited [in articulating reasonable suspicion] might not justify a search, but one cannot piecemeal this analysis. One piece of sand may not make a beach, but courts will not be made to look at each grain in isolation and conclude there is no seashore." (internal quotation marks and citation omitted)).

Defendant next argues that he was seen approximately a quarter of a mile away from, as opposed to at or immediately near, 109 South Peak Drive. Defendant, therefore, contends that the trial court's findings that he was seen "in the vicinity of 109 South Peak Drive" and "coming from the area of the burglary" are not supported by the evidence. "Vicinity," however, is a relative term,[3] and under the circumstances of this case, the trial court's use of the word "vicinity" to describe a distance of a quarter of a mile is not unreasonable. *See, e.g.*, *State v. Reaves*, 132 N.C. App. 615, 617, 513 S.E.2d 562, 564 (using the word "vicinity" to describe a distance of one-half mile), *disc. rev. denied*, 350 N.C. 846, 539 S.E.2d 4 (1999); *see also Nashville, C. & St. L. Ry. Co. v. Sutton*, 104 S.W.2d 834, 844 (Tenn. Ct. App. 1936) ("The word 'vicinity' is a relative term, and there is nothing erroneous or inaccurate in referring to a spring or a home situated two miles from a railroad station as being in the vicinity of such station."). Furthermore, although the evidence does not establish that defendant was seen coming from 109 South Peak Drive, the evidence does demonstrate that defendant was seen "coming from the *area*" of 109 South Peak Drive. Defendant was riding on Old Pittsboro Road—which Officer Coyle described as "close" to South Peak Drive—in a direction heading away from South Peak Drive. Defendant's contention that he "was no more 'coming from' South Peak Drive than he was coming from any other location in Carrboro" is without merit.

Defendant also attempts to diminish the significance of the time of the stop. Specifically, defendant contends in his brief that "[r]iding a bicycle at 3:40 a.m. in Carrboro, especially on a late summer night in clear weather, is not suspicious," and in his reply brief, defendant argues that "[e]veryone knows this hour is not unusually late in Carrboro. Further the stop occurred on a July sum-

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3. *See State v. Stumbo*, 111 N.W.2d 664, 665-66 (Iowa 1961) ("The ordinary and common usage of the word 'vicinity' is a relative term, synonymous with such words as 'neighborhood', 'community' or 'locality', 'not remote', 'nearness', and describes a state of being near." (citations omitted)). In *Stumbo*, the Iowa Supreme Court also noted that "the word 'vicinity' is derived from '*vicus*', a village, and signifies a place which does not exceed in distance the extent of a village." *Id.* at 666 (citing *Borough of Madison v. Morristown Gaslight Co.*, 52 A. 158, 159 (N.J. Ch. 1902), *rev'd on other grounds*, 54 A. 439 (N.J. 1903)).

mer night in clear weather, a perfect time for a bicycle ride home in this late-night bohemian college town."[4] However, defendant's description of Carrboro in the early morning hours is belied by the trial court's finding of fact, to which defendant did not assign error, that "Officer Coyle observed *no one else* in the vicinity of 109 S[outh] Peak Drive at that time." (Emphasis added). Furthermore, our Supreme Court has described a similar time of day as "an unusual hour for persons to be going about their business." *State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981) (approximately 1:35 a.m.); *see also Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (labeling 3:00 a.m. an "unusual hour").

Finally, defendant contends that the "officers' failure to see anyone else in the vicinity is not [a] reasonable justification to stop defendant." Although this factor alone may not be a sufficient justification for a stop, the absence of other individuals in the vicinity is a valid factor for officers to use in determining whether reasonable suspicion exists to stop an individual. *See, e.g.*, *United States v. Moore*, 817 F.2d 1105, 1106 (4th Cir.) (noting that "[t]he area was otherwise deserted."), *cert. denied*, 484 U.S. 965, 98 L. Ed. 2d 396 (1987).

Accordingly, contrary to defendant's contentions, the trial court's findings—specifically, with respect to his proximity to 109 South Peak Drive, the time of day, and the absence of other persons in the area—are supported by competent evidence. These findings, in turn, support the trial court's conclusion that reasonable suspicion supported Officer Gandy's stop of defendant. Therefore, defendant's assignment of error is overruled.

Defendant next contends that the evidence should have been suppressed because, even assuming that Officer Gandy had reasonable suspicion to stop him, Officer Gandy and Lieutenant Taylor escalated the stop and unreasonably seized and searched him without justification. We disagree.

During an investigative stop, the investigative methods employed by police should be the least intrusive means reasonably available to effectuate the purpose of the stop. *See State v. Allison*, 148 N.C. App. 702, 706, 559 S.E.2d 828, 831 (2002) (citing *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)). Nevertheless, when conduct-

4. We must caution defense counsel against arguing facts not in the record. There was no evidence introduced relating to typical bicycle traffic in Carrboro under similar conditions, and such a subject is inappropriate for judicial notice. *See Greer v. Greer*, 175 N.C. App. 464, 472, 624 S.E.2d 423, 428 (2006) ("Any subject, however, that is open to reasonable debate is not appropriate for judicial notice.").

ing investigative stops, police officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *Hensley*, 469 U.S. at 235, 83 L. Ed. 2d at 616. As Maryland's high court recently noted,

> the permissible scope of a *Terry* stop has expanded in the past few decades, allowing police officers to neutralize dangerous suspects during an investigative detention using measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons, and other forms of force typically used during an arrest.

Longshore v. State, 924 A.2d 1129, 1142 (Md. 2007); *see, e.g.*, *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006) (listing examples from the Eighth Circuit when handcuffs were permitted in investigative detentions), *cert. denied*, 549 U.S. 1272, 167 L. Ed. 2d 241 (2007); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006) (listing examples from the Eleventh Circuit), *cert. denied*, 550 U.S. 956, 167 L. Ed. 2d 1129 (2007).

In the instant case, the trial court found that there were "prior occasions in which the Defendant had fled from law enforcement." This finding is supported by Lieutenant Taylor's testimony that he recognized defendant and believed that defendant posed a risk of flight. Specifically, Lieutenant Taylor testified, "I know that he [defendant] has run before and things of that nature." Further, although defendant cooperated with Officer Gandy and Lieutenant Taylor, his cooperation did not necessarily eliminate the risk of flight. *See State v. Blackmore*, 925 P.2d 1347, 1351 (Ariz. 1996) (declining to find "that defendant's subsequent cooperation should have dispelled any reasonable concerns that he posed a flight risk" and further noting that, as in the instant case, "[t]he burglary victims had not seen the perpetrator and therefore did not know if he or she was armed. As a result, [the investigating officer] could not know whether defendant, whom he reasonably suspected of committing the burglary, was armed."). By handcuffing defendant, Officer Gandy and Lieutenant Taylor sought "to maintain the status quo" of the situation, *Hensley*, 469 U.S. at 235, 83 L. Ed. 2d at 616, and therefore, their handcuffing of defendant was reasonable under the circumstances. *See United States v. Laing*, 889 F.2d 281, 285 (D.C. Cir. 1989) ("The amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent

flight."), *cert. denied*, 494 U.S. 1069, 108 L. Ed. 2d 792 (1990); *accord United States v. Nava*, 363 F.3d 942, 945 (9th Cir.), *cert. denied*, 543 U.S. 973, 160 L. Ed. 2d 347 (2004).

In addition to the use of handcuffs, we hold that the officers were justified in frisking defendant based upon the late hour and the nature of the crime committed. *See Moore*, 817 F.2d at 1108 ("The circumstances surrounding the stop support the officer's belief that a further frisk for weapons was warranted. The hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons."). As Officer Gandy noted, although defendant may not have displayed a weapon, he could have been "carrying anything from a pen that has a knife enclosed in it to a small handgun." Therefore, the frisk was justified based upon the circumstances with which Officer Gandy and Lieutenant Taylor were presented.

Accordingly, the trial court's conclusion that, "for officer safety,"[5] the officers were justified in temporarily detaining and frisking defendant was supported by the findings of fact, which, in turn, were supported by the evidence. Defendant's assignment of error, therefore, is overruled.

Finally, defendant argues that even if Officer Gandy had reasonable suspicion to stop him and even if the detention and search were reasonable, Officer Gandy lacked probable cause to arrest him for possession of burglary tools. We disagree.

As our Supreme Court has explained,

> [p]robable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. Probable cause deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

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5. We note that defendant disputes the State's contention that his handcuffing was for officer safety but did not assign error to the trial court's finding that "Officer Gandy . . . frisked the defendant for officer safety."

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (internal quotation marks, alterations, and citations omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

Pursuant to North Carolina General Statutes, section 14-55, "[i]f any person . . . shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking . . . , such person shall be punished as a Class I felon." N.C. Gen. Stat. § 14-55 (2005). "The essential elements of the crime with which the defendant is charged are (1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements." *State v. Stockton*, 13 N.C. App. 287, 290, 185 S.E.2d 459, 461-62 (1971). Although the statute "does not require proof of any specific intent to break into a particular building at a particular time and place," the statute does require "that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking." *State v. Bagley*, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (1980).

In the case *sub judice*, Officer Gandy testified that during the *Terry* frisk, she "could feel items in [defendant's] pockets" and "asked him what was in the pocket that I was touching." Defendant told Officer Gandy "to go ahead and take it out," whereupon Officer Gandy emptied defendant's pockets and discovered "[a] small flashlight and a Swiss Army-type knife." Meanwhile, "[d]uring the frisk, Officer Coyle advised [Officer Gandy] and Lieutenant Taylor that it appeared that some type of screwdriver had been used to pry the window [at 109 South Peak Drive] open." Although, as defendant notes and the trial court found, "[n]o evidence was introduced about the size or shape of the knife, or whether or not there were other tools, such as a pry tool or screwdriver, in the swiss army-style knife," Officer Gandy expressly testified, "At that point I believed he could have used at least part of that Swiss Army knife to open that window." Following the discovery of the flashlight and knife, the officers placed defendant under arrest.

Quoting from our Supreme Court, defendant first contends, correctly, that "flashlights . . . are not breaking tools." *State v. Morgan*, 268 N.C. 214, 220, 150 S.E.2d 377, 381 (1966). However, based upon Officer Coyle's description of the type of instrument likely used on the window at 109 South Peak Drive, Officer Gandy determined that defendant "could have used at least part of that Swiss Army knife to open that window." In addition to the knife and her belief that it could have been used to open a window, Officer Gandy's suspicion that

defendant possessed implements of housebreaking was supported by (1) defendant's possession of the flashlight; (2) defendant's possession of the backpack containing unknown items; and (3) all of the factors supporting the finding of reasonable suspicion for the initial stop of defendant. *See In re I.R.T.*, 184 N.C. App. 579, 587, 647 S.E.2d 129, 136 (2007) ("[W]e find probable cause based on the same factors in which we found reasonable suspicion to conduct the investigatory seizure."). The trial court, therefore, properly concluded that "[t]here was probable cause to arrest the Defendant in this case for possession of burglary tools." Accordingly, defendant's assignment of error is overruled.

Defendant has failed to present argument in his brief with respect to assignments of error numbers 2, 4 through 8, and 15. Accordingly, these assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

Affirmed.

Judges TYSON and ARROWOOD concur.

KEVIN PATRICK ROWLETTE, JANITH MARTIN, MARCHELLA THOMAS AND WANDA ADAMS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. STATE OF NORTH CAROLINA, AND RICHARD H. MOORE, IN HIS OFFICIAL CAPACITY AS THE TREASURER FOR THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA06-1036

(Filed 19 February 2008)

Constitutional Law— takings—interest on unclaimed property

The trial court correctly granted defendant's Rule 12(b)(6) motion to dismiss an action alleging an unconstitutional taking by the State retaining the interest from unclaimed funds after they were returned to the owners. This property is unique in that the State did not take possession through its own action, but as a result of the owner's neglect. The capture of interest on the property is not a taking.

Appeal by Plaintiffs from order entered 8 June 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 15 March 2007.

Futterman Howard Watkins Wylie & Ashley, Chtd., by John R. Wylie, pro hac vice, for Plaintiffs-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

STEPHENS, Judge.

"[T]he security of Property[,]" Alexander Hamilton informed the Philadelphia Convention in May of 1787, is one of the "great obj[ects] of Gov[ernment.]" 1 *The Records of the Federal Convention of 1787* 302 (Max Farrand ed. 1911). Accordingly, the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.[1] Although North Carolina's Constitution does not expressly prohibit private property from being taken for public use without compensation, " 'the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina[,]' " *Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4-5, 637 S.E.2d 885, 889 (2006) (quoting John V. Orth, *The North Carolina State Constitution* 58 (paperback ed. 1995)), and North Carolina's Constitution expressly provides that "[n]o person shall be . . . deprived of . . . property, but by the law of the land." N.C. Const. art I, § 19. In this case, we are called upon to determine whether the North Carolina Unclaimed Property Act, N.C. Gen. Stat. § 116B-51 *et seq.* (2003), violates these governmental guarantees which operate for the security of property. We hold that it does not.

FACTS

Plaintiffs Kevin Patrick Rowlette ("Rowlette"), Janith Martin ("Martin"), Marchella Thomas ("Thomas"), and Wanda Adams ("Adams") commenced this action by filing a complaint on 23 November 2004. According to the complaint, each Plaintiff owned property "which was delivered to and held by [] Defendants" pursuant to the Unclaimed Property Act. As to Rowlette, the complaint alleged Defendants held "dividends in the amount of $236.00[.]" As to Martin, Thomas, and Adams, respectively, the complaint alleged Defendants held $118.20, $71.95, and $84.01 worth of "funds[.]" Over the course of 2004, Defendants returned Plaintiffs' property to them, "but re-

1. This guarantee has been applied to the states by the Fourteenth Amendment to the United States Constitution. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979 (1897); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, *reh'g denied*, 439 U.S. 883, 58 L. Ed. 2d 198 (1978).

tained any interest or other income that had accrued on the property while in Defendants' custody." Plaintiffs alleged that Defendants' retention of the interest or income violated Article I, § 19 of the North Carolina Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs further alleged that Defendants' actions violated Section 1983 of the federal Civil Rights Act. Finally, Plaintiffs sought a determination that the action could be maintained as a class action on behalf of all other similarly situated persons or entities.

On 21 November 2005, Defendants filed a motion to dismiss Plaintiffs' complaint pursuant to Rules 12(b)(1), (2) and (6) of North Carolina's Rules of Civil Procedure. By the same pleading, Defendants moved the trial court to "strike [P]laintiffs' class action motion" pursuant to Rules 12(f) and 23 of the Rules of Civil Procedure. The matter came on for hearing before the Honorable Robert F. Hobgood in Wake County Superior Court on 30 May 2006.[2] By order filed 8 June 2006, Judge Hobgood dismissed Plaintiffs' action "against all Defendants pursuant to Rule 12(b)(1) and Rule 12(b)(6)." Plaintiffs timely appealed to this Court.

STANDARD OF REVIEW

The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*. *Welch Contr'g, Inc. v. N.C. Dep't of Transp.*, 175 N.C. App. 45, 622 S.E.2d 691 (2005). "The standard of review on a motion to dismiss under Rule 12(b)(6) is 'whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory.' " *Id.* at 50, 622 S.E.2d at 694 (quoting *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002)).

"[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy." *Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993) (citing *Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958)). When examining the constitutional propriety of legislation, "[w]e presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality." *State v. Evans*, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985) (citing *In re Hous. Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982); *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978)). "In challenging the constitutionality of a statute, the burden of proof is on the challenger,

2. The complaint was originally filed in Guilford County, but was transferred to Wake County by consent.

and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684-85 (citing *Baker v. Martin*, 330 N.C. 331, 410 S.E.2d 887 (1991); *In re Belk*, 107 N.C. App. 448, 420 S.E.2d 682, *appeal dismissed and disc. review denied*, 333 N.C. 168, 424 S.E.2d 905 (1992)).

ANALYSIS

The North Carolina Unclaimed Property Act provides the framework by which our State locates, collects, and "assumes custody and responsibility for the safekeeping" of "tangible personal property" which has gone unclaimed by its owner. N.C. Gen. Stat. §§ 116B-63, 116B-52(11) (2003). Such property includes, but is not limited to, cash, checks, deposits, interest, dividends, credit balances, customers' overpayments, unpaid wages, stocks, bonds, amounts due under insurance policies, amounts distributable from trusts, and the contents of safe deposit boxes. N.C. Gen. Stat. §§ 116B-52(11), 116B-55 (2003).

> Property is unclaimed if the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the [property's] holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property.

N.C. Gen. Stat. § 116B-53(a) (2003); *see also* N.C. Gen. Stat. § 116B-52(5) (2003) (defining "holder" as "a person obligated to hold for the account of or deliver or pay to the owner property[.]"). Depending on the type of property at issue, the property is "presumed abandoned" after a prescribed period of time, and the holder is then required to deliver the property to the State Treasurer. N.C. Gen. Stat. §§ 116B-53(c), 116B-61(a) (2003). Within three years of receiving the property, the Treasurer is required to sell the property at a public sale and to deposit the proceeds into the State's Escheat Fund. N.C. Gen. Stat. § 116B-65 (2003). The income derived from the investment of funds deposited into the Escheat Fund is distributed annually "to the State Education Assistance Authority for grants and loans to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State." N.C. Gen. Stat. § 116B-7(a) (2003).

At any time after unclaimed property is delivered to the Treasurer, a holder or owner may subsequently reclaim the property, or the amount received by the Treasurer from the sale of the property, by filing a claim with the Treasurer. N.C. Gen. Stat. §§ 116B-63, 116B-67 (2003).

> If property other than money is delivered to the Treasurer under this Chapter, the owner is entitled to receive from the Treasurer any income or gain realized or accruing on the property at or before liquidation or conversion of the property into money. If the property is interest-bearing or pays dividends, the interest or dividends shall be paid until the date on which the amount of the deposits, accounts, or funds, or the shares must be remitted or delivered to the Treasurer under G.S. 116B-61. *Otherwise, when property is delivered or paid to the Treasurer, the Treasurer shall hold the property without liability for income or gain.*

N.C. Gen. Stat. § 116B-64 (2003) (emphasis added). The dispositive issue on appeal is whether this directive—that the Treasurer, when returning property to its owner after a claim is made, shall not surrender income the State earned on the property or its proceeds—is unconstitutional. Citing the common law rule that "interest follows principal," Plaintiffs contend that because the State is a "mere custodian" of unclaimed property, *Rose's Stores, Inc. v. Boyles*, 106 N.C. App. 263, 265, 416 S.E.2d 200, 201, *disc. review allowed*, 332 N.C. 484, 421 S.E.2d 356 (1992), the State's retention of earned interest is an unconstitutional taking.

We are not aware of any decisions of the United States or North Carolina Supreme Courts which squarely address the issue presented. Plaintiffs, however, present authority from those Courts which they contend supports their position that the State's action in this case violates the constitutional guarantees.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 66 L. Ed. 2d 358 (1980), Eckerd's of College Park, Inc. ("Eckerd's") entered into an agreement to purchase substantially all of Webb's assets. When it appeared at closing that Webb's debts were greater than the purchase price, Eckerd's filed a complaint of interpleader in a Florida Circuit Court to protect itself, as permitted by Florida law. Pursuant to Florida law, the Circuit Court ordered the amount tendered at closing paid to the court's clerk, who was required to deposit the money in an interest bearing account. When the tendered amount was eventually ordered paid to Webb's receiver, the clerk did not sur-

render the interest which had accrued on the account[3] because a Florida statute dictated that all accruing interest was deemed income of the clerk.[4] The Florida Supreme Court held this statute was constitutional and that the clerk's retention of the interest was not a taking because: (1) the deposited funds were considered "public money" from the date of deposit until the funds left the account; (2) the statute "takes only what it creates"; and (3) the interest earned on the account was not private property. *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952-53 (Fla. 1979).

The United States Supreme Court reversed, holding that the statute violated the Fifth and Fourteenth Amendments. While the Court acknowledged that it "has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare[,]" *Webb's*, 449 U.S. at 163, 66 L. Ed. 2d at 366 (citing *Andrus v. Allard*, 444 U.S. 51, 64-68, 62 L. Ed. 2d 210 (1979); *Penn Central*, 438 U.S. at 125-29, 57 L. Ed. 2d 631), the Court held

> a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. at 164, 66 L. Ed. 2d at 367.

The facts of *Webb's* are easily distinguishable from the facts of the case at bar and Plaintiff's reliance on *Webb's* is misplaced. The nature of the property at issue in *Webb's* is quite distinct from the property at issue in this case. In that case, the property was paid into court by a known entity and was due to Webb's known creditors. In the case at bar, the property at issue was unclaimed and presumed abandoned. Furthermore, the Supreme Court specifically limited its holding to the "narrow circumstances" of that case[5] and "express[ed] no view as

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3. The interest which had accrued totaled more than $100,000.

4. The clerk also retained a statutorily prescribed fee for services rendered in receiving the money.

5. The Court specifically listed the narrow circumstances of that case:

> [W]here there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's

to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders." *Id.* *Webb's* does not control the resolution of this case.

In *Phillips v. Washington Legal Found.*, 524 U.S. 156, 141 L. Ed. 2d 174 (1998) and *Brown v. Legal Found. of Washington*, 538 U.S. 216, 155 L. Ed. 2d 376 (2003), the Supreme Court evaluated the constitutionality of two states' use of interest earned on the property of private individuals being held in attorneys' trust accounts ("IOLTA" accounts) to fund legal services for low income individuals. In *Phillips*, the Supreme Court acknowledged "the general rule that 'any interest . . . follows the principal.' " *Phillips*, 524 U.S. at 166, 141 L. Ed. 2d at 185 (quoting *Webb's*, 449 U.S. at 162, 66 L. Ed. 2d at 365). The Court then held that "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 172, 141 L. Ed. 2d at 188. However, the Court expressed "no view as to whether these funds have been 'taken' by the State[.]" *Id.*

In *Brown*, the Court addressed the question left unresolved by *Phillips*. Citing *Phillips*, the Court again recognized an owner's property interest in accrued earnings of IOLTA accounts. The Court further held that the appropriation of those earnings by the state constituted a "taking" and triggered the protections of the Fifth Amendment. Finally, however, the Court reasoned that "pecuniary compensation must be measured by [an owner's] net losses rather than the value of the public's gain," *Brown*, 538 U.S. at 237, 155 L. Ed. 2d at 395, and that since funds deposited into IOLTA accounts would otherwise not earn any interest, the owners of the funds had not suffered any compensable loss. The Court held that because "the owner's pecuniary loss . . . is zero . . . there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case." *Id.* at 240, 155 L. Ed. 2d at 397.

As with *Webb's*, neither *Phillips* nor *Brown* leads us inevitably to the conclusion that the State's action in the case at bar is unconstitutional. We again emphasize the unique nature of the property at issue in this case as compared to the property at issue in *Phillips* and *Brown*. Both of those cases dealt with property that unquestion-

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> registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others[.]

Webb's, 449 U.S. at 164, 66 L. Ed. 2d at 367.

ably belonged to identified owners. Here, we are dealing with property that is presumed abandoned until a holder or owner makes a claim to the Treasurer. The holdings of *Phillips* and *Brown* are, thus, distinguishable.

Finally, Plaintiffs direct our attention to the North Carolina Supreme Court's decision in *McMillan v. Robeson Cty.*, 262 N.C. 413, 137 S.E.2d 105 (1964). In that case, the Court evaluated a statute that permitted county clerks of court "to invest or reinvest any moneys representing unclaimed court costs, fees received, *and judgment payments and all moneys received* and held by him by color of his office[.]" *Id.* at 415, 137 S.E.2d at 107. The statute provided further that "[t]he interest and revenues received upon such securities and any profit from the sale thereof shall be deposited in and become a part of the general fund of the county[.]" *Id.* When the Robeson County Board of Commissioners instructed the County's clerk to deposit into the County's general fund the interest which had accumulated on such invested funds, the clerk sought a declaratory judgment to determine the constitutionality of the statute. The trial court held the statute valid and directed the clerk to deposit the accumulated interest into the general fund. The Supreme Court reversed, stating that "earnings on the fund are a mere incident of ownership of the fund itself[,]" and "[t]he constitutional provision . . . that no person shall be deprived of his property 'but by the law of the land,' applies to the earnings in the same manner, and with the same force, it applies to the principal." *Id.* at 417, 137 S.E.2d at 108. Noting that no one with an interest in the funds had been afforded an opportunity to challenge the right of the County to take the earnings on the funds, the Court remanded the case to the trial court for compliance with the statutory mandate that " '[w]hen declaratory relief is sought, all persons shall be made parties who have, or claim, any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.' G.S. s 1-260." *Id.* at 418, 137 S.E.2d at 109.

While the Court in *McMillan* reaffirmed the long-standing common law rule that "interest follows principal," the Court's ruling did not address or rely on the constitutional provisions at issue in the case at bar. The Court merely remanded the action to the trial court so that all interested parties could fully develop their claims.

Plaintiff's contention to the contrary notwithstanding, we find guidance in the United States Supreme Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L. Ed. 2d 738 (1982). In that case, the

Court reviewed the constitutionality of Indiana's Mineral Lapse Act. That statute provided that "a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." *Id.* at 518, 70 L. Ed. 2d at 744. When the owners of severed mineral interests did not use the interests for twenty years and did not file a statement of claim, the surface owner of the tract brought an action seeking declaratory judgment that the mineral owners' rights had lapsed and were extinguished. The Indiana Supreme Court held that the statute was constitutional as a permissible exercise of the state's police power.

The United States Supreme Court affirmed, stating, "[f]rom an early time, this Court has recognized that States have the power to permit *unused* or *abandoned* interests in property to revert to another after the passage of time." *Id.* at 526, 70 L. Ed. 2d at 749 (emphasis added). The Supreme Court "has never required the State to compensate the owner for the consequences of his own neglect. . . . It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." *Id.* at 530, 70 L. Ed. 2d at 751-52. The courts of several other states have cited *Texaco* in upholding the constitutionality of their states' unclaimed property acts.

In *Smolow v. Hafer*, 867 A.2d 767 (Pa. Commw. Ct. 2005), the Commonwealth Court of Pennsylvania examined Pennsylvania's Unclaimed Property Law when a suit was brought against the state for refusing to remit interest accrued on unclaimed property while it was in the state's possession. As with North Carolina's Act, Pennsylvania's Unclaimed Property Law provided that unclaimed property is presumed abandoned. Pennsylvania's statute further provided that upon a claim made by an owner, the state was required to return the property or the proceeds therefrom, but was not required to remit any interest earned on the property or its proceeds to the owner. Relying on *Texaco*, the Pennsylvania court determined that it was "Smolow's abandonment of his property, not the action of the Treasurer, which caused his pecuniary loss." *Id.* at 775. Therefore, the court held that "where an owner's interest in property is transferred to another pursuant to the Unclaimed Property Law and *due to the original owner's abandonment*, the delivery of the property to the Treasurer does not constitute a taking." *Id.*

In *Smyth v. Carter*, 845 N.E.2d 219 (Ind. Ct. App.), *transfer denied*, 860 N.E.2d 588 (Ind. 2006), *cert. denied*, 549 U.S. 1181, 166 L. Ed. 2d 996 (2007), the Indiana Court of Appeals determined that the refusal of the state to remit interest earned on property held pursuant to Indiana's Unclaimed Property Act did not violate the Taking Clause. Like Pennsylvania's and North Carolina's unclaimed property statutes, Indiana's law provided that the state may take custody of unclaimed property that is "presumed abandoned if the owner has not shown any interest in the property for a statutorily prescribed period of time." *Id.* at 222 (citation omitted). As in the case *sub judice*, the plaintiff in *Smyth* premised his "contention . . . on his belief that the State's possession of property . . . is 'purely' custodial[,]" and on "the common law maxim that 'interest follows principal.' " *Id.* at 223. Relying on *Texaco*, the Indiana court rejected Plaintiff's argument and held that "[b]ecause it is the owner's failure to act, and not the State's exercise of its sovereign power, that causes the deprivation, there is no 'taking' that requires compensation." *Id.* at 224.

In *Hooks v. Kennedy*, 961 So. 2d 425 (La. Ct. App.), *cert. denied*, 967 So. 2d 507 (La. 2007), the Louisiana Court of Appeal upheld the constitutionality of that state's unclaimed property act. Like North Carolina's Act, Louisiana's law provided

> a **custodial** scheme for handling certain types of abandoned property, rather than one in which the **title** to the abandoned property reverts to the sovereign. Under Louisiana law, after a specified passage of time, holders of property abandoned by missing owners must report the possession of the abandoned property and relinquish custody to the state. Upon transfer from the holder, the state assumes custody and responsibility for the safekeeping of the property.

Id. at 430-31 (quotation marks, footnote, and citations omitted). " 'Pending a claim by a missing owner, the [s]tate receives the use of the property as well as any income that it may provide.' " *Id.* at 431 (quoting *Louisiana Health Servs. & Indem. Co. v. McNamara*, 561 So. 2d 712, 716 (La. 1990)). In holding that the state's capture of interest under Louisiana's unclaimed property law did not violate the Taking Clause, the Louisiana Court of Appeal recognized that

> [t]he triggering event in the exercise of the state's power of eminent domain is the state's overt act of taking private property from an owner. The triggering event in an unclaimed property

> case is the owner's act of abandonment over a period of several years. After abandonment, the unclaimed property law requires the holder of the abandoned property to transfer "custody," not title, to the state.

Id. at 432 (citations omitted). Like the Supreme Court in *Texaco*, and the appellate courts of Indiana and Pennsylvania, the Louisiana court recognized that there can be no actionable taking when it is the neglect of the property owner that causes the state to assume custody of the property, and not an overt action on the part of the state to take private property from an owner.

Finally, in *Sogg v. Ohio Dep't of Commerce*, No. 06AP-883, 2007 WL 1821306 (Ohio Ct. App. 2007), *appeal allowed*, 876 N.E.2d 968 (Ohio Nov. 21, 2007), the Court of Appeals of Ohio distinguished *Webb's*, *Phillips*, and *Brown* on the basis of the "unique nature" of the property at issue in unclaimed property cases. *Id.* at *10. The court stated that although "title to unclaimed funds remains with the owner, there is unquestionably a *property lapse* that occurs because of the owner's failure to act with respect to said property within a statutorily prescribed period of time." *Id.* at *5 (emphasis added). The court continued:

> Because of the unique nature of the property, the state's retention of the interest earned on unclaimed funds while those funds are in the custody and control of the state, due to the owner's failure to take any action with respect to the property for the statutorily prescribed period of time, does not constitute a taking that requires compensation. It is the owner's conduct, and not that of the state that causes the lapse of the property right.

Id. at *10.

Based on a thorough review of the authority discussed above, we are persuaded by the United States Supreme Court's reasoning in *Texaco* to conclude that the State's retention of interest earned on unclaimed property while that property is in the State's possession is not a taking and, therefore, does not violate the United States or North Carolina Constitutions. In reaching this result, we do not conclude that *Texaco*, as a matter of law, bars Plaintiffs' claim. We are cognizant that the statute at issue in that case had the effect of transferring private property rights not to a state, but to another private party. Rather, we rely on the underlying reasoning of that Court's holding: "[T]his Court has never required the State to compensate the owner for consequences of his own neglect. . . . It is the owner's fail-

ure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." *Texaco*, 454 U.S. at 530, 70 L. Ed. 2d at 751-52. Here, the State does not take possession of private property through any overt action on its part. Rather, the State comes into possession of the property as a result of the owner's neglect which causes the property to be unclaimed for the prescribed period of time, and thus deemed abandoned. Due to this unique nature of the property, and since it is the owner's neglect that results in the State's possession of the property, the capture of interest accruing on that property by the State is not a taking, and the State is not required to pay the owner "just compensation."

Plaintiffs have not met their burden of showing "clearly, positively, and unmistakably . . . beyond a reasonable doubt" that section 116B-64 is violative of either the United States or the North Carolina Constitutions. *Guilford Cty. Bd. of Educ.*, 110 N.C. App. at 511, 430 S.E.2d at 684. Accordingly, the trial court properly granted Defendants' motion to dismiss pursuant to Rule 12(b)(6). Because the constitutional issue ultimately resolves the matter in Defendants' favor, we need not address Plaintiffs' remaining assignments of error. The order of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

MICHAEL L. HUNTER, EMPLOYEE, PLAINTIFF v. APAC/BARRUS CONSTRUCTION COMPANY, EMPLOYER, ESIS, CARRIER, DEFENDANTS

No. COA07-5

(Filed 19 February 2008)

1. Appeal and Error— preservation of issues—failure to cite authority—failure to assign error

Although defendants contend the Industrial Commission erred in a workers' compensation case by its first conclusion of law stating that plaintiff had a presumption of permanent total disability even though defendants contend the presumption of disability resulting from a Form 21 agreement applies only to

temporary total disability, this assignment of error is dismissed, because: (1) defendants failed to cite any authority for their proposition; (2) this argument is not properly before the Court of Appeals since defendants failed to assign error to this conclusion of law as required by N.C. R. App. P. 10(a); and (3) even after plaintiff pointed out in his brief the lack of assignment of error, defendants did not move to amend the record on appeal to add an assignment of error, nor did they ask in their reply brief for the Court of Appeals to apply N.C. R. App. P. 2.

2. Workers' Compensation— permanent total disability— wage earning capacity

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was entitled to permanent total disability benefits as a result of a brain injury he sustained during his employment with defendant even though defendants contend plaintiff was actively involved in running a family farm which allegedly established that plaintiff possessed wage earning capacity, because: (1) defendants failed to assign error to findings of fact that established plaintiff's son was the person responsible for the day-to-day operations of the farm; (2) the Commission's finding regarding plaintiff's limited involvement with the farm was supported by the testimony of plaintiff, plaintiff's son, a neighbor, the farm's CPA, a loan officer, and a grower; (3) while defendants point to the documents signed by plaintiff, the Commission was entitled to credit plaintiff's evidence that he only signed the documents based on his son's age and lack of credit history, and that the documents did not reflect actual involvement in the day-to-day operations of the farm; (4) contrary to defendants' assertion, the Commission did not disregard their expert's testimony, but instead simply did not credit it; and (5) the Commission's findings that plaintiff signed grower agreements and financial documents based on his son being a minor and lacking a credit history, coupled with the responsibilities assumed by the son, reflected adequate consideration and an implicit rejection of defendant's evidence.

3. Workers' Compensation— vocational rehabilitation—unwillingness to participate

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's alleged refusal to cooperate with vocational rehabilitation did not preclude an award of disability benefits under N.C.G.S. § 97-25 and N.C.I.C. Rule 703,

because defendants failed to demonstrate that plaintiff's unwillingness to participate in a sheltered workshop was unreasonable and mandated a denial of benefits.

Appeal by defendants from an opinion and award entered 6 September 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 August 2007.

Ward and Smith, P.A., by William Joseph Austin, Jr. and Nikiann Tarantino Gray, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer and Julie B. Bradburn, for defendants-appellants.

GEER, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission concluding that plaintiff is entitled to permanent total disability benefits as a result of injuries he sustained during his employment with defendant employer. On appeal, defendants primarily argue that the Commission should have found that plaintiff was actively involved in the running of a family farm and that this activity established that plaintiff possessed wage-earning capacity. Based upon this Court's standard of review, we hold that the Commission's findings of fact otherwise are supported by competent evidence, and those findings in turn support the conclusions of law. We, therefore, affirm.

Facts

At the time of the hearing, plaintiff was 52 years old and had a high school diploma. He began working for the defendant construction company as a heavy equipment operator on 24 September 1990. In December 1992, plaintiff and his brother also began the Hunter Hog Farm ("the farm"). Prior to being injured, plaintiff was responsible for overseeing the day-to-day operations of the farm. His son grew up helping with the farm and also learning its day-to-day operations.

On 6 May 1996, plaintiff was injured while working for defendant employer when a road sign fell and hit him in the head, resulting in a life-threatening epidural hematoma. Plaintiff was taken to the hospital where he underwent an emergency craniotomy and was released on 10 May 1996. The parties ultimately entered into a Form 21 agreement that was approved by the Commission on 17 June 1996. Plaintiff

has been receiving temporary total disability benefits at a rate of $390.00 per week since 6 May 1996.

As a result of his brain injury, plaintiff suffered a change in personality that caused him to become childish, forgetful, irrational, angry, and unexpectedly belligerent. Plaintiff also experienced headaches, tinnitus, diminished cognitive abilities, anxiety, and depression. He was seen by Dr. Antonio E. Puente, a neuropsychologist, on 84 occasions from 15 July 1996 through 9 December 2002. Dr. Puente continues to be plaintiff's treating doctor. Dr. Puente has diagnosed plaintiff as suffering from a closed head injury with PTSD/anxiety/reactive depression and a chronic organic personality disorder. According to Dr. Puente, plaintiff's brain injury resulted in cognitive and emotional limitations, impairing his memory, organizational skills, and ability to learn new skills and led to volatility, a hypersensitivity to noise, and an inability to perform repetitive tasks for extended periods of time.

Plaintiff was also seen, at defendants' request, by Dr. Margit Royal, a board-certified neurologist, and Dr. C. Thomas Gualtieri, a neuropsychiatrist. Dr. Royal ultimately concluded plaintiff was physically capable of working, but acknowledged that plaintiff may lack the cognitive function, especially with respect to organizational skills, necessary to perform consistently. Dr. Gualtieri diagnosed plaintiff as suffering a traumatic injury to the brain that had resulted in persistent problems, including headaches, tinnitus, cognitive problems, and emotional problems.

Subsequently, defendants requested a hearing to determine "whether Plaintiff is employable and whether Plaintiff is undermining Vocational Rehabilitation and medical diagnosis efforts." The hearing was conducted by the deputy commissioner on 17 October 2002 and 16 December 2003. As reflected in the stipulations set forth in the deputy commissioner's opinion and award, defendants contended "that the Plaintiff's ownership interest in and operation of [the farm] is suitable employment such that he is no longer entitled to receive ongoing total disability benefits." On 22 December 2005, the deputy commissioner awarded plaintiff permanent total disability compensation in the amount of $390.00 per week.

Defendants appealed to the Full Commission, which affirmed the deputy commissioner's opinion and award on 6 September 2006 with minor modifications. The Commission concluded that plaintiff's ownership of the farm was not sufficient to support a finding of wage

earning capacity based on its factual findings that (1) plaintiff was not involved in the day-to-day operations of the farm; and (2) the skills plaintiff used on the farm would not allow him to be employable in the competitive market place, considering his physical limitations, age, education, and experience. The Commission further concluded that because of plaintiff's compensable brain injury—and the resulting cognitive and emotional conditions—plaintiff would never be able to return to work in competitive employment, and plaintiff was, therefore, entitled to permanent total disability benefits. Defendants timely appealed the opinion and award of the Full Commission to this Court.

Discussion

Appellate review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The Commission's findings of fact may only be set aside if there is a "complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

[1] Defendants first contend that the Commission erred in concluding that plaintiff had a presumption of permanent total disability. In its first conclusion of law, the Commission stated: "Because the parties entered into a Form 21 Agreement, the plaintiff has the benefit of a presumption of total disability." Defendants argue that the presumption of disability resulting from a Form 21 agreement applies only to temporary total disability and, therefore, should not have been a basis for an award of permanent total disability. Significantly, defendants cite no authority that supports their proposition.

In any event, defendants did not assign error to this conclusion of law. Pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, "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." In the absence of an assignment of error directed to the first conclusion of law, defendants' arguments regarding that conclusion of law are not properly before this Court. *See Taylor v. Carolina Restaurant Group, Inc.*, 170 N.C. App. 532, 540, 613 S.E.2d 510, 515 (declining, pursuant to Rule 10(a), to address defendants' contention that Commission's conclusion of law was contrary to the law, when defendants' assignment of error as to that conclusion of law stated only that it was not supported by competent findings of fact), *aff'd per curiam*, 360 N.C. 173, 622 S.E.2d 492 (2005). We note further that even after plaintiff, in his appellate brief, pointed out the lack of an assignment of error, defendants did not move to amend the record on appeal to add an assignment of error and did not ask, in their reply brief, for this Court to apply N.C.R. App. P. 2. We, therefore, address neither defendants' arguments regarding the presumption nor defendants' contentions regarding plaintiff's purported failure to meet his burden of proof in the absence of the presumption.

[2] Defendants next contend that the Commission erred in determining plaintiff to be permanently and totally disabled because defendants' evidence established plaintiff's wage earning capacity. When a presumption has arisen from a Form 21, " 'the burden shifts to [the employer] to show that plaintiff is employable.' " *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257, *disc. review denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995)). At that point, "[t]he employee need not present evidence at the hearing unless and until the employer, 'claim[ing] that the plaintiff is capable of earning wages[,] . . . come[s] forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.' " *Id.* at 763-64, 487 S.E.2d at 749 (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)).

Defendants contend they met their burden by offering evidence regarding plaintiff's involvement with his family farm. The Supreme Court in *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 530 S.E.2d 54 (2000), set forth the test to be applied in determining whether an employee's ownership of a business supports a finding of earning capacity:

> [T]he test for determining whether the self-employed injured employee has wage-earning capacity is that the employee (i) be

> actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience. In the instant case, given plaintiff's exertional limitations, education, and experience, would he be hired to work in the competitive market place?

Id. at 107, 530 S.E.2d at 61.

The Supreme Court stressed in *Lanning* that questions regarding whether plaintiff is actively involved in the day-to-day operation of the business and whether plaintiff's self-employment involves marketable skills "are questions of fact." *Id.* at 108, 530 S.E.2d at 61. In *Lanning*, the Court held that this Court "usurped the fact-finding role of the Commission" when it made these determinations. *Id.* The Supreme Court reversed this Court and directed that the case be remanded to the Commission to make the necessary findings of fact. *Id. See also Devlin v. Apple Gold, Inc.*, 153 N.C. App. 442, 448, 570 S.E.2d 257, 262 (2002) (finding that although the Commission made adequate findings as to the employee's involvement in day-to-day operation of his business, it failed to make findings as to whether the employee's management skills "are competitively marketable in light of his physical limitations, age, education and experience"). In this case, the Commission made the findings required by *Lanning* and, more recently, by *Devlin*. The issue on appeal is whether those findings are supported by any competent evidence.

With respect to the first element of the *Lanning* test, the Commission found:

> 19. . . . All the testimony, including that from friends or business acquaintances and the plaintiff's brother James Hunter, a former partner in the hog farm, shows that Scott Hunter [plaintiff's son] is a hard-working young man, and that after his father's injury in May 1996, Scott rose to the occasion and basically took over the physical day-to-day operations of the farm.
>
> 20. Scott Hunter was a minor and did not have the credit history to take over financial ownership of the farm when his father was first injured. As a result, the plaintiff continued to sign as owner of the business on grower agreements, equipment purchases and financial documents until Scott was able to acquire a one-half ownership interest in Hunter Hog Farm in 2002.

> 21. Since May 6, 1996, Scott Hunter has been responsible for the day-to-day operations of the hog farm including driving the tractors, mowing the grass, irrigating the animals, pulling out the dead hogs, bailing the hay, operating the equipment, cleaning the hog houses, identifying whether there were sick or diseased animals, ordering the feed and all other tasks related to the hog farm.
>
> . . . .
>
> 25. Since his injury by accident, the plaintiff has done a limited amount of work on Hunter Hog Farm, but he is not involved in day-to-day operations or in management of the business. The plaintiff has walked the farm, co-signed loans, purchased equipment and signed grower agreements.

Defendants failed to assign error to findings of fact 19, 20, and 21 and, therefore, those findings are binding on appeal. Those findings establish that Scott Hunter is the person responsible for the day-to-day operations of the farm. Further, the Commission's finding regarding plaintiff's limited involvement with the farm is supported by testimony from Scott Hunter, plaintiff, a neighbor, the farm's CPA, a loan officer, and a grower. While defendants point to the documents signed by plaintiff, the Commission was entitled to credit plaintiff's evidence that plaintiff signed the documents only because of Scott's age and lack of credit history and that the documents did not reflect actual involvement in the day-to-day operations of the farm.

Defendants, however, argue that the Commission failed to take into account testimony from their expert, Dr. Lamb, and lay witnesses testifying about plaintiff's signing of financial documents and engaging in other tasks in connection with the farm. Defendants cite *Weaver v. American Nat'l Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996), which held: "Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Id.* at 510, 473 S.E.2d at 12.

Defendants hired Dr. Russell Lamb, a Ph.D. agricultural economist, to analyze the farm's financial records. Based upon his review of those records, Dr. Lamb concluded that plaintiff was actively involved in the operation of the farm from 1996 to 2002. Far from disregarding Dr. Lamb's testimony, the Commission included a specific finding of fact explaining why it did not find his testimony persuasive:

> 24. Dr. Lamb has never met the plaintiff, never talked to anyone who has ever done business with the plaintiff, and has never met Scott Hunter or Dale Hunter[, plaintiff's wife]. Further, Dr. Lamb does not have the expertise necessary to render an opinion about the plaintiff's physical capacity or the extent of the plaintiff's head injury, or cognitive deficits. He has never visited the Hunter Hog Farm or observed the day-to-day operation. The Full Commission finds that, to the extent that Dr. Lamb's conclusions about the economic status of Hunter Hog Farm are based upon incomplete information about the actual operations of the farm and who manages it and does the work, they are insufficient and not persuasive to establish any wage earning capacity on the part of the plaintiff.

The Commission thus did not disregard Dr. Lamb; it simply did not credit his testimony. "In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). *See also Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987) (holding that the Commission may refuse to believe certain evidence, controverted or not, and may accept or reject the testimony of any witness), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

Defendants also point to the lay testimony of certain growers who had business contracts with the farm and, defendants argue, supported their contention that plaintiff was in fact still involved in the operation of the farm. While the Commission did not make specific findings addressing that testimony, the Commission is not required to "make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence." *Hensley v. Indus. Maint. Overflow*, 166 N.C. App. 413, 421, 601 S.E.2d 893, 899 (2004), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 690 (2005). The Commission's findings that plaintiff "signed grower agreements," that plaintiff signed financial documents because Scott Hunter was a minor and lacked a credit history, and the responsibilities assumed by Scott reflect an adequate consideration—and implicit rejection—of defendants' evidence.

Accordingly, we hold that the Commission's finding that plaintiff was not involved in the day-to-day operations of the farm is supported by competent evidence and, therefore, must be upheld on

appeal. "As this finding of fact establishes that the [business] did not meet one prong of the *Lanning* two-prong test, we need not address whether [plaintiff] gained any marketable skills from his [business]." *Id.* at 419, 601 S.E.2d at 898. We, therefore, uphold the Commission's determination that plaintiff's participation in the farm did not establish wage-earning capacity.

[3] Alternatively, defendants argue that plaintiff's refusal to cooperate with vocational rehabilitation precludes an award of disability benefits under N.C. Gen. Stat. § 97-25 (2005) and N.C.I.C. Rule 703. Defendants complain that the Commission's determination that plaintiff's refusal to continue at a sheltered workshop was "reasonable" constituted a "*de facto* reversal of the Order compelling plaintiff to attend vocational rehabilitation" and, in combination with its "determination of permanent disability erroneously deprived defendants of the chance to assist plaintiff in regaining any alleged diminished capacity resulting from the injury."

The record indicates that defendants' vocational rehabilitation professional, Robert Manning, Jr., recommended that plaintiff work for a period of time in "supportive employment," also known as a sheltered workshop. In response to a request by defendants, the Commission's Executive Secretary entered an order stating:

> For good cause shown, IT IS HEREBY ORDERED that plaintiff shall comply with reasonable vocational rehabilitation services provided by defendants pursuant to N.C. Gen. Stat. § 97-25, including attempting to attend an interim workshop, after the vocational Rehabilitation Professional observes the plaintiff in his current efforts at returning to work and after the Rehabilitation Professional clearly enunciates the plan for use of the workshop in a report which specifies the maximum length of time the plaintiff should attempt the workshop and how the workshop will aid in returning the plaintiff to suitable employment.

Mr. Manning, in consultation with Dr. Puente, ultimately decided on a two-week period at Omega Enterprises. During an initial tour of the Omega facilities, plaintiff left after a few minutes. The Commission found:

> 18. In December 2000, at the direction of the defendants, the plaintiff visited a sheltered workshop. The plaintiff was overwhelmed by the noise and number of developmentally dis-

> abled individuals at the shelter and left after a few minutes. Mr. Manning testified that the attempt to rehabilitate the plaintiff in a sheltered workshop was a wasted cause. The plaintiff's decision to walk out of the sheltered workshop was a reasonable reaction.

Defendants have not made any specific argument, apart from a general citation to N.C. Gen. Stat. § 97-25 and Rule 703, that the Commission was required to suspend benefits despite this finding. Further, even assuming that defendants are correct in arguing that the Commission "de facto" reversed the Executive Secretary when it found that plaintiff's decision not to go through with the Omega trial was "reasonable," defendants have cited no authority and made no specific argument as to why such a reversal would be erroneous.

Defendants argue instead that the finding misstates Mr. Manning's testimony when it indicated that Mr. Manning testified that pursuit of the sheltered workshop was "a wasted cause." We disagree. When asked whether he thought plaintiff would participate in the Omega workshop, Mr. Manning responded: "I didn't really feel any need to pursue—not that I was ever asked to, again, but I certainly felt it was a wasted cause." Thus, the Commission's finding is consistent with Mr. Manning's testimony.

With respect to the Commission's finding that plaintiff's departure from Omega was a reasonable reaction, Mr. Manning explained that he could understand plaintiff's reaction.

> Well, I think I used the word, insulted, before and I—I can understand that. . . .
>
> But with the scenario that you've painted—I mean, when you pull up in front of that building and you walk in and somebody walks by with, you know, perhaps not their Sunday best on that's acting a little bit strange, I'll admit to you it could be a little bit intimidating.

Mr. Manning confirmed that Omega was not work in a competitive labor market, but explained the reasoning for the referral to Omega:

> [W]ith the problems that [plaintiff] had, I just—I couldn't see going out trying to place him in the job market, but at the same time, as a rehab person, I wasn't about to give up on him. I was just trying to find something that would help him kind of crawl back.

> And this may have turned out to be an absolute disaster if we'd gone through with it, but I guess in some sense of the word, at least we'd be that far down the road and know that it was a disaster.

We believe that this testimony supports the Commission's finding that plaintiff's decision to leave Omega was reasonable. Defendants present no other argument supporting their contention that plaintiff's refusal to cooperate precluded an award of benefits.

In this section of their brief, defendants also challenge an unrelated finding of the Commission that "Bob Manning, the vocational rehabilitation expert hired by the defendants, testified that there was 'no way' the plaintiff could get a job in the competitive labor market when one considers his physical and mental limitations." This finding of fact relates to the second prong of the *Lanning* test and, therefore, is immaterial. Nevertheless, this finding is supported by Mr. Manning's deposition. After describing the Omega experience, Manning went on to acknowledge that he "never did go on to recommend a job placement plan or anything like that." He explained that he did not prepare a plan because: "I just can't imagine going hand-in-hand to an employer at that time and . . . trying to give somebody his history and—and to stand there and say yeah, I'm ready to go to work, I'll be here Monday morning. That wasn't going to happen." When asked by plaintiff's counsel if plaintiff would be hired if they had done so, he said, "No, way." The Commission's finding is a reasonable construction of Mr. Manning's testimony.

Conclusion

Defendants failed to preserve any argument that a presumption of disability did not apply. The burden to prove that plaintiff was employable, therefore, shifted to them. Because the Commission's findings of fact under *Lanning* are supported by competent evidence, and defendants have failed to demonstrate that plaintiff's unwillingness to participate in the Omega sheltered workshop mandated a denial of benefits, we affirm the Commission.

Affirmed.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. TEMETRIA SHATORIE DAVIS, DEFENDANT

No. COA06-1707

(Filed 19 February 2008)

1. Drugs— conspiracy to traffic cocaine—instructions—omission of "by possession"—unanimity of verdict

The trial court's instruction in a prosecution for conspiracy to traffic in cocaine by possession that referred only to conspiracy to traffic in cocaine without specifying "by possession" did not create a risk of a nonunanimous verdict because it did not constitute a disjunctive instruction, and any danger of a nonunanimous verdict was removed when defense counsel's closing argument repeatedly identified the charge against defendant as conspiracy to traffic by possession, defendant's conspiracy instruction was linked to the preceding conspiracy instruction relating to a codefendant which specified that the conspiracy involved an agreement to traffic in cocaine by possession, and the verdict form required the jury to decide whether defendant was guilty of conspiracy to traffic in cocaine by possession of more than 28 grams but less than 200 grams of cocaine.

2. Drugs— trafficking—instruction on lesser offense—not required

The trial court did not err by not giving an instruction on a lesser offense in a prosecution for conspiracy to traffic in cocaine. Although defendant argued that she was entrapped into the greater offense, sentencing entrapment was not raised at trial and was not properly before the appellate court, and the evidence supported an instruction only on the greater offense.

Appeal by defendant from judgment entered 17 May 2006 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

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

GEER, Judge.

Defendant Temetria Shatorie Davis appeals from her conviction of conspiracy to traffic in cocaine by possession. Defendant contends first that she was deprived of a unanimous jury verdict when the trial court instructed the jury on conspiracy to commit trafficking in cocaine without specifying that the trafficking occurred through possession. Because the trial court did not give any disjunctive instruction as to defendant and, in any event, the unanimity cases relied upon by defendant do not apply to a charge of conspiracy to traffic in cocaine, we hold that the trial court's instruction did not create a risk of a non-unanimous verdict.

Defendant also argues that the sentencing entrapment defense, *see State v. Foster*, 162 N.C. App. 665, 671-72, 592 S.E.2d 259, 264, *aff'd by equally divided court*, 359 N.C. 179, 604 S.E.2d 913 (2004), entitled her to an instruction on the lesser included offense of conspiracy to commit possession of cocaine. Defendant, however, neither requested an instruction on the sentencing entrapment defense at trial nor assigned error on appeal to the court's failure to give such an instruction. Thus, the issue of sentencing entrapment is not before us. Since the evidence at trial supported only an instruction on conspiracy to traffic in cocaine, we hold that the trial court properly refused defendant's request for an instruction on conspiracy to commit possession of cocaine.

Facts

In June 2005, Jeffrey Gamble was living with defendant's sister. While defendant was visiting Gamble and her sister on 23 June 2005, Gamble received several phone calls from Noy Sykeo. Gamble had known Sykeo for six or seven years, and Sykeo had been one of Gamble's drug suppliers. Sykeo asked Gamble, who owed Sykeo $500.00, if he could help Sykeo obtain two ounces of cocaine. Gamble in turn asked defendant if she knew someone who would have two ounces of cocaine. Defendant agreed to help and called Saint Griffin who was willing to supply the cocaine.

Gamble was unaware that Sykeo had agreed to work with the police as a confidential informant because of pending felony charges. As part of this work, Detective Marshburn of the Raleigh Police Department had asked Sykeo to purchase a "trafficking amount" of cocaine, which equaled at least one ounce.

Gamble called Sykeo back, told Sykeo that he had located the cocaine, and asked Sykeo to pick up Gamble and defendant. Gamble, Sykeo, and defendant were supposed to meet Griffin and his partner, Maurice Teasley, in a Wendy's parking lot. On the way, at approximately 1:00 a.m., they met Detective Marshburn, who was working undercover, in a Papa Lou's restaurant parking lot. Defendant told Marshburn that they were going to meet the person with the cocaine at the Wendy's parking lot.

Detective Marshburn, driving a separate car, followed Sykeo, Gamble, and defendant to a Hardee's parking lot. Defendant told Marshburn that the drug supplier was in the Wendy's parking lot across the street, and the supplier wanted defendant to bring him the money. Marshburn refused to give them the money for the drugs until either he or Sykeo had seen the cocaine. Gamble got in the car with Detective Marshburn while Sykeo and defendant drove across the street to the Wendy's parking lot.

After a few minutes, Sykeo returned to the Hardee's parking lot without defendant. He reported that he had seen some cocaine, but it did not look like the full amount he had requested. Marshburn called off the deal and left the parking lot. Gamble got back into Sykeo's car, and they drove back across the street to the Wendy's parking lot. Griffin and Teasley were standing outside a car. As Gamble rolled down his window to speak to Griffin, police officers yelled "Freeze!" Gamble, Griffin, Teasley, and defendant were all arrested. Officers seized 53 grams of powder cocaine from Griffin.

On 6 February 2006, defendant was indicted on one count of conspiracy to traffic in cocaine by possession of 28 grams or more of cocaine, but less than 200 grams of cocaine. Defendant and Teasley were tried together beginning on 16 May 2006. The jury found defendant guilty of conspiracy to traffic in cocaine by possession on 17 May 2006, and Judge Orlando F. Hudson, Jr. sentenced defendant to a presumptive range sentence of 35 to 42 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erred when instructing the jury as to the sole charge brought against defendant: conspiracy to commit trafficking in cocaine by possession. Defendant argues that because the trial court's instruction referred only to "conspiracy to commit trafficking in cocaine" without specifying "by possession," it gave rise to the risk of a non-unanimous verdict. We disagree.

Defendant and Teasley were tried in the same proceeding. After giving several standard jury instructions, the trial court instructed the jury on Teasley's charge of trafficking in cocaine by transportation:

> Members of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant Maurice Teasley, acting either by himself or acting together with Saint Griffin, and that the defendant Maurice Teasley knowingly transported cocaine from one place to another, and that the amount transported was 28 grams or more but less than 200 grams, then it would be your duty to return a verdict of guilty of this offense.
>
> However, if you do not so find, or if you have a reasonable doubt, it would be your duty to return a verdict of not guilty.
>
> Members of the jury, the defendant Maurice Teasley has been charged with feloniously conspiring to commit trafficking in cocaine by possessing 28 grams or more but less than 200 grams of cocaine.

The court went on to instruct the jury on the elements of conspiring to commit trafficking in cocaine by possession:

> First, that the defendant Maurice Teasley and Saint Griffin entered into an agreement.
>
> Second, that the agreement was to commit trafficking in cocaine by possessing 28 grams or more but less than 200 grams of cocaine.
>
> . . . .
>
> And third, that the defendant and Saint Griffin intended that the agreement be carried out at the time it was made.

The court concluded the instruction on the conspiracy charge with respect to Teasley by stating:

> Members of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant agreed with at least one person, and that the defendant and that person intended at the time of the agreement, that person being Saint James [sic], that it was made—that it would be carried out, it would be your duty to return a verdict of guilty.

> However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

Immediately following the instructions for Teasley, the trial court instructed the jury with respect to defendant:

> And members of the jury, if you further find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant Temetria Davis agreed with at least one of these people, that being Jeffrey Gamble and Saint James [sic], to commit trafficking in cocaine and that the defendant and those persons intended at the time the agreement was made that it be carried out, then it would be your duty to return a verdict of guilty against this defendant.
>
> However, if you do not so find, or if you have a reasonable doubt at [sic] to one or more of these things, then it would be your duty to return a verdict of not guilty.

At the completion of the instructions, the court asked if counsel had any additions or corrections to the instructions. The State noted that the court referred to "Saint James" rather than "Saint Griffin" at one point, but there were no objections or requested corrections by either defense counsel.

Generally, when a defendant fails to object to errors committed by the trial court during the trial, he is precluded from raising the issue on appeal. N.C.R. App. P. 10(b)(1). This Court has recently reiterated, however, that "[a] defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal." *State v. Mueller*, 184 N.C. App. 553, 575-76, 647 S.E.2d 440, 456, *cert. denied*, 362 N.C. 91, —— S.E.2d —— (2007). *See also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("Where, however, the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal."). We may, therefore, consider defendant's unanimity argument despite the lack of any objection at trial.[1]

1. Defendant did not assign plain error to the instruction and we are, therefore, precluded from considering any arguments relating to this instruction apart from the question of unanimity. *See State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994) (holding defendant waived appellate review because he failed to timely object to the jury charge at trial and failed to allege plain error on appeal).

Under the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. *See also* N.C. Gen. Stat. § 15A-1237(b) (2005) ("The verdict must be unanimous, and must be returned by the jury in open court."). Issues of unanimity have usually arisen in the appellate courts when the trial court gave a disjunctive jury instruction. Although defendant relies upon disjunctive jury instruction cases, there was no disjunctive instruction in this case—the court did not provide the jury with alternative bases upon which it could find defendant guilty of conspiracy.

In asserting that the trial court's instruction was effectively a disjunctive instruction, defendant points to N.C. Gen. Stat. § 90-95(h)(3) (2005), which provides that a person is guilty of trafficking in cocaine if he "sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine." Defendant notes that trafficking in cocaine by sale, manufacture, delivery, transportation, and possession are "separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Garcia*, 111 N.C. App. 636, 641, 433 S.E.2d 187, 190 (1993). Defendant then argues that the court's instruction was necessarily disjunctive since the jury could have found defendant guilty on any one of these five bases.

Defendant, however, overlooks the fact that the trial court, in instructing the jury on the conspiracy charge asserted against defendant, did not instruct the jury regarding these five different means of engaging in trafficking. Even though the trial court instructed that Teasley could be found guilty of trafficking on two different grounds, the instruction as to the conspiracy charge brought against defendant did not include alternative bases and, therefore, there was no disjunctive instruction. Although the lack of specification regarding what activity constituted trafficking might give rise to problems other than a disjunctive instruction, such issues are not before us.

Even if the instruction could be viewed as being disjunctive, defendant has also disregarded the fact that not all disjunctive instructions create an impermissible risk of a non-unanimous verdict. Our Supreme Court has identified two different categories of offenses, with disjunctive instructions violating the unanimity requirement only in one category. As explained by the Supreme Court in *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (citing *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986)), "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 sep-*

arate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." On the other hand, "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." *Id.* at 303, 412 S.E.2d at 312 (citing *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990)).

Neither defendant nor the State fully address whether this case falls within the *Hartness* or the *Diaz* line of authority. Although *Diaz* held that disjunctive instructions were impermissible with respect to a charge of trafficking with its five different types of offenses, this case involves a conspiracy to traffic. In *State v. McLamb*, 313 N.C. 572, 578, 330 S.E.2d 476, 480 (1985), our Supreme Court noted that it "has long held that the charge of conspiracy need not describe the subject crime with legal and technical accuracy, the charge being the crime of *conspiracy* and not the charge of committing the subject crime." Applying this principle, the *McLamb* Court stated: "Although we recognize that the sale and the delivery of controlled substances are separate offenses, we hold that the indictment in this case charges defendant with one offense: conspiring to sell or deliver—i.e. transfer—cocaine." *Id.* at 579, 330 S.E.2d at 481. As a result, a jury's verdict finding defendant guilty of "conspiring to sell or deliver cocaine" was not ambiguous. *Id.*

McLamb controls the resolution of this case. Since defendant was charged only with conspiracy to traffic in cocaine, the fact that the different methods of trafficking constitute separate offenses is immaterial. According to *McLamb*, the trial court instructed the jury as to a single offense—conspiracy to traffic—and, therefore, no risk of a non-unanimous verdict arose.

In any event, even if *Diaz* did apply, the existence of disjunctive instructions does not end the analysis. The court must then "examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

Here, defendant's counsel, in his closing argument, repeatedly identified the charge against defendant as conspiracy to traffic by possession. Then, during the jury instructions, the language of defendant's conspiracy instruction linked it to the immediately pre-

ceding conspiracy instruction relating to Teasley, which specified that the conspiracy involved an agreement "to commit trafficking in cocaine by possessing 28 grams or more but less than 200 grams of cocaine." Moreover, the verdict form, which was reviewed with the jury by the trial judge, required that the jury decide whether defendant was "Guilty of Conspiracy to Traffic in Cocaine by Possession of more than 28 grams but less than 200 grams of cocaine." While we observe that the better practice would be to have a separate instruction for defendant setting out each of the elements of the charge of conspiracy with respect to her, our review of the record indicates that any danger of a non-unanimous verdict was removed.

II

[2] Defendant next contends that the trial court erred in denying her request for an instruction on the lesser included offense of conspiracy to commit simple possession. She argues that the instruction on the lesser offense was required because she was entrapped into committing the greater offense through manipulation by the police.

During the charge conference, defense counsel stated:

> . . . Well, the last thing, your Honor—and I will admit that I don't have any case law to back me up on this.
>
> But these kind of cases, as far as conspiracy goes, are unique in that the amount of drugs is an element of the crime. It's the element of the underlying crime which is trafficking in cocaine by possession of more than 28 grams but less than 200 grams.
>
> And in this particular case, the evidence is that Noy Sykeo, who was the informant, had been instructed to try to make a trafficking amount case, that he in fact was the one that sought two ounces of cocaine and that there was no evidence that Miss Davis had any sort of input at [sic] to that decision.
>
> And given the fact that it is—that that goal of the conspiracy originated in the mind of a government agent—that is, the informant in this case—I would ask the Court to consider in the discretion giving a lesser included offense of conspiracy to commit simple possession of cocaine.
>
> And I ask that, your Honor, just in the sense of equity and fundamental fairness. Because there are no other crimes that I can think of where the informant has such power.

> We don't see in the criminal justice system cases where someone that's working for the government approaches someone and says let's go do five bank robberies or let's go do eight armed robberies. It is a very powerful position for the informant to be in, and it obviously—as you well know you are submitting this case to the jury that it does not take very much for the State to prove that someone is a co-conspirator.
>
> So it would make a huge difference obviously in Miss Davis' exposure. All we are asking is that you consider submitting it to the jury so that they can make that determination and give whatever significance to the fact that Noy's—it was Noy's idea that it be two ounces.
>
> Let them attach the significance to that particular act. Thank you.

Subsequently, the trial court denied defendant's request for an instruction on conspiracy to commit simple possession.

Defendant argues at length in her brief on appeal that the concept of "sentencing entrapment" required that the trial court instruct on the lesser included offense. "Sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct." *United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003). Sentencing entrapment has been recognized by other states and in federal court. *See Foster*, 162 N.C. App. at 671-72, 592 S.E.2d at 264. This Court adopted the doctrine in *Foster*, 162 N.C. App. 665, 592 S.E.2d 259 (2004), but our decision was affirmed by an equally divided Supreme Court, 359 N.C. 179, 604 S.E.2d 913 (2004), thereby eliminating any precedential value.

In contrast to this case, however, the sentencing entrapment cases involve a request for an instruction on that defense. *Foster*, 162 N.C. App. at 671-72, 592 S.E.2d at 264. Here, defendant never requested an instruction on the sentencing entrapment defense at trial nor does she assign error on appeal to the trial court's failure to give the sentencing entrapment instruction. With respect to the request for an instruction on the lesser included offense, defendant cites no authority suggesting she was entitled to such an instruction in the absence of the sentencing entrapment defense being submitted to the jury. We, therefore, hold that the issue of sentencing entrapment is not properly before this Court.

Based upon the evidence in the record, the trial court did not err in refusing to instruct as to conspiracy to commit simple possession. "A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Ledwell*, 171 N.C. App. 328, 333, 614 S.E.2d 412, 415 (internal quotation marks omitted), *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005). The evidence presented in this case supports only a finding that defendant conspired to possess a trafficking amount of cocaine. There was no evidence presented tending to show that defendant conspired to possess any lesser amount. The trial court was not, therefore, required to give an instruction on the lesser offense.

No error.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. CHAUNCEY LEE MARSHALL

No. COA07-838

(Filed 19 February 2008)

1. Robbery— dangerous weapon—sufficiency of indictment—common law robbery—keeping hand in coat while demanding money

An indictment alleging the use of "an implement, to wit, keeping his hand in his coat demanding money" was insufficient to charge the offense of robbery with a dangerous weapon, and the case is remanded for entry of judgment and resentencing on common law robbery, because: (1) although the indictment named the weapon, the keeping of his hand in his coat demanding money as the implement, the indictment failed either to state expressly that the weapon was dangerous or to allege facts that necessarily demonstrated the dangerous nature of the weapon; (2) case law revealed that a defendant's hands cannot constitute dangerous weapons for purposes of robbery with a dangerous weapon under N.C.G.S. § 14-87; (3) although pretending to possess a dangerous weapon may create a presumption that defendant in fact possessed a dangerous weapon, it is not a dangerous weapon in and

of itself; and (4) the indictment sufficiently alleged the lesser-included offense of common law robbery since the use or threatened use of a dangerous weapon is not an essential element of this crime.

2. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—arm in coat to simulate weapon

The trial court did not err by failing to dismiss the charge of robbery with a dangerous weapon involving Circle K even though defendant contends the State failed to prove that he used or threatened use of a dangerous weapon and obtained property by endangering or threatening the victim's life, because: (1) the evidence demonstrated that defendant kept his arm in his coat to simulate a weapon, video surveillance depicted a bulge in defendant's jacket, the victim observed defendant keep his hand on an object with a black texture or grip inside his coat, and the victim expressly stated she was afraid of defendant and though he would hurt her based on the way he was acting; (2) the State was entitled to a presumption that the instrument was what defendant's conduct represented it to be, an implement endangering or threatening the life of the person being robbed; and (3) defendant did not present evidence that unequivocally rebutted the presumption.

Appeal by defendant from judgments entered 13 December 2006 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 16 January 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Lars F. Nance, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Charles K. McCotter, Jr., for defendant.

JACKSON, Judge.

Chauncey Lee Marshall ("defendant") appeals from judgments entered upon guilty verdicts for two charges of robbery with a dangerous weapon. For the following reasons, we hold no error in part, arrest judgment in part, and remand for resentencing.

At approximately 7:30 a.m. on 11 March 2006, Nancy Henneke ("Henneke"), assistant manager of the Kangaroo Express ("the Kangaroo Express") on Piney Green Road in Onslow County, ob-

served defendant enter the store. Defendant did not respond to Henneke's greeting and instead proceeded behind the clerk's counter. Defendant came within three or four inches of Henneke and demanded, "I want the money out of the register." Video surveillance showed that "defendant's right arm was located inside of his coat, held at approximately [a] 90[-]degree angle to his body and his hand was pointed forward in the coat." Henneke testified that she believed defendant had a weapon by the way he carried himself and by the way his hand and arm were jammed in his coat. Henneke testified that she was scared and gave him the money from the register, totaling approximately $63.00. She explained that defendant's keeping his hand inside his coat caused her to give the money away. Defendant also demanded money from the safe, but Henneke was unable to access the safe. Defendant left the store, and Henneke locked the doors and called the police. She subsequently identified defendant in a photographic lineup.

At 8:19 a.m. on 11 March 2006, less than one hour after the robbery at the Kangaroo Express, defendant entered the Circle K ("the Circle K") on Pine Valley Road in Onslow County. Toni Cinotti ("Cinotti"), manager of the Circle K, observed defendant enter the store wearing a black puffy jacket. Defendant came behind the counter, and Cinotti began screaming, "I'm being robbed, I'm being robbed." Cinotti testified that defendant kept his hand in his coat and she "knew there was a gun." Defendant insisted, "[G]ive it up, give it all up. I want all of it." Cinotti was terrified and screaming. Defendant reached for Cinotti's cell phone with his left hand, and she jerked it back and threw it. Cinotti testified that defendant never took his right hand out of his coat and that she saw in his jacket what she believed was a handgun:

> I saw what was like a grip, I guess [that is] the best way to call it. It was like a black handled—I haven't seen many guns, but I've seen them with like a texture. . . .
>
> . . . .
>
> . . . When he was grabbing for the cell phone, it was a glimpse and it looks like a texture, I guess a handle. It was black. It all happened so quickly, . . . but I was convinced it was a gun.

Cinotti did not see a barrel, trigger, or hammer, but she observed defendant keep his hand on an object with a grip, and when asked if she thought defendant had a gun, Cinotti stated, "Yes. There was no

doubt in my mind." Defendant yelled at Cinotti to open the drawer and stated, "I want it all. I even want what's under the drawer." Cinotti said there was nothing under the drawer, and she gave him the money from the register. Defendant stuffed the money in his jacket and left the store. Although no evidence was presented that defendant actually possessed a gun, surveillance footage showed both a bulge in defendant's jacket and defendant's keeping his right hand in his jacket during the entire encounter.

Defendant was arrested at approximately 10:00 p.m. on the evening after the robberies. In his statement to police, defendant admitted committing the robberies but denied possessing a weapon and claimed that he had pretended to be armed during the robberies. Defendant was indicted on 6 June 2006 for, *inter alia*, two counts of robbery with a dangerous weapon, and on 13 December 2006, a jury found defendant guilty of both charges. The trial court consolidated the convictions and sentenced defendant as a prior record level IV offender to 117 to 150 months imprisonment.[1] Thereafter, defendant gave timely notice of appeal.

[1] On appeal, defendant first contends that the trial court erred by failing to dismiss the indictment in 06 CRS 52283 for failure to properly charge the offense of robbery with a dangerous weapon because (1) the indictment fails to allege that the "implement" was dangerous; and (2) "keeping his hand in his coat" does not constitute a dangerous weapon endangering or threatening the life of the victim.

Preliminarily, we note that defendant failed to raise this issue before the trial court. Nevertheless, it is well-settled that "the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981); *see also State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 ("[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if

1. In a related case, 06 CRS 52479, defendant pled no contest to possession of cocaine and was sentenced to eight to ten months imprisonment, with the sentence to run concurrently to his sentence for the two convictions of robbery with a dangerous weapon. Defendant has not assigned error with respect to this conviction, and therefore, any issues related to case number 06-CRS-52479 are not before this Court. *See* N.C. R. App. P. 10(a) (2006) (limiting the scope of appellate review to the assignments of error).

it was not contested in the trial court."), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001).

We review the issue of insufficiency of an indictment under a *de novo* standard of review. *See Sturdivant*, 304 N.C. at 309, 283 S.E.2d at 730. "A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, 'and to give authority to the court to render a valid judgment.' " *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). As this Court recently explained,

> "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.' " In other words, *an indictment must allege every element of an offense in order to confer subject matter jurisdiction on the court.*

State v. Kelso, 187 N.C. App. 718, 654 S.E.2d 28, 31 (2007) (emphasis added) (alterations in original) (quoting *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992)).

Pursuant to North Carolina General Statutes, section 14-87(a),

> [a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2005). Our Supreme Court has clarified that

> [t]he essential elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened."

State v. Haselden, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). "A dangerous or deadly weapon 'is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.' " *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985) (quoting *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 725). "[W]hether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985).

In the case *sub judice*, defendant's indictment provides:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in Onslow County the defendant named above unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, U.S. money of the value of $78.00[,] from the person and presence of Nancy L. Henneke, said property belonging to The Pantry, Inc. D/B/A The Kangaroo Express # 896 located at 1079 Piney Green Road, Jacksonville, North Carolina. The defendant committed this act by means of an assault consisting of *having in possession and threatening the use of an implement, to wit, keeping his hand in his coat demanding money*, whereby the life of Nancy L. Henneke was endangered and threatened.

(Emphasis added). Defendant contends that, as a matter of law, "keeping his hand in his coat demanding money" is insufficient to constitute a dangerous weapon for purposes of an indictment pursuant to section 14-87.

Our Supreme Court has instructed "that it is sufficient for indictments . . . charg[ing] a crime in which one of the elements is the use of a deadly [or dangerous] weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly [or dangerous] weapon" or to allege such facts as would *necessarily* demonstrate the deadly [or dangerous] character of the weapon." *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977) (emphasis in original) (alterations added). The indictment in the instant case names the weapon—*i.e.*, "an implement, to wit, keeping his hand in his coat demanding money." However, the indictment fails either to

state expressly that the weapon was dangerous or to allege facts that necessarily demonstrate the dangerous nature of the weapon.

First, the indictment refers to defendant's keeping his hand in his coat as the "implement," but the statute requires that the implement be dangerous.[2] Here, the indictment contains no such express allegation. Second, it is axiomatic that keeping one's hand in a coat cannot be a dangerous weapon when our case law is settled that a defendant's hands, even when used to inflict serious injury, cannot constitute dangerous weapons for purposes of robbery with a dangerous weapon pursuant to section 14-87. *See State v. Hinton*, 361 N.C. 207, 212, 639 S.E.2d 437, 441 (2007) ("[A] defendant's hands, in and of themselves, cannot be dangerous weapons for purposes of robbery with a dangerous weapon under [section] 14-87.").

We agree with the State that a firearm or other dangerous weapon need not be displayed, and our Courts have upheld convictions for robbery with a dangerous weapon when, as in the case *sub judice*, the evidence showed that the defendant did not possess a firearm or dangerous weapon but merely pretended to possess a firearm or dangerous weapon. *See State v. Jarrett*, 167 N.C. App. 336, 338-39, 607 S.E.2d 661, 662-63 (2004) (citing *State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728-29 (1994); *State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003); *State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376, *appeal dismissed and disc. rev. denied*, 348 N.C. 76, 505 S.E.2d 883 (1998)), *disc. rev. denied*, 359 N.C. 324, 611 S.E.2d 840 (2005). However, "[t]he gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972). Therefore, pretending to possess a dangerous weapon is not a dangerous weapon in and of itself; instead, pretending to possess a dangerous weapon creates a presumption that the defendant, in fact, possessed a dangerous

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2. Because the adjective "dangerous" precedes "weapon, implement or means" in the phrase "other dangerous weapon, implement or means" in section 14-87, it necessarily follows that the weapon, implement, or means must be "dangerous." *See Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 849 (Cal. Ct. App. 2003) ("Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears."), *disc. rev. denied*, No. S122187, 2004 Cal. LEXIS 2859 (Cal. Mar. 30, 2004); *accord Golf Course Superintendents Ass'n v. Underwriter's at Lloyd's*, 761 F. Supp. 1485, 1490 (D. Kan. 1991); *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005); *Ryder v. USAA Gen. Indem. Co.*, 2007 Me. 146,¶ 15, —— A.2d ——, —— (Me. 2007).

weapon. *See State v. Joyner*, 312 N.C. 779, 782-83, 324 S.E.2d 841, 844 (1985). Specifically,

> [w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory. If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened). This is so because, when *no evidence is introduced* tending to show that a life was not endangered or threatened, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt.
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> . . . .
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> The mandatory presumption under consideration here, however, is of the type which merely requires the defendant to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. Therefore, when *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears leaving only a mere permissive inference. The permissive inference which survives permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon).

Id. (emphases in original) (internal quotation marks, alterations, and citations omitted). Pursuant to *Joyner* and its progeny, a defendant's keeping his hand in his coat may create a presumption that he possessed a firearm or other dangerous weapon, but his keeping his hand in his coat cannot constitute, in and of itself, a dangerous weapon.

In the instant case, the allegation in the indictment that defendant "ha[d] in possession and threaten[ed] the use of an implement, to wit, keeping his hand in his coat demanding money," was insufficient to satisfy the jurisdictional requirement that an indictment for robbery with a dangerous weapon allege that the defendant "use[d] or threatened use of a firearm or other dangerous weapon." *Call*, 349 N.C. at 417, 508 S.E.2d at 518. Because the indictment for the robbery with a dangerous weapon at the Kangaroo Express failed to allege all of the essential elements, the indictment failed to provide the trial court with subject matter jurisdiction to convict defendant of robbery with a dangerous weapon.

As this Court recently explained,

> [a]n arrest of judgment is proper when the indictment . . . fails to state some essential and necessary element of the offense of which the defendant is found guilty. 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.

Kelso, 187 N.C. App. at 722, 654 S.E.2d at 31-32 (second alteration in original) (internal quotation marks and citation omitted). "The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966). "However, where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002), *appeal dismissed and disc. rev. denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, 540 U.S. 928, 157 L. Ed. 2d 231 (2003).

"The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. In contrast, the use or threatened use of a dangerous weapon is not an essential element of common law robbery. *See State v. Moore*, 279 N.C. 455, 457-58, 183 S.E.2d 546, 547-48 (1971). Therefore, we arrest judgment on robbery with a dangerous weapon of the Kangaroo Express, and we remand for entry of judgment and resentencing on common law robbery.

[2] Defendant next contends that the trial court erred in denying his motions to dismiss each of the charges. Specifically, defendant contends that the State failed to prove that (1) he used or threatened use of a dangerous weapon in either of the robberies and (2) obtained property by endangering or threatening Henneke's life in the robbery of the Kangaroo Express or Cinotti's life in the robbery of the Circle K. Because we have arrested judgment on robbery with a dangerous weapon of the Kangaroo Express and because neither of defendant's arguments are material with respect to common law robbery, we confine our analysis to the robbery with a dangerous weapon of the Circle K.

As our Supreme Court has explained,

> [w]hen a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion. A substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight. The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. Finally, sufficiency review is the same whether the evidence is circumstantial or direct, or both.

State v. Garcia, 358 N.C. 382, 412-13, 597 S.E.2d 724, 746 (2004) (internal quotation marks, citations, and alteration omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "In considering a motion to dismiss, the trial court is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

In the instant case, defendant correctly argues that (1) no gun was found on defendant; (2) no gun was introduced into evidence at trial; and (3) defendant's hands cannot be dangerous weapons pursuant to section 14-87. However, as stated *supra*,

> [w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other danger-

> ous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed.

Joyner, 312 N.C. at 782, 324 S.E.2d at 844 (emphasis in original).

Here, the evidence demonstrated that defendant kept his arm in his coat to simulate a weapon, and video surveillance depicted a bulge in defendant's jacket. Additionally, Cinotti observed defendant keep his hand on an object with a black texture or grip inside his coat, and she testified that "[t]here was no doubt in [her] mind" that defendant possessed a gun. Cinotti also expressly testified that she was afraid of defendant and thought he would hurt her because of "[t]he way he was acting. The way he was carrying himself. The fact that he had a gun." The State, therefore, was entitled to a presumption that "the instrument [wa]s what [defendant's] conduct represent[ed] it to be—an implement endangering or threatening the life of the person being robbed." *Id.*

Defendant, on the other hand, presented evidence in the form of his testimony and his statement to police that he was not armed during the robberies and only pretended to be armed. Defendant, therefore, presented some evidence showing that Cinotti's life was not endangered or threatened, and consequently, " 'the mandatory presumption disappear[ed] leaving only a mere permissive inference.' " *Id.* at 783, 324 S.E.2d at 844 (quoting *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 443 (1980)). Nevertheless, because defendant did not present evidence that unequivocally rebutted the presumption, the permissive presumption was sufficient to overcome defendant's motion to dismiss. *See*, *e.g.*, *State v. Barrett*, 20 N.C. App. 419, 422-23, 201 S.E.2d 553, 555, *cert. denied*, 285 N.C. 86, 203 S.E.2d 58 (1974). The trial court, therefore, correctly denied defendant's motion to dismiss, and accordingly, defendant's assignment of error is overruled.

No Error in part, Judgment Arrested in part, and Remanded for resentencing.

Judges HUNTER and BRYANT concur.

HARRY B. GRAHAM, EMPLOYEE, PLAINTIFF v. MASONRY REINFORCING CORP. OF AMERICA, EMPLOYER, AND ATLANTIC MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA07-372

(Filed 19 February 2008)

1. Workers' Compensation— disability—economic downturn—misconduct

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee was disabled after 17 December 2001 and in awarding temporary total indemnity benefits until 31 October 2004 even though defendants contend plaintiff failed to prove work-related disability for any time after 17 December 2001, and that plaintiff's termination was allegedly due to an economic downturn or personal misconduct, because: (1) the Commission could conclude plaintiff had proven his disability based on plaintiff's testimony and documentation of the numerous jobs plaintiff had inquired into after his hip replacement surgery until his Social Security Disability began, thus showing he was incapable of earning the same wages he had earned in the same or other employment; (2) the evidence including plaintiff's testimony also showed plaintiff's incapacity to earn was causally related to his physical restrictions from the hip injury; (3) even assuming arguendo that plaintiff was terminated for an economic downturn, this fact would not preclude a finding that plaintiff was disabled and thus eligible to receive indemnity benefits during the term of his disability; and (4) the Commission's finding that plaintiff's termination was not due to poor job performance was supported by the evidence that showed plaintiff had received positive feedback from his supervisor regarding his work performance and that his company was aware of his workers' compensation claims at the time of his termination.

2. Workers' Compensation— sufficiency of findings of fact—causation—back injury

The Industrial Commission erred in a workers' compensation case by finding that plaintiff employee's back condition was compensable and by ordering defendants to pay for back treatment, and the case is remanded for further findings as to the actual condition which created plaintiff's back pain and whether that con-

dition is causally linked to plaintiff's workplace injury, because: (1) the Commission not only failed to make findings of fact as to the causation of plaintiff's back pain, but also failed to make a finding as to the medical condition of plaintiff's back; and (2) in order for a reviewing court to determine whether plaintiff's back treatment is compensable, it must be known whether there is evidence that the medical condition causing plaintiff's back pain was caused by his workplace injury.

Appeal by defendants from the Opinion and Award entered 31 October 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2007.

Bollinger & Piemonte, PC by Bobby L. Bollinger, Jr. for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P. by Shannon P. Metcalf and M. Duane Jones for defendant-appellants.

Stroud, Judge.

Defendant appeals opinion and award by the Full Commission. Defendant contends the Full Commission erred by concluding plaintiff was disabled after 17 December 2001 and finding plaintiff's termination was not due to an economic downturn and plaintiff's misconduct, and by concluding plaintiff's back condition was compensable. For the following reasons, we affirm in part and remand in part.

I. Background

In May of 2000, plaintiff began working for defendant Masonry Reinforcing Corp. of America ("Masonry") as a cost accountant. Plaintiff's job "required him to prepare cost accounting reports for upper management[,] . . . go out into the manufacturing facilities and observe production, take inventories, [and] obtain data from machines[.]" On 6 February 2001, plaintiff tripped over a forklift barrier. Plaintiff lost his balance and fell against a golf cart striking his lower back and left hip. Plaintiff had immediate intense pain in his left hip, buttock, leg, and lower back, but he "walked it off and returned to work." Plaintiff reported this incident to his supervisor who indicated that he would fill out an accident report. Plaintiff went to the Veterans' Administration Hospital and was diagnosed with avascular necrosis in the left hip. Plaintiff did not fill out a written

accident report for his injury until 6 July 2001 because of his supervisor's earlier indication that he would be filing a report.

On 31 August 2001, plaintiff stepped into a pool of spilled fluid and slipped, "causing his right leg to go out from under him." "[T]he incident exacerbated his pre-existing hip, leg and back condition" stemming from his February injury. On 26 September 2001, Masonry's chief financial officer, Mark McClure ("McClure"), decided to terminate plaintiff. McClure claimed the termination was because of economics and poor job performance. Masonry paid plaintiff through 15 October 2001, and on 16 October 2006 plaintiff had "hip replacement surgery due to his avascular necrosis[.]" After surgery, "[p]laintiff was restricted to lifting no more than 10 pounds, no bending, no stooping," and to changing positions every 30 minutes. On 17 December 2001, approximately eight weeks after surgery, plaintiff began to look for a new job and continued to until October of 2004 when he began receiving Social Security Disability benefits.

Plaintiff filed Form 18, "Notice of Accident to Employer and Claim of Employee, Representative, or Dependant", with the Industrial Commission for each of his two accidents. Masonry filed Form 19, "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission", denying the claim because "the employee was not injured within the course and scope of his employment." Plaintiff filed Form 33, requesting that his claim be assigned for a hearing. Plaintiff requested payment for compensation for days missed, medical expenses/treatment, permanent partial disability, scars, post operative care, and rehabilitation expenses. Masonry responded to plaintiff's request for a hearing with Form 33R and denied compensability for the claim because it was not an injury by accident and it did not arise out of and in the course of employment.

On or about 10 February 2006, Deputy Commissioner Phillip A. Holmes ordered defendants to pay plaintiff, *inter alia*, $588.00 per week from 16 October 2001 through 17 December 2001 in a lump sum and "for all medical treatment received by [p]laintiff for his left hip as a result of his compensable injuries" in February and August of 2001 "for so long as said treatment effects a cure, gives relief or lessens [p]laintiff's period of disability." Plaintiff appealed to the Full Commission.

On 31 October 2006, the Full Commission by Commissioner Bernadine S. Ballance awarded plaintiff, *inter alia*, $588.00 per week

from 16 October 2001 through 31 October 2004 in a lump sum and "for all medical expenses incurred or to be incurred in the future by [p]laintiff for his left hip and back for so long as such treatment is reasonably required to effect a cure, provide relief and lessen his disability[.]" Defendants appeal.

Defendants present two issues before this Court: (1) Whether the Industrial Commission erred in finding plaintiff disabled after 17 December 2001 and in awarding him temporary total indemnity benefits until 31 October 2004, and (2) whether the Industrial Commission erred in finding plaintiff's back condition compensable and ordering defendants to pay for back treatment.

II. Standard of Review

> Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. However, the Commission's conclusions of law are reviewed *de novo*.

Rose v. City of Rocky Mount, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006) (internal citations and internal quotations omitted), *disc. rev. denied*, 361 N.C. 356, 644 S.E.2d 232 (2007).

III. Proof of Disability and Reason for Termination

[1] Defendants first argue that the Industrial Commission erred in finding that plaintiff was disabled after 17 December 2001 and in awarding temporary total indemnity benefits until 31 October 2004. Specifically, defendants contend (1) plaintiff did not prove his work-related disability for any time after 17 December 2001, and (2) plaintiff's termination was due to an economic downturn and plaintiff's personal misconduct; thus plaintiff is not entitled to further indemnity benefits beyond 17 December 2001.

A. Proof of Disability

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2001). Our Supreme Court has stated that

> in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (internal citations omitted). This Court has stated a claimant may prove the first two prongs of *Hilliard* through

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, . . . (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, . . . (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, . . . or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The Industrial Commission found as fact that plaintiff

> looked for suitable employment on his own by submitting more than one hundred applications for jobs he felt he was qualified and able to perform. He sought jobs through the Employment Security Commission, newspapers and other leads. The job search resulted in three interviews and no offers of employment.

The Industrial Commission concluded that

> [a]s of December 17, 2001, [p]laintiff was ready to begin an effort to return to work and he commenced a reasonable job search effort until he began receiving Social Security Disability benefits 'the last of October 2004,' and stopped looking for employment. Without vocational assistance from [d]efendants, [p]laintiff looked for suitable employment on his own by

> submitting more than one hundred applications for jobs he felt he was qualified and able to perform. He sought jobs through the Employment Security Commission, newspapers and other leads. The job search resulted in three interviews and no offers of employment. Although highly educated, [p]laintiff's advanced age; physical restrictions due to his injury; and health condition, including severe chronic pain syndrome, hypertension, disc disease, arthritis, depressive disorder and a number of other conditions diminished his employment opportunities. Therefore, [p]laintiff has proven disability under the second prong of *Russell*.

Based upon competent evidence, including plaintiff's testimony and documentation of the numerous jobs plaintiff had inquired into after his hip replacement surgery until his Social Security Disability began, the Industrial Commission found that plaintiff had proven his disability by showing that "he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[.]" *Russell* at 765, 425 S.E.2d at 457; *see Hilliard at* 595, 290 S.E.2d at 683. From these facts the Industrial Commission could properly conclude that plaintiff had proven his disability as the evidence presented by plaintiff about his job search showed that he was incapable of earning the same wages he had earned in the same or other employment. *See Hilliard* at 595, 290 S.E.2d at 683. The evidence, including plaintiff's testimony, also showed that plaintiff's incapacity to earn was causally related to his physical restrictions from the hip injury. *Cf. Fletcher v. Dana Corp.*, 119 N.C. App. 491, 497, 459 S.E.2d 31, 35, *disc. rev. denied*, 342 N.C. 191, 463 S.E.2d 235 (1995) (noting that without a work-related injury, an employee would not have been "unemployed and suffered wage loss").

B. Economic Downturn

Defendants rely on *Segovia v. J.L. Powell & Co.*, where a plaintiff-employee had compensable injuries and was subsequently laid off. 167 N.C. App. 354, 354-55, 608 S.E.2d 557, 557-58 (2004). The Industrial Commission found as fact that

> [h]ad it not been for the reduction in business associated with the company-wide layoffs due to the economic downturn, [plaintiff] would have returned to work for defendant-employer . . . . The greater weight of the evidence establishes that the plaintiff's inability to earn wages since March 2001 was due to the layoff

> and plaintiff's lack of interest in returning to work, and *not due to any disability associated with plaintiff's injury*.

Id. at 356, 608 S.E.2d at 558-59 (emphasis added). This Court further stated:

> These findings support the full Commission's conclusion that plaintiff's earning capacity is not currently affected by the injuries he suffered to his back and ear. Therefore, we conclude that the full Commission did not err in *concluding that plaintiff is not currently disabled* as a result of his injuries and thus, in denying plaintiff further compensation.

Id. at 357, 608 S.E.2d at 559 (emphasis added).

> This Court [citing *Segovia*] has [also] held that the Full Commission did not err in denying an employee benefits under the Workers' Compensation Act *where the employee was physically able to perform his former job* and the employee's inability to earn wages was due to a layoff resulting from a downturn in the economy and the employee's lack of interest in returning to work.

Eudy v. Michelin North America, Inc., 182 N.C. App. 646, 654, 645 S.E.2d 83, 89, *disc. rev. denied*, 361 N.C. 426, 648 S.E.2d 211 (2007) (emphasis added) (citing *Segovia*, 167 N.C. App. 354, 356-67, 608 S.E.2d 557, 558-59).

However, the facts of *Segovia* are quite different from this case as in *Segovia* the Industrial Commission found that plaintiff was "physically capable of performing his regular job with defendant-employer . . . except for two very short periods[.]" *See Segovia* at 356, 608 S.E.2d at 558. In the case at bar we have already concluded that the Industrial Commission could properly and did find that plaintiff was disabled for some time after his termination. As this Court stated in *Britt v. Gator Wood, Inc.*,

> Defendants have focused on the wrong issue. While the immediate cause of the loss of plaintiff's wages . . . may have been the lay-off, that fact does not preclude a finding of disability. As *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) explained, an injured employee's earning capacity is determined by the employee's own ability to compete in the labor market. Thus, the fact that plaintiff was laid off does not preclude a finding of total disability if, because of plaintiff's injury, he was incapable of obtaining a job in the competitive labor market.

Britt v. Gator Wood, Inc., 185 N.C. App. 677, 683, 648 S.E.2d 917, 921 (2007) (internal quotations and ellipses omitted). Thus, even assuming *arguendo* that plaintiff was terminated for an economic downturn, this would not preclude a finding that plaintiff was disabled and thus eligible to receive indemnity benefits during the term of his disability.[1] *See id.* at 685, 648 S.E.2d at 921.

C. Misconduct

> [W]e hold that where an employee, who has sustained a compensable injury and has been provided light duty or rehabilitative employment, is terminated from such employment for misconduct or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability. Rather, the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability. Therefore, in such cases the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated.

Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 233-34, 472 S.E.2d 397, 401 (1996).

Here the Industrial Commission found as fact that "[t]he greater weight of the evidence establishes that [p]laintiff's job performance was satisfactory and the Full Commission gives little weight to testimony indicating that [p]laintiff was terminated for poor job performance." The evidence showed that plaintiff had received positive feedback from his supervisor regarding his work performance and that Masonry was aware of his worker's compensation claims at the time of his termination; this supports the Industrial Commission's finding of fact that plaintiff's "job performance was satisfactory" which in

1. Defendants also argue it was error for the Industrial Commission not to make a specific finding of fact and conclusion of law as to the economic downturn as the Industrial Commission "is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). However, as we have previously stated, the economic downturn is not a "crucial fact" in light of a proper finding that plaintiff was disabled. *See Gaines* at 579, 235 S.E.2d at 859.

turn supports the conclusion of law that "[p]laintiff's termination was not due to misconduct." *See Rose at* 395, 637 S.E.2d at 254.

We therefore find that the Industrial Commission did not err in finding that plaintiff was entitled to indemnity benefits after 17 December 2001.

IV. Plaintiff's Back Condition

[2] Lastly, defendants contend the Industrial Commission erred in determining that plaintiff's back condition was compensable and ordering defendants to pay for back treatment because plaintiff did not prove "his back condition is causally related to the hip injury or that it definitively arose from the two incidents in question[.]" Defendants argue that the Full Commission's finding of fact regarding plaintiff's back was not enough to support its conclusions of law regarding defendants paying for the treatment of plaintiff's back.

The Full Commission found as fact that

> [i]n addition to his avascular necrosis, the Full Commission finds that [p]laintiff also suffered back pain as a result of his fall on February 6, 2001. The physicians treating [p]laintiff have not recommended any invasive treatment for the back injury and the narcotic pain medication that he takes from the hip pain appears to address the back pain as well.

The Full Commission concluded as law that

> [p]laintiff has proven by the greater weight of the evidence that as a result of his accidents on February 6, 2001 and on August 31, 2001, he developed disabling avascular necrosis of the left hip and back pain. N.C. Gen. Stat. § 97-2.
>
> [and that] [p]laintiff is entitled to have [d]efendants pay for medical treatment for his injury to his left hip and back, for so long as such treatment is reasonably required to effect a cure, provide relief and lessen his disability. N.C. Gen. Stat. §§ 97-2(19), 97-25.

However,

> [w]hile the commission 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. *Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E.2d 717 (1975). If the findings of fact of the commission are insufficient to enable the court to determine the rights of the parties upon the matters in

controversy, the proceeding must be remanded to the commission for proper findings of fact. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948). As stated in *Thomason v. Cab Co.*, 235 N.C. 602, 605-[0]6, 70 S.E.2d 706, 709 (1952):

> 'The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.'

Gaines v. Swain & Son, Inc., 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977) (ellipses omitted).

In the present case, the Full Commission has not only failed to make findings of fact as to the causation of plaintiff's back pain, but it has also failed to make a finding as to the medical condition of plaintiff's back. In order for a reviewing court to determine whether plaintiff's back treatment is compensable we must know whether there is evidence that the medical condition causing plaintiff's back pain was caused by his workplace injury; this cannot be done without a finding that plaintiff actually has a back condition or any other medical condition that would create pain in his back. Therefore, we remand this case for further findings as to the actual condition which created plaintiff's back pain and whether that condition is causally linked to plaintiff's workplace injury. *See id.*

V. Conclusion

As to the determination that plaintiff did prove his disability and his termination was not due to an economic downturn or misconduct, we affirm. As to the determination that plaintiff's back pain was compensable we remand with instructions for the Full Commission to make further findings of fact and conclusions of law.

AFFIRMED IN PART AND REMANDED IN PART.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. LAUREN ELIZABETH CROWE

No. COA07-428

(Filed 19 February 2008)

1. Homicide— solicitation—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a charge of solicitation to commit murder. The State presented no evidence that defendant counseled, enticed, or induced another to murder her mother.

2. Homicide— conspiracy—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of conspiracy to murder her mother for insufficient evidence.

Appeal by defendant from judgments entered 12 May 2006 by Judge J. Marlene Hyatt in Cherokee County Superior Court. Heard in the Court of Appeals 26 November 2007.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, for the State.

Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Lauren Elizabeth Crowe was indicted for the first degree murder of her mother, Janet Evangeline Crowe Mundy, for soliciting Christopher Albert Tarantino to commit the felony of first degree murder, and for conspiring with Tarantino to commit first degree murder. She entered pleas of not guilty and was tried noncapitally. A jury found defendant not guilty of first degree murder and guilty of solicitation to commit first degree murder and conspiracy to commit first degree murder. Defendant was sentenced to consecutive sentences of 72 to 96 months for solicitation to commit first degree murder and 156 to 197 months for conspiracy to commit first degree murder. Defendant gave notice of appeal.

As relevant to the issues properly before this Court, evidence presented at defendant's trial tended to show that in the early morning hours of 10 July 2004, defendant's mother was fatally shot and stabbed in her home. She suffered four gunshot wounds to the legs,

abdomen, liver, and lung, and multiple stab wounds to the neck, back, shoulder, and hand. The victim was found partially clothed lying on top of some bedding in the doorway between the kitchen and her bedroom with blood pooling around her. The glass panel closest to the doorknob on the front door was broken, glass particles were found inside the home, and the house looked as though it had been "ransacked." Upon entry into the home, the investigative personnel on the scene smelled a "strong odor" which "seemed to be practically everywhere." The source of the odor was later determined to be vinegar. A bottle of vinegar was found on the floor next to the victim's body. The scent of vinegar was also found on the lower portion of the size 2 blue jeans found on the floor of defendant's bedroom.

Defendant called 911 at 5:01 a.m. to report the murder of her mother. Defendant told the 911 dispatcher that she was "in bed asleep and heard noises, heard a car drive by, heard a window break" and "came downstairs and found her mother on the floor and she was dead." When authorities arrived at the scene, the then-sixteen-year-old defendant was found "sitting on the front porch still holding the phone." When asked where her mother was, defendant sat silently and then motioned with her head toward the house saying, "In there."

At the scene, defendant told investigators that when she heard the gunshots, she hid in the bedroom closet. She said she saw a tall, skinny black male get into a dark vehicle with a Tennessee license plate and an orange sticker on the back. Defendant later told investigators that Junior Mundy, defendant's stepfather, murdered her mother. In this second version of events, defendant said that Junior Mundy fought with her mother earlier in the evening and said she heard him tell her mother, "This is your last chance to choose me or [defendant]." Defendant said she heard him slap her mother and heard her mother scream, "No, no," and then heard gunshots. Defendant said she ran downstairs and saw Junior Mundy "throwing things everywhere." She said he told her that, "unless she wanted things to happen to her," she should help him clean up the blood. Defendant said Junior Mundy broke the window by the doorknob with a blue flashlight and took the vinegar-soaked, blood-stained rag defendant was using to clean the floor and rubbed it all over her shirt. Defendant said he changed his clothes and left with the bloody rag.

Defendant then changed her story again and told investigators that Tarantino, her former boyfriend, arrived at her mother's home at

4:15 a.m. to murder her mother. During her interview at the Cherokee County Sheriff's Office, defendant reportedly said that Tarantino arrived at her home with a gun and, when she met him outside, "she knew what was going to happen." Defendant said that Tarantino went into the house and shot her mother. Defendant then entered the house where she found her mother lying on the floor, pleading with defendant to help her saying, "[Y]ou've got to help me." Defendant then testified to exiting the house before Tarantino stabbed her mother repeatedly.

Defendant claims Tarantino made her help him clean up and gave her a flashlight and told her to break out a window panel to make it look like a break-in. Defendant testified that she was afraid of Tarantino and said he threatened to "go and get [her] grandmother" if she did not help him stage the scene, and told her she "was next." Tarantino was the subject of a domestic violence protective order filed by defendant and her mother on 13 May 2004, almost two months before the murder. However, defendant was said to have repeatedly violated the protective order by meeting and communicating with Tarantino and, according to Junior Mundy, defendant asked her mother to lift the protective order because she "still like[d Tarantino]" and wanted to "start back running around with him."

Among the items of evidence recovered at the scene was a crime book entitled *Anatomy of Motive*, which had a place-holding indentation on a section referencing "someone killing their mother" where the suspect in the book used a nine-millimeter pistol. The book was found in defendant's bedroom next to her bed. Several nine-millimeter shell casings and a bullet were recovered at the scene at and around the victim's body.

The record on appeal contains eighteen assignments of error. In her brief, however, defendant presented arguments in support of only eight assignments of error. The remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(a) (2008) ("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] Defendant first contends the trial court erred by denying her motion to dismiss the charge of solicitation to commit murder at the close of the State's evidence. We agree.

It is "well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "[T]he trial court should consider if the [S]tate has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001) (citing *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 636 (2000)), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Brown*, 310 N.C. at 566, 313 S.E.2d at 587 (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)). If the evidence "supports that a reasonable inference of defendant's guilt may be drawn from the circumstances, then 'it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443 (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998); *see also Brown*, 310 N.C. at 566, 313 S.E.2d at 587 ("Any contradictions or discrepancies in the evidence are for resolution by the jury." (citing *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977))). However, "[e]vidence is not substantial if it arouses only a suspicion about the facts to be proved, *even if the suspicion is strong*." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (emphasis added) (citing *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983)).

"Solicitation of another to commit a felony is a crime in North Carolina . . . under the common law in this [S]tate." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (citations omitted), *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). "The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime." *Id.*; *see also State v. Mann*, 317 N.C. 164, 171, 345 S.E.2d 365, 369 (1986) ("The solicitor conceives the criminal idea and furthers its commission via another person by suggesting to, inducing, or manipulating that person."). "Solicitation is complete when the request to commit a crime is made, regardless of whether the crime solicited is ever committed or attempted." *State v. Richardson*, 100 N.C. App. 240, 247, 395 S.E.2d 143, 147-48 (citing *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986)), *disc. review denied*, 327 N.C. 641, 399 S.E.2d 332 (1990).

"[T]o hold a defendant liable for the substantive crime of solicitation, *the State must prove a request to perform every essential element of the [underlying] crime*." *State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995) (emphasis added). The underlying felony in the present case is first degree murder. Therefore, to hold defendant liable for solicitation, the State must prove that defendant counseled, enticed, or induced another to commit each of the following: "(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007).

In the present case, in support of its contention that defendant conceived of a plan to have her mother murdered, the State offered into evidence written reports of two interviews with defendant on 10 July and 11 July 2004 taken by Detective Dwayne Anders of the Cherokee County Sheriff's Office and Agent Tom Frye of the Multiple Agency Narcotics Unit. The 11 July 2004 Report of Interview stated:

> [Defendant] said she wasn't supposed to be . . . [at home with her mother when Tarantino arrived on the night he killed defendant's mother], that was the plan. [Defendant] said she shouldn't have let [Tarantino] in because she knew what was going to happen. . . . [Defendant] said she knew that there was a chance that [Tarantino] was coming that night. . . . [Defendant] said she had remorse about thinking up such a thing and not stopping it. [Defendant] said she could have stopped it.
>
> [Defendant] said it was supposed to happen Friday. . . . [Defendant] said [Tarantino] asked her what time he could come over and if 1:30 or 2:00 [a.m.] would be ok [sic]. [Defendant] said [Tarantino] said he was going to do it and [defendant] said she . . . told [Tarantino] to do just whatever he wanted to do because she was tired of living like this.

The State further offered evidence, through the testimony of Shane Reid, that defendant had stated "she wanted her mother gone." Reid, who was a friend of both defendant and Tarantino, testified as follows:

> A. Up at Sonic. [Defendant] said that she wanted her mother gone.
>
> Q. Do you remember generally approximately when that was?
>
> A. No, sir.

Q. Who was around?

A. I don't recall.

. . . .

Q. Did something happen at school?

A. Yes. [Defendant] said that she wanted her mother gone.

Q. When did that conversation take place?

A. With me and [Tarantino] and a group of my friends before the bell rang.

Q. Do you remember approximately what time of year it was in?

A. Spring time.

Q. Do you remember who was around?

A. No, sir.

Q. Do you remember what exactly she said?

. . . .

A. She said she wanted her mother gone.

The State cites no other evidence to support the charge of solicitation to commit murder, nor does our close review of the five-volume trial transcript reveal any other evidence to support the charge. Thus, at the close of the State's case, the only evidence the State relied upon to argue that defendant solicited Tarantino to kill her mother was the defendant's "plan" to have her mother killed, her agreement with Tarantino about the time that he should arrive at her house to kill her mother, and Reid's testimony that defendant made two statements that she "wanted her mother gone" to one or more of her peers. Although "[a] defendant's conviction of criminal solicitation may properly be based on the defendant's statements and corroborative evidence, including circumstantial evidence showing the defendant's seriousness," 40A Am. Jur. 2d *Homicide* § 586 (1999), in the present case, the State presented no evidence that defendant "counsel[ed], entic[ed,] or induc[ed]" Tarantino to murder defendant's mother. *See Furr*, 292 N.C. at 720, 235 S.E.2d at 199. Therefore, we find that the trial court erred by denying defendant's motion to dismiss the charge of solicitation to commit murder at the close of the State's evidence, and we must reverse defendant's conviction on this charge.

II.

[2] Defendant next contends that the trial court erred by denying her motion to dismiss the charge of conspiracy to commit murder due to insufficient evidence. We disagree.

"Conspiracy . . . is the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means." *Richardson*, 100 N.C. App. at 247, 395 S.E.2d at 148 (citing *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978)). "The reaching of an agreement is an essential element of conspiracy." *Id.* "Thus, to survive the defendant's motion to dismiss, . . . [the] conspiracy charge[] required that the State produce substantial evidence, which considered in the light most favorable to the State, would allow a jury to find beyond a reasonable doubt that the defendant" and Tarantino agreed to commit the murder of defendant's mother. *See Suggs*, 117 N.C. App. at 661-62, 453 S.E.2d at 216.

However, "[i]n order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). "The proof of a conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (quoting *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933)), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *see also State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) ("[I]f the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy.") (internal quotation marks omitted).

In this case, as excerpted above, the State presented evidence of an investigative interview with defendant on 11 July 2004 at the Cherokee County Sheriff's Office in which defendant said that she "wasn't supposed to be . . . [at home with her mother when Tarantino arrived on the night he killed defendant's mother], *that was the plan*." (Emphasis added.) There was evidence that defendant admitted that she "knew what was going to happen" and said she "*had remorse about thinking up such a thing* and not stopping it." (Emphasis added.) In the interview, defendant further asserted: her mother's murder "was supposed to happen Friday"; she and Tarantino "had talked about [the murder]"; Tarantino "asked her what time he could

come over and if 1:30 or 2:00 [a.m.] would be ok [sic]"; and defendant "said [Tarantino] said he was going to do it and [defendant] said she . . . told [Tarantino] to do just whatever he wanted to do because she was tired of living like this."

Additionally, the State presented evidence of three telephone calls made from the telephone at defendant's mother's house—where defendant and her mother were located during the nighttime hours preceding the murder—to the cellular telephone in the possession of Tarantino on that same night. The telephone calls each lasted at least twenty seconds and were made at 4:04 a.m., 4:06 a.m., and 4:14 a.m. At 5:01 a.m., defendant called 911 to report her mother's murder.

While the exact content of the telephone conversations between defendant and Tarantino are not in evidence, the evidence showed that the phone calls were made in rapid succession immediately preceding Mrs. Mundy's death. Defendant contends she telephoned Tarantino to try to stop him from going to her house to carry out the murder. In other words, although defendant "knew what was going to happen" when Tarantino arrived at her mother's house, she argues that she chose to try to reason with Tarantino herself in three early morning phone calls to him while he was en route to her mother's home to commit the murder, rather than call the police for assistance. Further, the State presented evidence that defendant admitted to conceiving of and agreeing to a plan with Tarantino to murder her mother on a certain date and at a certain time. Defendant also admitted to agreeing to work with Tarantino to alter the crime scene by cleaning her mother's blood off of the floor with vinegar, and breaking the window panel next to the doorknob to stage the scene like a break-in. While defendant testified that she acted out of fear of Tarantino, testimony was presented that defendant ignored the protective order entered against Tarantino and had decided she wanted to "start back running around with [Tarantino]." Because all the evidence admitted must be considered "in the light most favorable to the State, giving the State *the benefit of every reasonable inference* that might be drawn therefrom," *Brown*, 310 N.C. at 566, 313 S.E.2d at 587 (emphasis added), we conclude that the trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit murder.

III.

Defendant finally contends that the trial court erred by sentencing her to consecutive rather than concurrent sentences for conspir-

acy to commit murder and solicitation to commit murder. Our decision to reverse defendant's conviction on the charge of solicitation to commit murder renders unnecessary our consideration of this assignment of error, and we do not address it.

04 CRS 1715—Solicitation to commit murder—reversed.

04 CRS 2619—Conspiracy—no error.

Judges McGEE and STEPHENS concur.

IN THE MATTER OF T.R.M.

No. COA07-1170

(Filed 19 February 2008)

1. Child Abuse and Neglect-dependent juvenile— guardianship—return to home improbable

The trial court sufficiently addressed statutory criteria when it found that the return of a juvenile to the home within the next six months was "improbable" rather than the statutory "possible."

2. Child Abuse and Neglect— dependent child—guardianship—mother's rights and responsibilities

The trial court adequately addressed respondent mother's rights and responsibilities in an action establishing a guardianship for a dependent child where the court provided visitation rights and clear guidance as to limitations upon those visitation rights. Respondent did not specifically challenge the remaining statutory criteria.

3. Appeal and Error— preservation of issues—assignment of error—argument outside scope

An argument concerning the standard for changing the guardianship of a dependent child was not addressed where it was outside the scope of the assignment of error, which was limited to whether the trial court made the required findings.

4. Child Abuse and Neglect— dependent juvenile—cessation of periodic review hearings

The trial court properly addressed each of the statutory factors concerning the cessation of periodic review hearings.

5. Child Abuse and Neglect— dependent juvenile—permanency planning hearing

The trial court did not err by not finding that a juvenile was still dependent on the date of the permanency planning hearing.

6. Child Abuse and Neglect— dependent juvenile—guardianship—cessation of reunification efforts

The trial court did not err by deciding that a dependent child was not likely to be returned home within the next six months, nor did the court err by changing the permanent plan to guardianship and relieving DSS of its obligation to continue with reunification efforts.

Appeal by respondent from order entered 11 July 2007 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 28 January 2008.

Lynne G. Schiftan, for petitioner-appellee Guilford County Department of Social Services.

Margaret Rowlett, for guardian ad litem.

Christy E. Wilhelm, for respondent-appellant.

JACKSON, Judge.

Ericka M. ("respondent"), mother of the juvenile T.R.M., appeals from the trial court's order entered 11 July 2007 granting guardianship of T.R.M. to T.R.M.'s maternal grandparents. For the reasons stated herein, we affirm.

In early August 2006, the Guilford County Department of Social Services ("DSS") became involved with the family based upon allegations that respondent could not provide proper care and supervision of the minor child. Specifically, DSS alleged that respondent was unable to maintain stable housing or obtain employment, and she was unable to feed T.R.M. on a regular basis. DSS also alleged that respondent suffered from mental health problems and needed a psychological evaluation. Respondent was arrested on 15 August 2006 pursuant to outstanding warrants, and T.R.M. was placed with the

maternal grandmother. DSS was granted nonsecure custody pursuant to a juvenile petition in which DSS alleged T.R.M. to be neglected and dependent.

On 9 October 2006, the trial court entered an order adjudicating T.R.M. dependent, but dismissing the allegation of neglect. Respondent was ordered to comply with a family service agreement and a case plan, and to submit to random drug screenings. The trial court also granted respondent supervised visitation.

By order entered 12 January 2007, the trial court noted that pursuant to respondent's case plan with DSS, she had agreed to maintain stable housing, find employment, and participate in a psychological evaluation. The court found that respondent (1) had obtained part-time employment, but had been unable to find suitable housing; (2) failed to appear for her scheduled psychological evaluation on 14 December 2006; and (3) attended eight out of twelve visitations with T.R.M., but was tardy for some of them. The trial court ordered respondent to comply with her case plan, continue visiting T.R.M., and attend a newly scheduled psychological evaluation appointment.

By order entered 13 April 2007, the trial court found that although respondent was complying with her visitation plan with T.R.M., she no longer was employed and still did not have stable housing. The court also found that respondent was "not willing to work in any capacity, other than (sic) a professional capacity. Therefore there are certain jobs she refuses to apply for." The court further found that respondent refused to consider certain housing options suggested by the social worker. The trial court ordered DSS to continue to make reasonable efforts to return T.R.M. to the home, and ordered respondent to comply with her case plan. The trial court also granted DSS the authority to allow respondent unsupervised visitation with the child.

In its permanency planning review order entered 11 July 2007, the trial court found that respondent had completed her psychological evaluation. The recommendation given as a result of the evaluation was that respondent should be required to attend individual counseling. The trial court found as fact that respondent (1) was unwilling to participate in counseling; (2) failed to obtain a second opinion regarding counseling even though she previously had stated her intention to do so; (3) repeatedly violated certain parameters for her visitation and communication with T.R.M.; (4) was unwilling to accept employment offered to her; and (5) was having trouble being accepted for housing by one agency because of her previous state-

ment that she did not intend to comply with their program. The trial court found it unlikely that T.R.M. would be returned to the home within the next six months due to respondent's lack of progress with her case plan, and granted guardianship of T.R.M. to the maternal grandparents. Thereafter, respondent filed timely notice of appeal.

On appeal, respondent first contends that the trial court failed to make sufficient findings of fact pursuant to North Carolina General Statutes, section 7B-907. Specifically, she contends the trial court erred because (1) the court failed to find that it would not be possible to return the juvenile to the home; (2) no explanation was offered regarding the effect of guardianship as a permanent plan, nor did the trial court address the rights and responsibilities accorded to respondent; (3) the court failed to give a reason as required by statute for ceasing to hold further review hearings; and (4) no facts exist to support the conclusion that T.R.M. continues to be a dependent juvenile. We disagree.

Permanency planning hearings are held for the purpose of "develop[ing] a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2007). If the trial court decides to allow DSS to cease reunification efforts with the parent, and the juvenile is not returned home, then

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

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2007).

In the instant case, the trial court made the following findings of facts:

4. The juvenile was placed in the home of her maternal grandmother and her husband . . . . It is reported that this juvenile has been residing in this home for the majority of her life, with the exception of a year-and-a-half. This is a stable environment for this juvenile and all of her needs have been met.

. . . .

6. [Respondent] entered into a case plan with [DSS] wherein she agreed:

[a.] To maintain a bond with her child through visitation and telephone contact. . . . She was requested to refrain from visit[ing] the child unexpectedly or outside the visitation schedule. [Respondent] has continued to be in noncompliance with respect to these components, in that she has come by unexpectedly and has called repeatedly after 9:30 p.m.

. . . .

[d.] [To] participate in a psychological evaluation; that evaluation has been completed. Dr. Michael McCollum submitted a report after testing [respondent]. The report indicates that she suffers from paranoia, narcissism, compulsivity[,] and sadistic characteristics. . . . [The doctor's] recommendation is that she be required to attend individual counseling . . . . [Respondent] indicated to the social worker that she does not need counseling [and] that she was going to get a second opinion. [Respondent] has failed to get a second opinion, []or indicate to the Court that she has made arrangements to obtain a second opinion. [Respondent] has also failed to indicate to the Court that she is willing to participate in counseling.

7. [Respondent] has shown by her behavior, and her statements, that she is unwilling to submit to counseling and anything else

she does not want to do. She has been offered employment, on at least two different occasions, and she rejected each opportunity, and for at least one of those jobs, she indicated that that is not the type of employment she was seeking.

8. [DSS] has made reasonable efforts towards reunification in that they have made referrals to or provided services for [*inter alia*, assistance toward obtaining employment, housing, day care, financial assistance, and mental health treatment.]

. . . .

10. It is improbable that the child will return to the home within the next six months due to [respondent]'s lack of progress on her case plan and the choices that she continues to make that impedes (sic) her progress on the case plan.

11. Adoption should not be pursued in that the maternal grandparents have indicated that they wish for the Court to grant guardianship as oppose[d] to adoption. The child should remain in the current placement. It is in this juvenile's best interest for the Court to grant guardianship to the grandparents to provide stability and finality.

Respondent has failed to assign error to these, or any other, findings of fact made by the trial court, and therefore, the findings are deemed supported by competent evidence and are binding upon this Court. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Based upon its findings of fact, the trial court concluded:

1. That it is in the best interest of [T.R.M.] to be placed under the guardianship with the maternal grandparents, . . . in that this child has been in non-secure custody since August 2006, and the mother's minimum progress on her case plan and refusal to comply with many of the components of her case plan.

2. Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.

The trial court then ordered T.R.M. placed in the guardianship of the maternal grandparents, with visitation rights granted to respondent, and respondent was ordered to comply with certain communication and visitation restrictions.

[1] Respondent first contends that the trial court failed to make the required finding pursuant to 7B-907(b)(1). Specifically, although the

trial court found that T.R.M.'s return to the home was improbable, respondent attempts to argue a distinction between the trial court's use of the word "improbable" and the statutory requirement that a court find whether return of the child is "possible" pursuant to section 7B-907(b)(1).

"While it is better practice to use the words of the statute," *State v. Boone*, 293 N.C. 702, 711, 239 S.E.2d 459, 464 (1977), we decline to hold that the trial court's use of language of probability—as opposed to language of possibility—requires remand. This Court previously has not required such a strict interpretation of section 7B-907(b)(1).[1] In fact, we have not required trial courts to specifically identify the factors set forth in section 7B-907(b), provided that the record demonstrates that the factors were taken into account. *See In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) ("Here, by changing the permanent plan for J.C.S. and R.D.S. to adoption, the trial court necessarily determined it was not in the children's best interests to return home within the next six months, pursuant to [section] 7B-907(b)(1)."), *overruled on other grounds by In re R.T.W.*, 359 N.C. 539, 542-43, 614 S.E.2d 489, 491 (2005), *superceded by statute as stated in In re A.B.*, 179 N.C. App. 605, 608 n.2, 635 S.E.2d 11, 14 (2006). Furthermore, as Judge Posner once remarked, "*[a]nything* is possible; there are no metaphysical certainties accessible to human reason . . . ." *United States v. Ytem*, 255 F.3d 394, 397 (7th Cir. 2001) (emphasis in original).[2] As such, it is patently unrealistic to expect

1. Although we are not bound by prior unpublished opinions, *see State v. Pritchard*, 186 N.C. App. 128, 129-30, 649 S.E.2d 917, 918 (2007), we note that in several unpublished opinions, this Court has found no error in a trial court's finding of fact that departed from the language of possibility in section 7B-907(b)(1). *See, e.g.*, *In re C.H.*, No. COA06-1041, 2007 N.C. App. LEXIS 890, at *17-18 (N.C. Ct. App. May 1, 2007) (holding "the trial court made sufficient independent findings of fact as required by [section] 7B-907(b)(1)" based, in part, upon the trial court's finding that "it is not possible for the child, [C.H.], to be returned to the home immediately *nor is it likely* within the next six months." (second alteration in original) (emphasis added)); *In re L.B.*, No. COA05-1565, 2006 N.C. App. LEXIS 1289, at *10 (N.C. Ct. App. June 20, 2006) (holding that the trial court complied with section 7B-907(b)(1) based upon the finding of fact that "[i]t is *not anticipated* that the child will be returned to the parents within the next six (6) months." (alteration in original) (emphasis added)).

2. *Accord In re Metricom, Inc.*, 275 B.R. 364, 371 (Bankr. N.D. Cal. 2002) ("[A]nything is possible under the infinite number of potential fact patterns that might ever arise."); *United States v. Watkins*, 983 F.2d 1413, 1424 (7th Cir. 1993) (Easterbrook, J., dissenting) ("[A]nything is possible in a world of quantum mechanics."); *United States v. New York*, 552 F. Supp. 255, 262 (N.D.N.Y. 1982) (" '[T]he great Voltaire once wrote . . . [that] anything is possible in this best of all possible worlds.' " (quoting *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 759 (2d Cir. 1979))), *aff'd*, 708 F.2d 92 (2d Cir. 1983) (per curiam), *cert. denied*, 466 U.S.

trial courts to determine whether an event is or is not possible, and "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Union v. Branch Banking & Trust Co.*, 176 N.C. App. 711, 717, 627 S.E.2d 276, 279 (2006) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)). The trial court's finding of fact sufficiently addresses the criteria listed in subsection (b)(1), and accordingly, this argument is overruled.

[2] Respondent also argues that the trial court failed to explain respondent's rights and responsibilities pursuant to subsection (b)(2). However, contrary to respondent's contention, the trial court addressed respondent's rights and responsibilities by providing her visitation rights and clear guidance as to the limitations upon those visitation rights. Respondent does not specifically challenge the remaining criteria in section 7B-907, and we hold that the findings of fact adequately address each of the criteria. Therefore, respondent's argument is overruled.

[3] Respondent further contends that the trial court misled her by stating she could motion the court to modify the custody arrangement if her circumstances improved, because the standard for changing guardianship pursuant to section 7B-600 carries a heavier burden. This argument is not properly before this Court because respondent's corresponding assignment of error is limited to whether "the trial court erred in failing to make the required findings of fact pursuant to N.C. Gen. Stat. § 7B-907." According to the North Carolina Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." N.C. R. App. P. 10(a) (2007). "Each assignment of error . . . shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1) (2007). Since the argument regarding the standard for changing guardianship is outside the scope of respondent's first assignment of error, we decline to address it.

[4] Respondent next argues that the trial court failed to make the necessary findings of fact to discontinue its obligation to hold further review hearings. Section 7B-907(c) provides that "[i]f at any time cus-

936, 80 L. Ed. 2d 456 (1984); *see also State v. Poh*, 343 N.W.2d 108, 120 (Wis. 1984) (Steinmetz, J., concurring) (noting that "[t]rial judges for years have said in regard to questions containing the word 'possibility' that anything is possible.").

tody is restored to a parent, or findings are made in accordance with [section] 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-907(c) (2007). Section 7B-906(b) provides for the cessation of periodic review hearings if the trial court finds:

> (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

N.C. Gen. Stat. § 7B-906(b) (2007). Our review of the record shows that each of these factors was properly addressed in the trial court's permanency planning order. Accordingly, respondent's argument on this issue is without merit.

[5] Next, respondent contends that the trial court failed to make findings of fact that T.R.M. still was dependent as of the date of the permanency planning hearing. No such finding is required by section 7B-907, however, and the trial court did not err by failing to address the continued dependency of the minor child. Accordingly, this argument is overruled.

[6] In her final assignment of error, respondent contends that the trial court (1) failed to give her one full year to comply with her case plan; and (2) erred in changing the permanent plan to guardianship. She argues that the court should have ordered DSS to continue with its attempts to reunify T.R.M. with respondent. We disagree.

Section 7B-907(a) requires a trial court to hold a permanency planning hearing "within 12 months after the date of the initial order removing custody" in order "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time."

N.C. Gen. Stat. § 7B-907(a) (2007). If further permanency planning hearings are required, they are to be held at least every six months and for the purpose of allowing the trial court either to review progress toward finalizing the permanent plan or, if necessary, to change to a new permanent plan. *See id.* The trial court may consider granting guardianship of the juvenile to a relative as part of the permanent plan. *See* N.C. Gen. Stat. § 7B-907(c) (2007). Nothing in the permanency planning statute requires the trial court to allow a respondent a certain period of time to comply with directives in order that the juvenile may be returned to the home. The only requirement of the trial court is to make necessary findings of fact when a juvenile is not returned to his or her home. *See* N.C. Gen. Stat. § 7B-907(b) (2007).

As we held *supra*, the trial court made the necessary findings of fact pursuant to section 7B-907(b). Therefore, the court did not err in deciding the child was not likely to be returned home within the next six months, nor did the court err in changing the permanent plan to guardianship and relieving DSS of its obligation to continue with reunification efforts. Accordingly, this assignment of error is overruled.

Affirmed.

Judges TYSON and GEER concur.

FRANK S. KIRSCHBAUM, PLAINTIFF v. McLAURIN PARKING COMPANY; McLAURIN MANAGEMENT ASSOCIATES, INC.; QUANTUM SUPPORT, INC., DEFENDANTS

No. COA07-385

(Filed 19 February 2008)

1. Trespass— against personal property—booting of car

The trial court did not err by granting summary judgment for defendants on a trespass against personal property claim arising from the booting of plaintiff's car in a private parking lot. Defendants were privileged to attach a boot to plaintiff's car to protect their right to exclusive possession of the lot.

2. Damages and Remedies— booting of car—attempt at removal

The trial court did not err by granting summary judgment for defendants on a claim for damages to personal property arising from the booting of plaintiff's car. Defendants were within their rights to boot the car, and plaintiff inflicted the damage on his car himself by resorting to a bludgeon rather than a legal remedy.

3. Unfair Trade Practices— booting of car—summary judgment

Summary judgment was correctly granted for defendants on an unfair and deceptive trade practices claim arising from the booting of plaintiff's car in a private parking lot.

4. Malicious Prosecution— booting of car—taking off boot—malice not shown

Summary judgment was correctly granted for defendants on a claim for malicious prosecution arising from plaintiff's car being booted in a private parking lot. Plaintiff did not show malice: defendants had no desire to press charges once the boot was recovered, the police department proceeded on its own in proceeding with a misdemeanor larceny charge, and there was probable cause to believe that defendant had committed larceny in taking the boot.

Appeal by plaintiff from an order entered 18 December 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 October 2007.

Frank S. Kirschbaum, plaintiff, pro se.

McDaniel & Anderson, L.L.P., by William E. Anderson, for defendant McLaurin Parking Company.

Cranfill, Sumner & Hartzog, LLP, by Dan M. Hartzog, for defendant Quantum Support, Inc.

ELMORE, Judge.

Frank S. Kirschbaum (plaintiff) appeals from an order of summary judgment in favor of McLaurin Parking Company (McLaurin Parking) and Quantum Support, Inc. (Quantum) (together, defendants).

Around noon on 1 March 2006, a weekday, plaintiff parked his car in a private parking lot sub-leased by McLaurin Parking (Lot 11). McLaurin Parking leases the spaces in that lot to long-term tenants

during the work week, and to a nearby restaurant, Caffé Luna, during evenings and weekends. McLaurin Parking employs Quantum to monitor the lot, provide security, and ensure that the people who have paid for parking spaces in the lot have access to their space during the appropriate hours.

The entrance to Lot 11 is flanked on each side by a sign. At the time of the incident, the sign on the left side of the entrance stated the following:

EVENING & WEEKEND
PARKING FOR CAFFÉ LUNA
PATRONS ONLY

6 pm until Midnight Weekdays
8 am until Midnight Weekends

DAY TIME PARKING & ADDITIONAL EVENING
PARKING IN WILMINGTON STREET DECK
(CONTINUE ON HARGETT—TURN RIGHT ON
WILMINGTON ENTER MIDDLE OF BLOCK)

WARNING

PARKING NOT PERMITTED AFTER MIDNIGHT
ANY AUTOMOBILE IN LOT AFTER MIDNIGHT
SUBJECT TO BEING TOWED AT OWNERS EXPENSE

The owner of Caffé Luna, Parker Kennedy, drafted the language on this sign. He stated in an affidavit that he had the sign

> placed in the parking lot so that it would be clear to patrons of my restaurant and members of the general public *whether* they were permitted to park in this lot. The language contained on this sign clearly indicates that Caffé Luna patrons may only park in this lot during evening hours before midnight and on the weekends. As a convenience to those who seek to park in the lot, but cannot, either because there are no available space[s] or *because they are not authorized to do so*, I included instructions on the sign indicating where public parking is available near my restaurant.

(Emphasis added).

The sign to the right of the entrance into Lot 11 stated the following:

PERMIT
PARKING

ILLEGALLY PARKED AND
UNAUTHORIZED VEHICLES WILL
BE TOWED AT VEHICLE
OWNER'S EXPENSE
24 HOURS A DAY-7 DAYS A WEEK

ACE TOWING
821-2121

McLaurin Parking does not tow vehicles from Lot 11 because there is not enough space in the lot for a tow truck when all of the spaces are filled, and because it is not McLaurin Parking's policy to tow vehicles. McLaurin Parking installed the sign at the request of the Raleigh Police Department as a crime deterrent.

Plaintiff did not have a permit to park in Lot 11 and had no verbal or written agreement that he could park in Lot 11. Although there were three public parking lots within approximately 100 yards of Lot 11, plaintiff chose to park in Lot 11 while he had lunch, on a weekday, at Caffé Luna. Plaintiff spent about two hours having lunch at Caffé Luna. During that time, the person who leased the parking space returned from his own lunch outing to discover that plaintiff had parked in his space. The authorized lessee notified McLaurin Parking that somebody had parked in his space. A Quantum security guard, Samuel Okoya, investigated the situation and determined that the Toyota Land Cruiser parked in the space was not an authorized vehicle. Okoya then placed an immobilization device commonly referred to as a "boot" on plaintiff's car. According to Okoya's affidavit,

> The boots used by Quantum Support, Inc. have been designed so that damage, scratching or marring of the vehicle's wheel, rim edge or hubcap does not occur. In addition to the precautions taken by the manufacturer to prevent damage to the vehicle, Quantum Support, Inc. also places a piece of carpet, one-half inch in thickness, in between the boot and the wheel each time a vehicle is immobilized. The carpet is removed when the boot is removed from the vehicle.

Okoya employed the extra-precautionary piece of carpet when he booted plaintiff's car.

When plaintiff returned to his car after lunch, he saw that his car had been booted and that an immobilization notice had been placed on his window. The notice instructed plaintiff to contact Quantum so that the boot could be removed upon the payment of a $50.00 fee. The notice also provided Quantum's telephone number. Plaintiff returned to Caffé Luna and asked Parker Kennedy to remove the boot. Kennedy advised plaintiff to follow the instructions on the notice.

Instead, plaintiff attempted to remove the boot himself. Eventually, plaintiff was able to remove the entire wheel from his car and replace it with a spare. He placed the wheel, with boot still attached, into his car and drove away. Plaintiff admitted during his deposition that he scratched his wheel during his attempt to remove the boot and that the boot did not cause damage to his vehicle until he attempted to remove it. The next day, plaintiff removed the boot from the wheel.

McLaurin Parking contacted the Raleigh Police Department to ask for help in recovering the boot. This was also done in case McLaurin Parking had to file an insurance claim. A police officer visited plaintiff and told plaintiff that he had to return the boot to McLaurin Parking. Plaintiff responded that "[he] was going to let them bid on it on eBay like everybody else . . . ."[1] Plaintiff later returned the boot to the Raleigh Police, who returned it to McLaurin Parking. McLaurin Parking representatives told the officer that they were satisfied with the return of the boot and did not want to do anything else. Defendants did not pursue criminal charges.

[1] Plaintiff first argues that the trial court erred by granting summary judgment in favor of defendants with regard to his claim that defendants trespassed against plaintiff's personal property when they "locked a metal object to Plaintiff's vehicle such that it could not be driven." Plaintiff cites only to the *Restatement (Second) of Torts* for the elements of trespass to chattel, without further reference to any legal authority with precedential value.

Nevertheless, we supply plaintiff with the proper elements of trespass to chattel and find that plaintiff's argument lacks merit. To satisfy a claim for trespass to chattel, a plaintiff must "demonstrate that [he] had either actual or constructive possession of the personalty or goods in question at the time of the trespass, and that there was an unauthorized, unlawful interference or dispossession of the

1. According to plaintiff's affidavit, plaintiff was only joking and had never put it on eBay or considered putting it on eBay.

property." *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (citations and quotations omitted). Actual damages, however, are not an element of trespass to chattel. *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991).

We are satisfied that plaintiff had, at the very least, constructive possession of his car. *See Fordham*, 351 N.C. at 155, 521 S.E.2d at 704 ("Constructive possession is a legal fiction existing when there is no actual possession, but there is title granting an immediate right to actual possession.") However, there was no "unauthorized, unlawful interference or dispossession of the property." *Id.* Plaintiff claims that the general principle that a private property owner has an "absolute right to the exclusive use and enjoyment" of his private property "does not hold true with respect to private parking lots." Plaintiff cites to criminal statutes in support of this claim. *See* N.C. Gen. Stat. § 20-219.2 (2005) (stating that it is unlawful for an unauthorized person to park in a private parking space provided that the private parking lot contains certain signage); N.C. Gen. Stat. § 20-107 (2005) (stating that tampering with a vehicle without the owner's consent is a Class 2 misdemeanor).

Plaintiff's reliance is misplaced. The first statute defines the State's right to prosecute private citizens who trespass in private parking lots, but does not and cannot define the rights between two private citizens when one citizen trespasses upon the real property of the other. The second statute defines the State's right to prosecute private citizens who tamper with a vehicle that does not belong to them, but does not and cannot provide separate recourse for the owner of the vehicle against the tamperer. Having been directed to the *Restatement*, we find that the following principle applies to the situation at hand:

> [O]ne is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is, or is reasonably believed to be, necessary to protect the actor's land or chattels or his possession of them, and the harm inflicted is not unreasonable as compared with the harm threatened.

Restatement (Second) of Torts § 260(1) (1965).

The application of a boot to a car is an "interference" with the property. Plaintiff correctly deduced that the main purpose of a car is transportation, and that one cannot drive around with a boot attached to the wheel of one's car. However, defendants were privi-

leged to attach that boot to plaintiff's car to protect their right to exclusive possession of Lot 11. Plaintiff has provided no relevant legal authority stating otherwise.

We also note that "rightful possession 'cannot be vindicated by a bludgeon,' but must be determined by a resort to legal proceedings." *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 350, 100 S.E. 602, 606 (1919) (quoting *State v. Davenport*, 156 N.C. 602, 72 S.E. 7 (1911)). Quantum provided plaintiff with a telephone number that he could have called to have the boot removed. Quantum also has an appeals process for people who contend that they were improperly booted. Plaintiff did not avail himself of either.

[2] Plaintiff next argues that the trial court erred by granting summary judgment in favor of defendants with regard to plaintiff's claim that he is entitled to recover for damage to his personal property, which he alleges was caused by defendants' unlawful actions. In his deposition, plaintiff testified that the wheel of his car "was physically damaged by the metal object locked to it by Defendants." Plaintiff also testified that he himself inflicted the damage to the wheel. Having already determined that defendants were within their rights to boot plaintiff's car, and that plaintiff inflicted the damage himself by resorting to a bludgeon rather than a legal remedy, we hold that this argument lacks merit.

[3] Plaintiff next argues that the trial court erred by granting summary judgment in favor of defendants with regard to plaintiff's claim that defendants' actions constitute unfair and deceptive trade practices. We disagree.

"To establish a *prima facie* case of unfair and deceptive trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff." *Di Frega v. Pugliese*, 164 N.C. App. 499, 507, 596 S.E.2d 456, 462 (2004) (citation omitted). "An act is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* (citation omitted). We have already determined that defendants were privileged to boot plaintiff's car. In addition, our General Assembly has specifically authorized private parking lot owners in Forsyth County to boot unauthorized vehicles, which further suggests that the act is neither unethical nor unscrupulous. Act of June 7, 1983, ch. 459, sec. 4, 1983 N.C. Sess. Laws 386 (codified at N.C. Gen. Stat. § 20-219.2(a) (2005)).

Accordingly, plaintiff failed to establish a *prima facie* case of unfair and deceptive trade practices and the trial court properly granted summary judgment to defendants on this issue.

[4] Plaintiff next argues that the trial court erred by granting summary judgment in favor of defendants with regard to plaintiff's claim for malicious prosecution. Again, we disagree.

> To prove a claim for malicious prosecution, a plaintiff must establish four elements: (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff.

Nguyen v. Burgerbusters, Inc., 182 N.C. App. 447, 450, 642 S.E.2d 502, 505 (2007) (citations and quotations omitted).

"[I]t cannot be said that one who reports suspicious circumstances to the authorities thereby makes himself responsible for their subsequent action, . . . even when . . . the suspected persons are able to establish their innocence." *Id.* at 450, 642 S.E.2d at 506 (citations and quotations omitted). "However, where it is unlikely there would have been a criminal prosecution of [a] plaintiff except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." *Becker v. Pierce*, 168 N.C. App. 671, 675, 608 S.E.2d 825, 829 (2005) (citations and quotations omitted). Defendants did contact the Raleigh Police regarding the stolen boot, and it is unlikely that the Raleigh Police would have known about the stolen boot without defendants' actions, thus satisfying the first element of malicious prosecution.

However, plaintiff fails to satisfy the second element of malicious prosecution, malice. " 'Malice' in a malicious prosecution claim may be shown by offering evidence that defendant 'was motivated by personal spite and a desire for revenge' or that defendant acted with 'reckless and wanton disregard' for plaintiffs' rights." *Id.* at 676, 608 S.E.2d at 829 (quoting *Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997)) (additional citation omitted). "In an action for malicious prosecution, the malice element may be satisfied by a showing of either actual or implied malice. Implied malice may be inferred from want of probable cause in reckless disregard of the plaintiff's rights." *Nguyen*, 182 N.C. App. at 452, 642

S.E.2d at 506-07 (citations, quotations, and alterations omitted). In this case, once defendants recovered their boot, they informed the Raleigh Police that they had no further desire to press charges. The Raleigh Police proceeded with the misdemeanor larceny charge on their own steam, not defendants'. Morever, both defendants and the Raleigh Police had probable cause to believe that plaintiff had committed misdemeanor larceny. He took defendants' property, and carried it away without defendants' consent, and demonstrated his intent to deprive defendants of the property permanently when he told the investigating officer that defendants could "bid on it on eBay like everybody else . . . ." *See State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (listing the elements of larceny). Accordingly, we find neither actual nor implied malice on the part of defendants.

We affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ANTHONY EUGENE WARE, DEFENDANT

No. COA07-260

(Filed 19 February 2008)

1. Sexual Offenses— statutory sex offense of person fifteen years old—incest—motion to dismiss—sufficiency of evidence—paternity—age—temporal variance

The trial court did not err by denying defendant's motion to dismiss two counts of statutory sex offense of a person who is fifteen years old and two counts of incest because: (1) contrary to defendant's assertion, both the victim's testimony and her birth certificate were direct evidence of defendant's paternity of the victim; (2) the evidence presented at trial was beyond mere suspicion or conjecture; (3) although defendant contends there was insubstantial evidence of his age produced at trial, the victim testified that defendant was her biological father and it was biologically impossible for defendant to be less than six years older than the victim; (4) the Court of Appeals has previously held that an indictment is sufficient if it sets out a time period during which

the time occurred, and the exact date that defendant had sex with the victim in the instant case was immaterial when the evidence at trial showed the offenses occurred when the victim was fifteen years old; (5) there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was fifteen years of age; and (6) defendant failed to demonstrate that his ability to present a defense was impaired by the temporal variances in the evidence presented at trial.

2. Constitutional Law— right to unanimous verdict—double jeopardy—overlapping dates of sexual offenses

Defendant was not denied his right to a unanimous verdict and his right against double jeopardy in a double statutory sex offense of a person who is fifteen years old and double incest case based on the alleged overlap in the dates of the offenses because: (1) the trial court instructed the jury on each of the charged offenses and issued separate verdict sheets to the jury for each charged offense; (2) there were specific incidents which supported each of the guilty verdicts rendered by the jury, and thus there was no danger of a lack of unanimity between the jurors with respect to the verdict; and (3) although defendant contends he was subjected to double jeopardy since there was no specific proof of carnal intercourse on 3 September 2004 or between 10 September 2004 and 4 October 2004 as charged in the indictments, there was evidence of at least two separate instances of incest occurring contemporaneously to the charged dates.

3. Evidence— questioning by trial court—opinion—clarification of testimony

The trial court did not err in a double statutory sex offense of a person who is fifteen years old and double incest case by allegedly impermissibly commenting on a question of fact to be decided by the jury when one question asked by the court included the fact that the victim was eight at the time of previous abuse by a neighbor because: (1) as defendant concedes, a judge is permitted to ask questions of a witness sua sponte to clarify testimony; (2) none of the questions asked by the trial judge in the instant case related to any question of fact to be decided by the jury; and (3) defendant failed to demonstrate how he was prejudiced by the trial court's questions.

4. Evidence— expert testimony—questioning by trial court—clarification of testimony—foundation questions

The trial court did not err in a double statutory sex offense of a person who is fifteen years old and double incest case by questioning the State's expert witness while the prosecutor was laying the foundation for admitting the witness as an expert and by asking questions to clarify the witness's testimony once she was properly admitted because: (1) not only is a trial judge permitted to ask questions of a witness to clarify her testimony, but he may also ask questions that lay the foundation for a witness to be qualified as an expert; and (2) doing so does not breach a defendant's right to a trial before an impartial judge.

5. Witnesses— expert—qualifications—licensed clinical social worker—sexual abuse

The trial court did not abuse its discretion in a double statutory sex offense of a person who is fifteen years old and double incest case by admitting a licensed clinical social worker as the State's expert because: (1) although an expert witness may not testify as to whether sexual abuse has actually occurred, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith; and (2) the witness was properly qualified as an expert, and the witness's testimony that it was common for children who have been abused by a parental figure to have a dilemma about reporting the abuse was properly allowed.

Appeal by defendant from judgments entered 26 June 2006 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 19 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State.

L. Jayne Stowers for defendant.

ELMORE, Judge.

On 21 June 2006, a jury found Anthony Ware (defendant) guilty of two counts of Statutory Sex Offense of a Person who is Fifteen Years Old and two counts of Incest. On 26 June 2006, the trial court entered judgment against defendant and sentenced him to a term of 336-413

months' imprisonment on the two counts of Statutory Sex Offense, to run consecutively, and two terms of twenty-one to twenty-six months on the two counts of Incest, to run consecutively but concurrent to the sentences imposed on the two counts of Statutory Sex Offense. Defendant appeals and we affirm.

I. Discussion

a. Sufficiency of the Evidence

[1] Defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence on both the statutory sex offense and incest charges.

In ruling on a motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Kitchengs*, 183 N.C. App. 369, 374-75, 645 S.E.2d 166, 171 (2007 (quotations and citation omitted). Furthermore, all evidence is considered "in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* (quotations and citation omitted).

Defendant was indicted on two counts of statutory sex offense with a person of the age of 15 years and two counts of incest. Our statutes require the State to prove, beyond a reasonable doubt, that "defendant [engaged] in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person . . . ." N.C. Gen. Stat. § 14-27.7A(a) (2005). In order to carry its burden on incest, the State must prove, beyond a reasonable doubt, that defendant engaged "in carnal intercourse with the [defendant's] . . . (ii) parent or child or stepchild or legally adopted child . . . ." N.C. Gen. Stat. § 14-178(a) (2005).

Defendant argues, *inter alia*, that the State failed to produce substantial evidence of defendant's age, vaginal intercourse or a sexual act on the dates charged on the indictment, and defendant's paternity. Defendant's argument is unpersuasive.

The victim testified at trial that defendant was her biological father and identified him in open court. Furthermore, the victim's birth certificate, clearly identifying defendant to be the victim's

father, was admitted into evidence. Both the victim's testimony and her birth certificate are direct evidence of defendant's paternity. The crime of incest was first created by our legislature long before the advent of DNA or blood type paternity testing. *See*, *e.g.*, *State v. Harris*, 149 N.C. 513, 514, 62 S.E.1090, 1090 (1908) ("Section 3351 defines incest to be carnal intercourse between grandparent and grandchild, parent and child, brother and sister of the half or whole blood."). We hold that witness testimony and birth records are substantial evidence of paternity. Finally, defendant characterized his relationship with the victim and her sister as one where he sought to be a "cool dad."

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Kitchengs*, 183 N.C. App. at 374-75, 645 S.E.2d at 171 (quotations and citation omitted). Testimony by a competent witness as to defendant's paternity, birth records, and the defendant's own testimony are substantial evidence. Furthermore, "[d]eterminations of the credibility of witnesses are issues for the jury to resolve, and they do not fall within the role of the trial court or the appellate courts." *State v. Legins*, 184 N.C. App. 156, 159, 645 S.E.2d 835, 837 (2007) (citations omitted). "When a trial court is considering a defendant's motion to dismiss based upon an insufficiency of the evidence presented, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *Id.* at 159, 645 S.E.2d at 837-38 (quotations and citations omitted). Finally, the evidence presented at trial consisted of evidence beyond mere "suspicion or conjecture." *Id.* at 159, 645 S.E.2d at 837 (quotations and citations omitted).

Defendant also argues that there was not substantial evidence of his age produced at trial. However, the victim "testified [that] defendant was her biological father. As it was biologically impossible for defendant to be less than six years older than [the victim] and to be her father, we conclude that there was sufficient evidence of defendant's age to overcome the motions to dismiss." *State v. Wiggins*, 161 N.C. App. 583, 591, 589 S.E.2d 402, 408 (2003).

Defendant also contends that the State did not produce substantial evidence of vaginal intercourse or a sexual act on the dates charged on the indictment. On the two counts of Statutory Sex Offense, Defendant was indicted for an offense occurring "[o]n or about 11/15/03 to 12/25/03" and one occurring "[o]n or about 12/3/03." The indictments for incest listed two dates of offense, one for "9/3/04"

and another for "9/10/04 to 10/4/04." This Court has held that "[a]n indictment is sufficient if it sets out a time period during which the crime allegedly occurred." *State v. Crockett*, 138 N.C. App. 109, 112, 530 S.E.2d 359, 362 (2000) (citations omitted). The victim was fifteen years old on all of the charged dates. Therefore, "the exact date that defendant had sex with [the victim] is immaterial because the evidence at trial showed that [the offenses] occurred . . . when the victim was [fifteen years old]." *Id.* at 113, 530 S.E.2d at 362. Furthermore, there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was fifteen years of age.

This Court has previously recognized that "[c]ourts are lenient in child sexual abuse cases where there are differences between the dates alleged in the indictment and those proven at trial." *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002) (citation omitted). Furthermore, "[l]eniency has been allowed in cases involving older children as well." *Id.* (citation omitted). This Court has acknowledged that there is considerable "[j]udicial tolerance of variance between the dates alleged and the dates proved in cases involving child sexual abuse. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs." *State v. Brown*, 178 N.C. App. 189, 195, 631 S.E.2d 49, 53 (2006) (internal quotations and citations omitted) (alteration in original).

Defendant has not demonstrated that his ability to present a defense was impaired by the temporal variances in the evidence presented at trial; he simply relies on the fact that there were temporal variances in a vain attempt to find reversible error. We decline to find such error in this case.

II. Unanimity and Double Jeopardy

[2] Defendant next assigns error on the grounds that the "overlap in the dates of the offenses alleged" violated his right to a unanimous jury verdict and his right against double jeopardy provided by the North Carolina State Constitution and the Constitution of the United States. Defendant's argument has no merit.

It is well settled that "[w]hen [a] defendant is tried in a jury trial, 'the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged.' " *State v. Mueller*, 184 N.C. App. 553, 576, 647 S.E.2d 440,

456 (2007) (quoting *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982)). However, our Supreme Court has held that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006). This Court has "applied the same rationale to charges of sex offense and overruled the defendant's jury unanimity argument where the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were submitted to the jury for each charge." *State v. Burgess*, 181 N.C. App. 27, 37-38, 639 S.E.2d 68, 76 (2007) (quotations and citation omitted) (alteration in original).

In the case at bar, the trial court instructed the jury on each of the charged offenses and issued separate verdict sheets to the jury for each charged offense.

Furthermore, "there were specific incidents which supported each of the guilty verdicts rendered by the jury." *State v. Reber*, 182 N.C. App. 250, 256, 641 S.E.2d 742, 746-47 (2007). First, when asked by the prosecutor whether an incident of oral sex occurred "about December 3rd," the victim responded "Yes, ma'am." This testimony clearly supports Defendant's conviction for 05 CRS 73421, where the alleged offense occurred "[o]n or about 12/3/03." Second, when asked "what happened at [the victim's] house around Thanksgiving . . . 2003," the victim testified that her father "put down a $20 bill and started pulling [her] underclothes down." Again, the conduct that occurred around Thanksgiving 2003 plainly falls within the charged dates of 15 November 2003 to 25 December 2003. Thus, " 'there was no danger of a lack of unanimity between the jurors with respect to the verdict.' " *Id.* at 256, 641 S.E.2d at 747 (quoting *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409).

Defendant's double jeopardy argument is also meritless. "The Double Jeopardy Clause of the Fifth Amendment states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' " *State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004) (quoting U.S. Const. amend. V) (additional citation omitted). Defendant complains that he is subject to "multiple punishments for the same offense." *Id.*

Defendant argues that he has been subjected to double jeopardy because there was not specific proof of carnal intercourse on 3 Sep-

tember 2004 or between 10 September 2004 and 4 October 2004 as charged in the indictments. Because there was evidence of at least two separate instances of incest occurring contemporaneously to the charged dates, this argument is dismissed.

III. Questions by the Trial Court

[3] Defendant's next assignment of error concerns questions asked by the trial court during the trial. Specifically, Defendant argues that questions asked by the trial court of a witness constituted comments because the questions "assumed facts that were not in evidence" to be true. The trial court attempted to clarify a witness's testimony during the following exchange:

> Q: Okay. So she has alleged abuse by a neighbor and by her father, is that correct?
>
> A: Yes, sir.
>
> THE COURT: But she made the allegation of abuse by the neighbor when she was eight. Was that part of what she told you as well?
>
> THE WITNESS: Yes.

Defendant argues that the trial court impermissibly commented on a question of fact to be decided by the jury because the trial court's question included the fact that the victim was eight at the time of the previous abuse.

A trial judge may not express "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2005). However, as defendant concedes, a judge is permitted to ask questions of a witness *sua sponte* to clarify her testimony. We fail to see how any of the questions asked by the trial judge in the case at bar related to any question of fact to be decided by the jury. Furthermore, defendant has not demonstrated how he was prejudiced by the trial court's questions. Therefore, this assignment of error is dismissed.

IV. Questioning of the State's Expert Witness

[4] Defendant also alleges that the trial court erred by questioning the State's expert witness while the prosecutor was laying the foundation for admitting the witness as an expert and by asking questions to clarify the witness's testimony once she was properly admitted.

"Whether a witness is qualified as an expert is largely a question of fact answered by the trial court. Thus, trial courts are given wide discretion when determining whether expert testimony is allowed at trial." *State v. Steelmon*, 177 N.C. App. 127, 131, 627 S.E.2d 492, 494 (2006) (citations omitted). Furthermore,

> it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts. Likewise, it is 'well settled' that a trial judge may question witnesses in the interests of supervising and controlling the course of a trial.

State v. Burke, 185 N.C. App. 115, 119, 648 S.E.2d 256, 259 (2007) (quotations and citations omitted). It follows that not only is a trial judge permitted to ask questions of a witness to clarify her testimony, but he may also ask questions that lay the foundation for a witness to be qualified as an expert. Doing so does not breach a defendant's right to a trial before an impartial judge. This assignment of error must be overruled.

V. Qualification of the State's Expert Witness

[5] We review the trial court's decision to admit the State's expert, a licensed clinical social worker, for abuse of discretion. *See Steelmon*, 177 N.C. App. at 130, 627 S.E.2d at 494. Although an expert may not testify as to whether sexual abuse has actually occurred, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

Here, the expert testified that she received a master's degree in social work from East Carolina University, was licensed by the State of North Carolina as a clinical social worker, and that a substantial number of the individuals she had worked with had experienced some sort of sexual abuse by a parental figure. Accordingly, the witness was properly qualified as an expert and the witness's testimony that it was common for children who have been abused by a parental figure to "have a dilemma" about reporting the abuse was properly allowed. We hold that the trial court did not abuse its discretion in admitting the State's expert witness. Thus, this assignment of error is overruled.

Defendant makes seven assignments of error but only argues six. The remaining assignment of error is deemed abandoned. *See*

N.C.R. App. P. 28(b)(6) (2007). Having conducted a thorough review of the briefs and record on appeal, we find no error.

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. MELVIN EARL HAGANS

No. COA07-743

(Filed 19 February 2008)

1. Sentencing— on remand—bias by judge—not demonstrated

Defendant did not demonstrate bias by a judge in a resentencing after a remand where the sentence on remand was actually less than the original sentence, the sentencing judge carefully weighed the arguments by counsel and the mitigating factors offered by defendant, and there is no indication that the judge attempted to calculate a sentence that mirrored the original.

2. Constitutional Law— double jeopardy—sentencing—attempt and completed act—multiple shots toward vehicle—one bullet hole

Defendant's double jeopardy rights were not violated by three separate sentences for three counts of attempted discharge of a firearm into occupied property where the evidence was that seven shots were fired toward the car with one bullet hole found in the car.

3. Appeal and Error— preservation of issues—denial of motion for appropriate relief—notice of appeal—not timely

The appellate court was without jurisdiction to review an assignment of error to the extent it challenged the denial of a motion for appropriate relief where the record had no evidence that defendant filed a timely notice of appeal from the denial of his motion.

4. Constitutional Law— double jeopardy—multiple attempts, one completion

Defendant was not convicted and sentenced for both attempting and completing the same offense where seven shots

were fired and one struck the vehicle. Each shot fired constituted a separate offense; defendant was culpable for six attempted offenses and one completed offense.

Appeal by defendant from judgments entered 22 February 2007 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 29 November 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Bruce T. Cunningham, Jr., for defendant.

JACKSON, Judge.

Melvin Earl Hagans ("defendant") appeals from his sentence received after remand from this Court on convictions for assault with a deadly weapon, discharge of a firearm into an occupied vehicle, and three counts of attempted discharge of a firearm into an occupied vehicle. For the following reasons, we dismiss in part and hold no error in part.

The facts of the instant case, which are set forth in greater detail in this Court's opinion in defendant's prior appeal, show that William Parker ("Parker") was robbed at gunpoint on 20 June 2004 by two masked, black males. *See State v. Hagans*, 177 N.C. App. 17, 18, 628 S.E.2d 776, 778 (2006). After the assailants drove away, Parker entered his vehicle and chased after them. *See id.* at 19, 628 S.E.2d at 779. During the chase, Parker "observed a muzzle flash from inside the Cadillac and heard a gunshot. . . . The chase continued for several minutes during which an arm and pistol emerged from the rear passenger window four times. Seven shots were fired toward Parker's car." *Id.* The assailants eventually eluded Parker but were stopped by police, and "[a]fter arriving home and inspecting his vehicle, Parker observed a small hole below the front grill of his vehicle, which appeared to be a bullet hole." *Id.*

A jury found defendant guilty of possession of a firearm by a felon, assault with a deadly weapon, discharge of a firearm into an occupied vehicle, and three counts of attempted discharge of a firearm into an occupied vehicle, and defendant was sentenced on 17 December 2004. Defendant appealed, and this Court vacated his possession of a firearm by a felon conviction and remanded for resentencing.

Pursuant to this Court's opinion, the trial court resentenced defendant on 22 February 2007. The court found that defendant was a prior record level III offender. The State stipulated to the existence of mitigating factors presented by defendant. The court then sentenced defendant to twenty-three to thirty-seven months for the conviction of discharge of a firearm into occupied property, twenty-three to thirty-seven months for each of the three convictions for attempted discharge of a firearm into occupied property, and sixty days for the conviction of assault with a deadly weapon. Defendant gave notice of appeal in open court. Thereafter, as permitted by North Carolina General Statutes, section 15A-1414(c), defendant filed a motion for appropriate relief, which was denied by order filed 2 April 2007.[1]

On appeal, defendant first contends that the trial judge who sentenced him was biased and that his due process rights, therefore, were violated. Specifically, defendant argues in his brief that (1) "Judge Grant appeared to make up his mind on the sentence before the evidence was heard"; and (2) Judge Grant "went to great lengths to fashion a sentence" and "went to the extraordinary step of 'unconsolidating' previously consolidated sentences in order to duplicate the original sentence." Having reviewed his arguments *de novo*,[2] *see State v. Cook*, 184 N.C. App. 401, 405, 647 S.E.2d 433, 436 (2007), we hold that defendant's arguments are wholly without merit.

[1] First, although defendant contends that he is entitled to relief pursuant to *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 34 L. Ed. 2d 267, 270 (1972), and *Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 754 (1927), defendant has not demonstrated, much less attempted to demonstrate, how Judge Grant had " 'a direct, personal, substantial, pecuniary interest in reaching a conclusion against him

1. *See* N.C. Gen. Stat. § 15A-1414(c) (2005) (noting that a motion for appropriate relief pursuant to section 15A-1414 "may be made and acted upon in the trial court whether or not notice of appeal has been given"); *see also* N.C. Gen. Stat. § 15A-1414 cmt. (2005) ("Giving notice of appeal does not divest the jurisdiction of the trial court to act on a motion.").

2. The State contends that, pursuant to North Carolina General Statutes, section 15A-1444(a1), defendant does not have a right to appeal his sentence. Section 15A-1444(a1) provides that a defendant may "appeal as a matter of right *the issue of whether his or her sentence is supported by evidence* introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range." N.C. Gen. Stat. § 15A-1444(a1) (2005) (emphasis added). In the instant case, defendant does not contend that his sentence was not supported by the evidence, but rather that the sentencing judge was biased. Therefore, section 15A-1444(a1) does not bar defendant's appeal of this matter.

in his case.' " *Ward*, 409 U.S. at 60, 34 L. Ed. 2d at 270 (quoting *Tumey*, 273 U.S. at 523, 71 L. Ed. at 754). Furthermore, although defendant laments that the trial court changed the manner in which it originally consolidated his sentences, defendant expressly *consented* to "a resentencing of all the charges rather than a resentencing restricted to the misdemeanor of assault with a deadly weapon." *See State v. Ransom*, 80 N.C. App. 711, 713, 343 S.E.2d 232, 234 ("[N]othing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand."), *cert. denied*, 317 N.C. 712, 347 S.E.2d 450 (1986); *see also State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984) ("For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence."). Additionally, defendant contends that notes taken by the judge during the sentencing hearing may demonstrate a strained attempt to calculate a sentence mirroring the duration of the original sentence.[3] However, the record demonstrates that the sentencing judge carefully weighed arguments by counsel as well as the mitigating factors offered by defendant, and there is no indication that the sentencing judge attempted to calculate a sentence mirroring the duration of the original term.

In fact, a review of the record reveals that the judge ultimately sentenced defendant in the mitigated range to a total term of imprisonment *less* than the original sentence. Defendant originally was sentenced to 108 to 150 months imprisonment. After deducting the thirteen- to sixteen-month presumptive range for defendant's vacated conviction for possession of a firearm by a felon, *see* N.C. Gen. Stat. §§ 14-415.1(a), 15A-1340.17(c) (2005), defendant's sentence would total ninety-five to 134 months. This range would be reduced further by the statutory credit provided by North Carolina General Statutes, section 15A-1354(b):

> In determining the effect of consecutive sentences . . . and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

3. In assignment of error number 10, which defendant listed in the argument heading in his brief, defendant contends that the sentencing judge erred in denying his request to make the judge's notes part of the record on the grounds that "the notes were . . . public record because Judge Grant is an elected official." Although other jurisdictions have had the opportunity to decide this issue, *see, e.g.*, *Beuhler v. Small*, 64 P.3d 78, 82 (Wash. Ct. App. 2003) ("A judge's notes are not public simply because the judge is an elected official."), defendant failed to argue this issue in his brief. Accordingly, this assignment of error is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

> (1) *The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies*; and
>
> (2) The minimum term consists of the total of the minimum terms of the consecutive sentences.

N.C. Gen. Stat. § 15A-1354(b) (2005) (emphasis added). Defendant's original consecutive sentences included two Class E felonies, and therefore, pursuant to section 15A-1354(b), the maximum term of defendant's total original sentence would be reduced by nine months, yielding a total original sentence of ninety-five to 125 months imprisonment.

Conversely, defendant's new sentence of ninety-four to 150 months imprisonment consists of four Class E felonies and, therefore, would be reduced by three nine-month credits pursuant to section 15A-1354(b). *See id.* After deducting the three credits totaling twenty-seven months from the maximum term of defendant's new sentence, defendant's new sentence amounts to ninety-four to 123 months. As a result, the minimum term of defendant's new sentence is *one month less* than the corresponding term of defendant's original sentence, and his new maximum term is *two months less* than his original maximum term. Therefore, after deducting the sentence for the conviction vacated by this Court and after granting defendant the full benefit of the statutory credits in section 15A-1354(b), defendant actually received a more favorable sentence on remand, and his arguments that the sentencing judge was biased and sentenced defendant more harshly on remand are without merit.[4] Accordingly, defendant's assignment of error is overruled.

[2] Defendant next argues that the imposition of three separate sentences for the three counts of attempted discharge of a firearm into occupied property—which defendant contends are "indistinguishable" offenses—violated defendant's right to be free from double jeopardy. We disagree.

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4. We caution counsel to be particularly vigilant in his factual and legal assertions when alleging that a trial judge is biased. "[S]purious allegations concerning the integrity of our trial bench will not be tolerated," *Mineola Cmty. Bank, S.S.B. v. Everson*, 186 N.C. App. 668, 671-72, 652 S.E.2d 369, 372 (2007), and defense counsel previously has been sanctioned by this Court for making similar, baseless accusations of bias against a trial judge. *See State v. Rollins*, 131 N.C. App. 601, 607-09, 508 S.E.2d 554, 558-59 (1998).

"It is well established that '[t]he Double Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and (3) multiple punishments for the same offense.' " *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613 (1994) (alteration in original) (quoting *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986)). We review defendant's double jeopardy argument *de novo*. *See State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007).

In the case *sub judice*, the State indicted defendant in four separate indictments for violations of North Carolina General Statutes, section 14-34.1. "The elements of this offense are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995); *see also* N.C. Gen. Stat. § 14-34.1 (2005). Defendant was convicted of one count of discharge of a firearm into an occupied vehicle and three counts of attempted discharge of a firearm into an occupied vehicle.

Defendant contends that his three convictions for attempted discharge of a firearm into an occupied vehicle violated double jeopardy because the indictments were identical. This same argument, however, was rejected in *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510, in which our Supreme Court was presented with a double jeopardy challenge to multiple indictments under section 14-34.1. In *Rambert*, the "indictments were identical and did not describe in detail the specific events or evidence that would be used to prove each count." *Rambert*, 341 N.C. at 176, 459 S.E.2d at 512. The Court, however, held that the indictments were sufficient since "indictments need only allege the ultimate facts constituting each element of the criminal offense." *Id.* Nevertheless, the Court acknowledged that "[b]ecause a very detailed account is not necessary for legally sufficient indictments, examination of the indictments is not always dispositive on the issue of double jeopardy." *Id.* The Court, therefore, examined the facts underlying each charge and noted that the evidence showed that the defendant fired three separate shots, holding that "[e]ach shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place." *Id.* at 176-77, 459 S.E.2d at 513; *accord State v. Nobles*, 350 N.C. 483, 505, 515 S.E.2d 885, 898-99 (1999) (holding that since "[t]he State's evidence at trial tended to

show the existence of seven bullet holes in the victim's vehicle," the defendant was properly indicted for seven separate violations of section 14-34.1). The *Rambert* Court "conclude[d] that [the] defendant's conviction and sentencing on three counts of discharging a firearm into occupied property did not violate double jeopardy principles." *Rambert*, 341 N.C. at 177, 459 S.E.2d at 513.

The facts of the instant case are virtually indistinguishable from *Rambert*. Each of the indictments alleged that "defendant . . . unlawfully, willfully and feloniously did discharge a handgun, a firearm, into a motor vehicle, to wit: a 2004 GMC Yukon, while it was actually occupied by William Robert Parker." Although the indictments at issue were identical, they satisfied the requirement that they "allege the ultimate facts constituting each element of the criminal offense." *Id.* at 176, 459 S.E.2d at 512. Each indictment alleged that defendant willfully and wantonly discharged a firearm into property while it was occupied. *See* N.C. Gen. Stat. § 14-34.1 (2005). Additionally, the State's evidence tended to show that seven shots were fired toward Parker's car and that one bullet hole was found in Parker's car. Based upon the evidence, it is conceivable that defendant could have been indicted for six counts of attempted discharge of a firearm into occupied property. Therefore, defendant was not placed in double jeopardy as a result of the convictions for attempted discharge of a firearm into occupied property based upon the three separate indictments of discharge of a firearm into occupied property. Accordingly, defendant's arguments are overruled.

[3] In his final argument, defendant contends that the trial court erred both in its resentencing of defendant and in denying his motion for appropriate relief on the grounds that his right to be free from double jeopardy was violated when he was convicted and sentenced for both discharging a firearm into occupied property and attempting to discharge a firearm into occupied property. We disagree.

As a preliminary matter, we note that defendant brought his motion for appropriate relief pursuant to North Carolina General Statutes, section 15A-1414, and section 15A-1422(b) provides that "[t]he grant or denial of relief sought pursuant to [section] 15A-1414 is subject to appellate review only in an appeal regularly taken." N.C. Gen. Stat. § 15A-1422(b) (2005). In order to perfect an appeal pursuant to section 15A-1422(b), a defendant must file notice of appeal from the order denying his motion for appropriate relief "within the time [and] in the manner . . . provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2005). Rule 4(a)(2) of the Rules

of Appellate Procedure requires notice of appeal to be filed within fourteen days after entry of the order denying a defendant's motion for appropriate relief. *See* N.C. R. App. P. 4(a)(2) (2006). In the case *sub judice*, the record on appeal contains no evidence that defendant filed timely notice of appeal from the 2 April 2007 order denying his motion for appropriate relief. Accordingly, this Court is without jurisdiction to review defendant's assignment of error to the extent it challenges the denial of his motion for appropriate relief, and that portion of defendant's appeal is dismissed.

[4] With respect to the 22 February 2007 resentencing hearing, the evidence, as discussed *supra*, showed that seven shots were fired at Parker's vehicle, with one of the bullets striking the vehicle. Although defendant contends that "at least one of the attempt charges must necessarily be related to the one charge of actually discharging a weapon into the occupied vehicle," defendant was not convicted for both attempting and completing the same offense. Instead, each shot fired at Parker's car constituted a separate offense under section 14-34.1. *See Rambert*, 341 N.C. at 176, 459 S.E.2d at 513. The evidence tended to show that defendant was culpable for six attempted offenses and one completed offense under section 14-34.1, and therefore, defendant was not convicted and sentenced for both attempting and completing the same offense. Accordingly, defendant's argument is without merit.

Defendant's remaining assignment of error not argued in his brief is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

No Error in part; Dismissed in part.

Judges TYSON and ARROWOOD concur.

MARY ANN CRADDOCK, PLAINTIFF v. ABRAM P. CRADDOCK, IV, DEFENDANT

No. COA07-899

(Filed 19 February 2008)

Divorce— breach of support agreement—cohabitation—conflicting evidence—summary judgment—subjective intent

The trial court erred by granting summary judgment in favor of plaintiff wife in an action for breach of a family support agreement where defendant husband cited plaintiff's cohabitation as

an affirmative defense because viewing the evidence in the light most favorable to defendant husband revealed there was a genuine issue of material fact regarding plaintiff's alleged cohabitation as defined under N.C.G.S. § 50-16.9 including evidence that: (1) plaintiff and a male companion maintained a mutually exclusive relationship from September 2002 until the time of the summary judgment hearing nearly five years later; (2) during their relationship, plaintiff and her companion went out to eat dinner or cooked meals together on the weekends, went to the movies, traveled together on overnight vacations, spent holidays together, exchanged gifts, and engaged in monogamous sexual activity; and (3) conflicting evidence was presented regarding how many times per week the companion stayed overnight at plaintiff's residence, whether the companion permanently kept his clothes at plaintiff's residence, and to what extent the companion used plaintiff's residence as his base of operations for his real estate appraisal business. The parties are entitled to present evidence regarding subjective intent when evidence of cohabitation is conflicting, and summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue.

Appeal by defendant from judgment entered 13 April 2007 by Judge Ben S. Thalheimer in Mecklenburg County District Court. Heard in the Court of Appeals 17 January 2008.

Katten, Muchin, Rosenman, L.L.P., by Amy E. Simpson, for plaintiff-appellee.

Casstevens, Hanner, Gunter Riopel & Wofford, P.A., by Nelson M. Casstevens, Jr., for defendant-appellant.

TYSON, Judge.

Abram P. Craddock, IV ("defendant") appeals from an order entered, which granted Mary Ann Craddock's ("plaintiff") motion for summary judgment. We reverse and remand.

I. Background

Plaintiff and defendant were married on 27 December 1975 and legally separated in October 2001. On 9 July 2002, the parties executed an agreement titled "Contract of Separation, Property Settlement, Alimony, Child Custody, and Child Support Agreement" ("agreement") in connection with the parties' separation and subsequent divorce. Section 29 of the agreement states:

> Husband shall pay to Wife as family support the sum of $7,000.00 per month. The obligation of Husband to pay family support to Wife of $7,000.00 per month shall continue until the occurrence of the first of the following contingencies:
>
> a. Death of Wife;
>
> b. Death of Husband;
>
> c. Remarriage of Wife;
>
> d. *Cohabitation of Wife as defined by N.C.G.S. § 50-16.9(b)*;
>
> e. Disability of Husband . . .;
>
> f. The arrival of November 1, 2007.

(Emphasis supplied).

Defendant paid all sums due pursuant to the agreement until March 2004 when defendant reduced the payment amount due to financial difficulties. Plaintiff and defendant agreed that defendant would pay $5,500.00 per month for "a few months" and defendant would resume paying plaintiff the full amount thereafter. The remaining balance was due to be paid upon the expiration of the written agreement. Defendant paid plaintiff $5,500.00 per month for several months. When plaintiff requested defendant resume paying the amount set out in the agreement, defendant refused and stated, "the only way you are going to get it is to take me to Court."

On 7 February 2006, plaintiff filed a complaint alleging defendant had breached section 29 of the agreement. On 10 April 2006, defendant filed his answer asserting as an affirmative defense that plaintiff had cohabited, as defined in N.C. Gen. Stat. § 50-16.9, with Andrew Picarsic ("Picarsic"). Both parties filed motions for summary judgment. Based upon the affidavits and depositions presented, the trial court found plaintiff did not cohabitate with Picarsic and entered an order that: (1) granted plaintiff's motion for summary judgment and (2) denied defendant's motion for summary judgment. Defendant was ordered to bring current all of his past due support payments in arrears totaling $131,000.00 within thirty days of the execution of the order. Defendant appeals.

II. Issue

Defendant argues the trial court erred by granting plaintiff's motion for summary judgment.

III. Summary Judgment

Defendant argues the trial court erred in granting plaintiff's motion for summary judgment where the evidence tended to show genuine issues of material fact existed regarding plaintiff's alleged cohabitation, as defined in N.C. Gen. Stat. § 50-16.9, with Picarsic. We agree.

A. Standard of Review

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law. 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) (internal citation and quotation omitted). "Summary judgment may not be used . . . to resolve factual disputes which are material to the disposition of the action." *Robertson v. Hartman*, 90 N.C. App. 250, 252, 368 S.E.2d 199, 200 (1988) (citation omitted).

B. Analysis

N.C. Gen. Stat. § 50-16.9 (b) (2005) states, in relevant part:

> As used in this subsection, *cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage*, or a private homosexual relationship. Cohabitation is evidenced by *the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations*. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

(Emphasis supplied).

The legislative policy and goals of this statute was articulated in *Lee's North Carolina Family Law* treatise:

> The statute reflects several of the goals of the "live-in lover statutes," terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence reflects the goal of terminating alimony in a relationship that probably has an economic impact. "Continuous and habitual" connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85, at 493-94 (5th ed. 1999).

In *Rehm v. Rehm*, this Court analyzed cohabitation under a separation agreement that provided for the termination of alimony upon cohabitation by the wife with a third party. 104 N.C. App. 490, 492, 409 S.E.2d 723, 724 (1991). Plaintiff argues *Rehm* is not controlling because it was decided four years prior to the amendment to N.C. Gen. Stat. § 50-16.9, which statutorily defined cohabitation. However, *Rehm* is the first North Carolina case that specifically defined cohabitation as "[t]he mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." *Id.* at 493, 409 S.E.2d at 724 (quoting *Black's Law Dictionary* 236 (5th ed. 1979)). *Rehm's* analysis is particularly relevant because the standard defining cohabitation enunciated in that case was subsequently adopted by our Legislature in N.C. Gen. Stat. § 50-16.9 (1995).

In *Rehm*, this Court upheld the trial court's finding of cohabitation and order terminating the husband's obligation to pay alimony based upon evidence that tended to show: (1) the wife maintained an exclusive relationship with a third party for approximately eleven months; (2) the third party stayed overnight at the wife's residence as many as five times per week; (3) the third party brought clothes to the wife's residence; (4) the wife and third party took trips together; (5) the third party kissed the wife goodbye in the mornings; and (6) the wife and third party engaged in monogamous sexual activity. *Id.* at 492-93, 409 S.E.2d at 724. The trial court also found that the wife and third party maintained separate residences. *Id.* at 493, 409 S.E.2d 724. This Court held sufficient evidence in the record supported the trial

court's conclusion that the wife had cohabited with a third party. *Id.* at 494, 409 S.E.2d at 725.

The meaning of the cohabitation statute was more recently interpreted in *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004). In *Oakley*, this Court reviewed prior cases addressing whether separated spouses had resumed their marital relationship and stated their analyses were instructive in determining the meaning of "marital rights, duties, and obligations" under N.C. Gen. Stat. § 50-16.9. 165 N.C. App. at 862, 599 S.E.2d at 928; *See also Rehm*, 104 N.C. App. at 493, 409 S.E.2d at 724.

In *Oakley*, this Court articulated two methods to determine whether a separated spouse had cohabited with a third party by voluntarily and mutually assuming "the marital rights, duties, and obligations . . . usually manifested by married people." *Id.* This Court stated:

> Our courts use one of two methods to determine whether the parties have resumed their marital relationship, depending on whether the parties present conflicting evidence about the relationship. See *Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992), *disc. rev. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). In the first test, developed from *Adamee*, where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties. *Schultz*, 107 N.C. App. at 373, 420 S.E.2d at 190. The other test grew out of the opinion in *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597, *disc. rev. denied*, 300 N.C. 556, 270 S.E.2d 107 (1980), and addresses cases *where the objective evidence of cohabitation is conflicting and thus allows for an evaluation of the parties' subjective intent. Schultz*, 107 N.C. App. at 371, 420 S.E.2d at 189.

Id. at 863, 599 S.E.2d at 928 (emphasis supplied).

We find the second method stated in *Hand* and reiterated in *Oakley* to be applicable to the facts at bar. 46 N.C. App. 82, 264 S.E.2d 597; 165 N.C. App. at 863, 599 S.E.2d at 928. Here, the undisputed facts show that plaintiff and Picarsic maintained a mutually exclusive relationship from September 2002 until the time of the summary judgment hearing, nearly five years later. During their relationship, plaintiff and Picarsic went out to eat dinner or cooked meals together on the weekends, went to movies, traveled together on overnight vaca-

tions, spent holidays together, exchanged gifts, and engaged in monogamous sexual activity.

Some evidence tended to show plaintiff and Picarsic maintained two separate residences. Plaintiff lived on 3142 Ethereal Lane, Charlotte, North Carolina and asserted she had paid all costs and expenses associated with this residence. Picarsic asserted that he lived with his brother, Lawrence Picarsic, at 2207 Hearthstone Lane, Gastonia, North Carolina and had paid all of the costs and expenses associated with his residence. Plaintiff and Picarsic did not share any financial assets, accounts or expenses. Plaintiff conceded that: (1) she and Picarsic worked together on real estate appraisals at plaintiff's residence during the day and (2) Picarsic received mail related to his appraisal business at plaintiff's residence and used plaintiff's address as his business address on his website.

Conflicting evidence was presented regarding: (1) how many times per week Picarsic stayed overnight at plaintiff's residence; (2) whether Picarsic permanently kept his clothes at plaintiff's residence; and (3) to what extent Picarsic used plaintiff's residence as his "base of operations" for his real estate appraisal business. Where evidence of cohabitation is conflicting, the trial court must evaluate the parties' subjective intent. *Oakley*, 165 N.C. App. at 863, 599 S.E.2d at 928 (citing *Schultz*, 107 N.C. App. at 371, 420 S.E.2d at 189; *Hand*, 46 N.C. App. at 82, 264 S.E.2d at 597).

"Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue." *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986). This Court has also stated, "[g]enerally, summary judgment is inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material, or when the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance." *Smith v. Currie*, 40 N.C. App. 739, 742, 253 S.E.2d 645, 647, *disc. rev. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979) (citation and quotations omitted). Where evidence of cohabitation is conflicting, the parties are entitled to present evidence regarding subjective intent. *Hand*, 46 N.C. App. at 87, 264 S.E.2d at 599.

Based on this Court's precedents in *Rhem* and *Oakley*, we hold the trial court erred by granting summary judgment in favor of plaintiff. Viewing the evidence in the light most favorable to defendant, genuine issues of material fact exist on whether plaintiff and Picarsic engaged in cohabitation as defined in N.C. Gen. Stat. § 50-16.9. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

The summary judgment order in this case contains 32 findings of fact and 7 conclusions of law. Some of the findings of fact set forth clearly undisputed facts, while others address issues upon which evidence is conflicting. We reiterate the warning of this Court, from *Capps v. City of Raleigh*:

> [W]e feel compelled again to point out that it is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. As we have pointed out on previous occasions, finding the facts in a judgment entered on a motion for summary judgment presupposes that the facts are in dispute. . . . [T]he Supreme Court and this Court have emphasized in numerous opinions that upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Despite our frequent reminders, we find that some of the trial judges continue to treat the motion for summary judgment as a hearing upon the merits before the court without a jury where the judge becomes the trier of the facts. Granted, in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts.

35 N.C. App. 290, 292, 241 S.E.2d 527, 528-29 (1978) (emphasis original) (internal citations and quotations omitted). The *Capps* reminder still holds true, as the trial judge may not assume the role of trier of fact too soon. *Id.* We reverse the trial court's order and remand for a trial on the merits.

IV. Conclusion

Conflicting evidence raised genuine issues of material fact on whether plaintiff cohabited with Picarsic as defined in N.C. Gen. Stat. § 50-16.9 in violation of the parties' agreement. Viewing the evidence in the light most favorable to defendant, the trial court erred when it granted plaintiff's motion for summary judgment. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249. The trial court's order is reversed and this cause is remanded for trial.

Reversed and Remanded.

Judges GEER and STROUD concur.

THOMAS FRANKLIN CRAVEN, PLAINTIFF v. SEIU COPE, DEFENDANT

No. COA07-925

(Filed 19 February 2008)

1. Libel and Slander— political campaign—rhetorical hyperbole and opinion

Statements in a political campaign did not support a claim of defamation per se where they were either matters of personal opinion or rhetorical hyperbole no reasonable reader would believe.

2. Constitutional Law— statements in political campaign—not shielded

Statements in a political campaign (which were not defamatory per se) were not constitutionally shielded; defendant was not free to make whatever assertions it desired.

3. Unfair Trade Practices— political campaign—underlying defamation claim—without merit

A claim for unfair and deceptive trade practices arising from statements made in a political campaign was correctly dismissed where the underlying defamation claim was correctly dismissed and there were no other allegations of tortious conduct.

Appeal by plaintiff from judgment entered 16 April 2007 by Judge Ronald Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 January 2008.

Boyce & Isley, PLLC, by Philip R. Isley, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, LLP, by Robert W. Spearman, Scott E. Bayzle, and Matthew H. Mall, for defendant-appellee.

TYSON, Judge.

Thomas Franklin Craven ("plaintiff") appeals from judgment entered, which granted SEIU COPE's ("defendant") motion to dismiss plaintiff's claims pursuant to North Carolina Rule of Civil Procedure 12(b)(6). We affirm.

I. Background

On 24 October 2006, plaintiff filed a complaint and alleged claims against defendant of: (1) defamation *per se*; (2) unfair and deceptive

trade practices; and (3) false and fraudulent political advertisement pursuant to N.C. Gen. Stat. § 163-274. Plaintiff alleged defendant had published a series of defamatory statements through the United States mail prior to the 2005 Raleigh City Council election, which: (1) "defamed and libeled [plaintiff] in his profession and means of livelihood[]" as a professional engineer; (2) "were done in the course and scope of commercial activity in the State of North Carolina[;]" (3) "were made in bad faith, were unethical, were unfair to [plaintiff], were deceptive to the public and were intended to harm [plaintiff] in his personal and professional activities[;]" and (4) had "disparaged [plaintiff's] professional reputation, and show that [plaintiff] engages in criminal conduct and such false and fraudulent political advertisements violate N.C. Gen. Stat. § 163-274."

On 30 January 2007, defendant moved to dismiss all claims pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Defendant's motion to dismiss asserted the statements: (1) were not defamatory; (2) were "political speech constitutionally protected by the First Amendment and Article I, Section 14 of the Constitution of North Carolina[;]" (3) were made in the context of a political campaign; (4) did not relate to plaintiff's profession; and (5) did not arise in or affect commerce. Defendant's motion to dismiss also stated that "[p]laintiff may not assert an alleged violation of N.C. Gen. Stat. § 163-274 as a civil claim in this litigation." Defendant's motion to dismiss requested the trial court: (1) dismiss plaintiff's claims; (2) tax the costs of the action against plaintiff; (3) award defendant attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1(2) and N.C. Gen. Stat. § 6-21.5; and (4) award such other relief as the trial court deemed to be just and proper.

On 18 April 2007, the trial court filed its order and judgment which: (1) concluded that plaintiff's complaint failed to state a claim upon which relief can be granted; (2) allowed defendant's motion to dismiss plaintiff's complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6); and (3) denied defendant's request for attorney's fees. Plaintiff appeals from only the dismissal of his defamation and unfair and deceptive trade practices claims.

II. Issue

Plaintiff argues the trial court erred when it granted defendant's motion to dismiss plaintiff's claims of defamation and unfair and deceptive trade practices pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

III. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.*

Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (internal quotations omitted) (emphasis supplied), *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 49 (2004). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

IV. Motion to Dismiss Pursuant to Rule 12(b)(6)

Plaintiff argues the trial court erred when it granted defendant's motion to dismiss plaintiff's claims of defamation and unfair and deceptive trade practices, pursuant to North Carolina Rule of Civil Procedure 12(b)(6), "because the complaint states claims for relief upon which relief may be granted as a matter of law." We disagree.

A. Defamation

[1] "In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted), *disc. rev. denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). "[T]he term defamation applies to the two distinct torts of libel and slander." *Id.* at 29, 568 S.E.2d at 898.

> North Carolina law recognizes three classes of libel: (1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and

> explanatory circumstances become libelous, which are termed libels *per quod*.

Daniels v. Metro Magazine Holding Co., L.L.C., 179 N.C. App. 533, 538, 634 S.E.2d 586, 590 (2006) (citation omitted), *disc. rev. denied*, 361 N.C. 692, 654 S.E.2d 251 (2007). "To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (citation omitted).

> There are, moreover, constitutional limits on the type of speech subject to a defamation action. If a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit. Rhetorical hyperbole and expressions of opinion not asserting provable facts are protected speech. . . . Although someone cannot preface an otherwise defamatory statement with "in my opinion" and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact. Rhetorical hyperbole, in contrast, might appear to make an assertion, but a reasonable reader or listener would not construe that assertion seriously. . . .
>
> In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article.

Daniels, 179 N.C. App. at 539-40, 634 S.E.2d at 590 (internal citations and quotations omitted). "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 701 (1964).

In *Boyce & Isley, PLLC*, this Court held that "[t]he allegations in [the] plaintiffs' complaint sufficiently pled their claim of defamation by defendants to overcome a Rule 12(b)(6) motion to dismiss." 153 N.C. App. at 35, 568 S.E.2d at 901 (citation omitted). This Court stated:

> the average viewer [of the defendant's political advertisement] was left solely with the following information about plaintiffs: that they (1) sued the State; (2) charged (and therefore received) $28,000 per hour to taxpayers to do so; (3) that this

> sum represented more than a policeman's annual salary; and (4) that a judge had pronounced that plaintiffs' behavior "shocked the conscience."

Id. at 32, 568 S.E.2d at 899. This Court concluded the "[d]efendants' statements directly maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices." *Id.*

Here, plaintiff's complaint alleged that a series of mailings defendant published were defamatory *per se*. The mailings stated: (1) if elected, plaintiff "would raise your taxes to pay for new development[;]" and (2) "[plaintiff] [is] against making development pay for itself." One mailing also showed a picture of a well-dressed, cigar-smoking "developer" with plaintiff's and another candidate's names and photographs sticking out of the "developer's" jacket pocket.

The statements and image contained in defendant's mailings are either matters of personal opinion or rhetorical hyperbole no reasonable reader would believe. Whether plaintiff would "raise . . . taxes" to pay for new development or whether plaintiff is "against making development pay for itself" are defendant's political opinion and campaign assertions, which are incapable of being actually or factually proven or disproven. The image of a well-dressed, cigar-smoking "developer" with plaintiff's and another candidate's names and photographs hanging out of the "developer's" jacket pocket is rhetorical hyperbole, which no reasonable reader would believe to be literally true. Any reasonable reader would liken defendant's assertions as similar to P.T. Barnum's historical political humbug and not as "statements [which] directly maligned plaintiff[] in [his] profession by accusing [him] of unscrupulous and avaricious . . . practices." *Id.*

[2] Defendant asserts that because these statements arose during an election for public office, defendant is constitutionally shielded and allowed to make whatever assertions it desired, free from liability for defamation. We disagree.

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated

> falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75, 13 L. Ed. 2d 125, 133 (1964) (internal citation and quotation omitted).

Defendant's statements and assertions contained in the mailings do not support a claim of defamation *per se*. *Daniels*, 179 N.C. App. at 539, 634 S.E.2d at 590. The trial court correctly dismissed plaintiff's defamation claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6). This assignment of error is overruled.

B. Unfair and Deceptive Trade Practices

[3] A claim [of unfair and deceptive trade practices] under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant. A libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of [N.C. Gen. Stat.] § 75-1.1, which will justify an award of damages for injuries proximately caused. . . . To recover, a plaintiff must have suffered actual injury as a proximate result of the deceptive statement or misrepresentation.

Boyce & Isley, PLLC, 153 N.C. App. at 35-36, 568 S.E.2d at 901-02 (internal citations and quotation omitted).

Plaintiff concedes that his claim of unfair and deceptive trade practices necessarily depends upon the validity of his alleged defamation *per se* claim. *Id.* We have held that the trial court properly dismissed plaintiff's defamation claim. In the absence of allegations of other tortious conduct, from which plaintiff "suffered actual injury . . . ." the trial court properly dismissed plaintiff's claim for unfair and deceptive trade practices. *Id.* at 36, 568 S.E.2d at 902. This assignment of error is overruled.

V. Conclusion

Defendant's political mailings about which plaintiff complains contain either: (1) expressions of pure opinion not capable of being

proven or disproven or (2) rhetorical hyperbole which no reasonable reader would believe. The statements and assertions contained in these mailings do not support a claim of defamation. *Daniels*, 179 N.C. App. at 539, 634 S.E.2d at 590. The trial court properly dismissed plaintiff's defamation claim.

Plaintiff's claim for unfair and deceptive trade practices necessarily depends on the validity of his defamation claim. *Boyce & Isley, PLLC*, 153 N.C. App. at 35-36, 568 S.E.2d at 902. In the absence of other alleged tortious conduct by defendant, the trial court properly dismissed this claim. The trial court's order, granting defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to North Carolina Rule of Civil Procedure 12(b)(6), is affirmed.

Affirmed.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA v. SAMUEL EUGENE ELLIS, JR., DEFENDANT

No. COA07-142

(Filed 19 February 2008)

1. Search and Seizure— motion to suppress—probable cause—totality of circumstances—sexually explicit instant message conversations with officers posing as minor children

The trial court did not err in a first-degree sexual exploitation of a minor and statutory rape case by denying defendant's motion to suppress all evidence seized as a result of a search warrant for defendant's computer, including sexually explicit instant message conversations between defendant and police officers posing as a twelve-year-old girl, and a video that defendant transmitted to one of the undercover officers of defendant masturbating while continuing to IM chat with the detective who defendant believed to be a twelve-year-old girl, because a totality of the circumstances review revealed that: (1) although defendant contends there was no probable cause to believe he violated or attempted to violate N.C.G.S. § 14-202.1 and former N.C.G.S. § 14-202.3 when

there was no minor child involved based on an officer playing the role of a minor child, the warrant application did not provide a definitive statement as to whether defendant violated the statute but instead was a statement of a Special Agent's belief that defendant violated the statute; (2) great deference should be paid to a magistrate's determination of probable cause and after-the-fact scrutiny should not take the form of a de novo review; and (3) setting aside defendant's assertion of factual impossibility, there was ample evidence in the warrant application to support a finding of probable cause including the number, detail, and content of instant messages between defendant and individuals who defendant believed were children suggesting that he engaged in this behavior on a regular basis, that the conversations with law enforcement personnel were not the only conversations that he had, and defendant also admitted during those conversations that he had penetrated children with his penis.

2. Search and Seizure— warrant application—attempted indecent liberties with children—attempted solicitation of minor

The trial court did not err in a first-degree sexual exploitation of a minor and statutory rape case by concluding that the warrant application contained evidence of attempted indecent liberties with children or attempted solicitation of a minor because: (1) in regard to conclusion of law number six, the evidence proffered by the Special Agent showed defendant committed the inchoate crime of attempt since defendant had the specific intent to take immoral, improper, or indecent liberties with a child he believed to be twelve years old by sending her a video of himself masturbating and inviting her to do the same, but an essential element of the crime, the child's age, was missing, causing defendant to fall short of completing the offense; and (2) in regard to conclusion of law number four, the evidence showed that defendant had the specific intent to entice eleven- and twelve-year-old children by means of a computer to meet him for the purpose of committing an unlawful sex act, and the legislature merely increased the severity of the crime by making attempted computer solicitation a felony instead of creating a new crime of attempt.

Appeal by defendant from judgment entered 17 August 2006 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 29 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Mark Montgomery for defendant.

ELMORE, Judge.

Samuel Eugene Ellis, Jr. (defendant), pled guilty to one count of first degree sexual exploitation of a minor and one count of statutory rape on 17 August 2006, pursuant to a plea agreement. Defendant was sentenced to a minimum term of 300 months and a maximum term of 369 months in the custody of the Department of Corrections. Defendant now appeals.

Defendant was charged with the rape and sexual exploitation of his stepdaughter. Police obtained a search warrant for the search of defendant's computer. The search warrant application included instant message conversations between defendant and police officers posing as a twelve-year-old girl. The exchanges included sexually explicit language, a statement that defendant had "been with" an eleven-year-old girl, a statement that defendant was "looking for a young girl who is looking to be with an older man in a real life relationship," and a request to meet in person. The application also described a video that defendant transmitted to one of the undercover officers. "In the video, the suspect was described as masturbating, while continuing to IM chat with" the detective, who defendant believed to be a twelve-year-old girl.

Defendant filed a motion to suppress all evidence seized as a result of the search warrant. The trial court denied the motion, which defendant contends was error. He argued then as he argues now that there was no probable cause to support the search warrant because the "warrant alleged that the defendant did unlawfully, willfully and feloniously take and attempt to take immoral, improper, and indecent liberties with MEGHAN, AGE 12, who was under the age of 16 years at the time, for the purpose of arousing and gratifying sexual desire." Defendant reasons that no such twelve-year-old exists because the "role" of Meghan was played by police officers who were not minor children, and thus "there is no minor child and a key element of this offense is lacking."

[1] On appeal, defendant argues that the trial court erred by denying his motion to suppress. Defendant contends that there was no probable cause to believe that defendant violated or attempted to vio-

late N.C. Gen. Stat. § 14-202.1 and former N.C. Gen. Stat. § 14-202.3. We disagree.

"In reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997). We employ a totality of the circumstances analysis to review the affidavit and warrant. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983) (citations omitted).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Id. at 238-39, 76 L. Ed. 2d at 548 (citations, quotations, and alterations omitted). "In adhering to this standard of review, we are cognizant that great deference should be paid to a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Dexter*, 186 N.C. App. 587, 592, 651 S.E.2d 900, 904 (2007) (citations, quotations, and alterations omitted).

Defendant repeatedly asserts that the warrant application alleges that defendant violated or attempted to violate the law. Having reviewed that warrant application, we cannot agree. The application does not state that defendant violated or attempted to violate any of the statutes. The application was drafted by SBI Special Agent E. Michael Smith and was approved by a magistrate on 18 November 2004. It recounts, over twenty disturbing pages, instant message conversations between defendant and various adults, most of whom were posing as children. On page twenty-one, we find the following language:

> 23. Based on the foregoing, there is probable cause to believe that suspect, Samuel Eugene Ellis, Jr.'s residence located at . . ., contains a computer; and that [defendant] has used the computer to take indecent liberties with a minor,

> and attempted to solicit a child by computer with the intent to commit an unlawful sex act.

It appears that defendant misread the above paragraph because he states in his brief that the paragraph is a statement that defendant "had in fact violated [the statute] by transmitting the video." Clearly, the paragraph is not a definitive statement as to whether defendant violated the statute, but instead is a statement of Special Agent Smith's belief that defendant violated the statute.

Setting aside defendant's assertions of factual impossibility, there was ample evidence in the warrant application to support a finding of probable cause. The application contained numerous sexually explicit instant message conversations between defendant and individuals who defendant believed were children, in which he asked to meet the "children" to engage in sexual conduct, and states that he transmitted a video of himself masturbating. In one conversation with an individual who defendant believed to be the adult mother of a five-year-old, defendant discussed the best way to ease the "mother" into having sexual contact with the daughter, including having the daughter watch the "mother" masturbate, and then initiating "oral and touching" with the daughter. Defendant suggested that he could participate in the "oral" contact. During that same conversation, he told the "mother" that another mother had allowed him to penetrate her seven-year-old daughter. Defendant assured the "mother" that she would not mentally damage her daughter so long as the relationship "is handled in a loving and caring way, not a mean, forceful or violent manner."

Based on the evidence in the warrant application, the magistrate had reasonable cause to believe that there was a "fair probability that contraband or evidence of a crime" would be found in defendant's home. *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984). "Probable cause does not mean actual and positive cause nor import absolute certainty." *Id.* at 636, 319 S.E.2d at 256 (citations omitted). Indeed, "[i]t must be remembered that the object of search warrants is to obtain evidence—if it were already available there would be no reason to seek their issuance." *State v. Bullard*, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966). The number, detail, and content of defendant's instant messages suggested that he engaged in this behavior on a regular basis, and that the conversations with law enforcement personnel were not the only conversations that he had. He also admitted during those conversations that he had penetrated children with his penis. We hold that the information provided in

the warrant application was sufficient to support a finding of probable cause.

[2] Although we need not reach this issue to adjudicate this case, for the sake of completeness we address defendant's argument that the warrant application contained no evidence of attempted indecent liberties with children or attempted solicitation of a minor.

Defendant argues that the trial court erred in its conclusion of law no. 6, which states, "The suspect's act, as described in Agent Smith's affidavit, of transmitting a video image of him masturbating to an undercover police officer posing as a child constitutes an attempted violation of N.C.G.S. 124-202.1. See, e.g., *State v. Strickland*, 77 N.C. App. 454 (1985)." Defendant argues that the warrant application contains no evidence of an attempted violation of N.C. Gen. Stat. § 14-202.1. We disagree.

Our Supreme Court has held that

> [W]hen a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime.

State v. Hageman, 307 N.C. 1, 13, 296 S.E.2d 433, 441 (1982). "The elements of an attempt to commit a crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations and quotations omitted).

N.C. Gen. Stat. § 14-202.1 states, in relevant part, that

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . .
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C. Gen. Stat. § 14-202.1(a)(1) (2005). This Court has previously held that an adult masturbating in front of children and inviting them

to masturbate along with him constitutes an indecent, immoral, or improper liberty with a child for the purpose of gratifying sexual desire. *State v. Strickland*, 77 N.C. App. 454, 456, 335 S.E.2d 74, 75 (1985).

In this case, the evidence provided by Special Agent Smith in his warrant application shows that defendant had the specific intent to take immoral, improper, or indecent liberties with a child he believed to be twelve years old by sending her a video of himself masturbating and inviting her to do the same. An essential element of the crime, the child's age, is missing, causing defendant to fall short of completing the offense. However, the evidence proffered is sufficient to show that defendant committed the inchoate crime of attempt.

We move now to conclusion of law no. 4, that defendant's "conduct described in [the warrant application] constitutes an attempted violation of former N.C.G.S. 14-202.3." Former N.C. Gen. Stat. § 14-202.3 is a Class I felony and states, in relevant part:

> A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child who is less than 16 years of age and at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act.

N.C. Gen. Stat. § 14-202.3(a) (2001). Again, if we apply the law of attempt as summarized by our Supreme Court in *Hageman*, we find that the warrant application provides sufficient evidence to show that defendant had the specific intent to entice eleven- and twelve-year-old children, by means of a computer, to meet him for the purpose of committing an unlawful sex act.

Defendant argues that the statute's subsequent amendment "also making it a felony criminal offense to solicit a person the predator believes to be a child to commit unlawful sex acts"[1] somehow proves that the older version of the statute cannot apply to "a citizen who communicates with an adult believed to be a child." Attempting to commit a Class I felony is a Class 1 misdemeanor. N.C. Gen. Stat. § 14-2.5 (2005). By also making attempted computer solicitation a felony, the legislature merely increased the severity of the crime; it did not create the new crime of attempt.

1. This language is taken from the title of S.L. 2005-121, which amended N.C. Gen. Stat. § 14-202.3.

We hold that the trial court did not err by denying defendant's motion to suppress.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TORRAIN LAMEL MELVIN

No. COA07-653

(Filed 19 February 2008)

Sentencing— extraordinary mitigating factors—abuse of discretion standard

The trial court did not abuse its discretion by refusing to find factors of extraordinary mitigation and by imposing an active punishment for defendant's two Class C felony convictions, three Class D felony convictions, one Class E felony conviction, and one Class F felony conviction, because: (1) the sheer number of mitigating factors in and of itself do not support a finding of extraordinary mitigation; (2) the trial court did not expressly hold that a statutory mitigating factor could not be the basis for a factor of extraordinary mitigation, but merely expressed doubt as to whether it was possible; (3) while the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the statutory mitigating factors, there must be additional facts present over and above the facts required to support a normal statutory mitigating factor; and (4) the record showed the trial court carefully and deliberately exercised its discretion in evaluating defendant's proffered factors in extraordinary mitigation, and defendant failed to show any abuse of discretion by the trial court.

Appeal by defendant from judgment entered 8 June 2006 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 28 November 2007.

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

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

STEELMAN, Judge.

When defendant did not demonstrate the existence of an extraordinary mitigating factor, the trial court did not abuse its discretion in imposing an active punishment for defendant's two Class C felony convictions, three Class D felony convictions, one Class E felony conviction, and one Class F felony conviction.

I. Factual and Procedural Background

On 26 September 2005, Torrain Melvin (defendant) was indicted on one count of first degree kidnapping, one count of assault with a deadly weapon inflicting serious injury, two counts of robbery with a dangerous weapon, one count of first degree sexual offense and one count of first degree rape. On 23 January 2006, defendant was indicted on one count of first degree burglary. On 13 March 2006, defendant pled guilty pursuant to a plea agreement before Judge Henry W. Hight, Jr. The kidnapping charge was reduced to felonious restraint, the two armed robbery offenses were to be consolidated for judgment, the first degree sexual offense and first degree rape charges were each reduced to second degree, and were consolidated for judgment. The State and defendant stipulated that defendant was a Prior Record Level II for felony sentencing purposes. Entry of judgment was continued to a later date.

On 8 June 2006, defendant appeared before Judge Hudson for sentencing. At that hearing, defendant requested that the court find the existence of twelve extraordinary mitigating factors pursuant to N.C. Gen. Stat. § 15A-1340.13(g) (2005), and not impose an active sentence. The trial court responded to this request:

> In some of your materials that you asked me to take a look at, you talked about extraordinary mitigating findings. He may have plenty of mitigating factors, but I don't really see an extraordinary mitigating factor.
>
> . . .
>
> [I]t's not an extraordinary mitigating factor when you have numerous mitigating factors. For instance, 10 mitigating factors

> don't add up to one extraordinary mitigating factor. That's not what [the General Assembly] had in mind, I don't think.
>
> . . .
>
> In fact, I'm not sure it's even possible for a statutory mitigating factor to be an extraordinary mitigating factor.
>
> . . .
>
> I'm willing to admit that he probably establishes some mitigating factors. My question is, is there an extraordinary mitigating factor. . . . Is it your argument it's just that the multiplicity of statutory mitigating factors amounts to an extraordinary mitigating factor, is that your argument?
>
> . . .
>
> I'm satisfied he has not established, and I don't think he can establish, based on the way this is proceeding, [an] extraordinary mitigating factor . . . . Now, he may have numerous mitigating factors, and I want to hear what you want to—want me to do if I find mitigating factors.

Judge Hudson found six statutory mitigating factors as set forth in N.C. Gen. Stat. § 1340.16(e) (2005) and no aggravating factors. He further found that the factors in mitigation outweighed the factors in aggravation and imposed sentences from the mitigated range in each judgment. The court did not find that there were present any extraordinary factors in mitigation that would make it a manifest injustice to impose an active punishment.

The charges of second degree sexual offense, felonious restraint, assault with a deadly weapon inflicting serious injury and second degree rape were consolidated in one judgment and an active sentence of 70 to 93 months imprisonment was imposed. The remaining charges of first degree burglary and two counts of robbery with a dangerous weapon were consolidated in a second judgment and a consecutive sentence of 55 to 75 months imprisonment was imposed. Defendant appeals.

II. Felony Structured Sentencing in North Carolina

Part 2 of Article 81B of Chapter 15A of the General Statutes sets forth North Carolina's framework of Structured Sentencing for felons. Felony sentences are determined by the classification of the felony and the defendant's prior record level. N.C. Gen. Stat.

§ 15A-1340.14 (2005). The felony sentencing grid set forth in N.C. Gen. Stat. § 15A-1340.17 provides for three possible sentencing dispositions: (1) "C" being community punishment as defined in N.C. Gen. Stat. § 15A-1340.11(2); (2) "I" being intermediate punishment as defined in N.C. Gen. Stat. § 15A-1340.11(6); and (3) "A" being active imprisonment in the Department of Corrections. N.C. Gen. Stat. § 15A-1340.11(1). If a particular cell in the sentencing grid contains only an "A" as a sentencing disposition, the trial court is required to impose an active prison sentence, and not suspend the sentence. N.C. Gen. Stat. § 15A-1340.11(1). The only exception to this is found in N.C. Gen. Stat. § 15A-1340.13(g), which allows the sentencing judge to impose an intermediate punishment upon a finding that an extraordinary mitigating factor exists in the case.

An extraordinary mitigation factor is defined as being "of a kind significantly greater than in the normal case." N.C. Gen. Stat. § 15A-1340.13(g)(1). The decision to find an extraordinary mitigating factor rests in the discretion of the presiding judge. Upon the finding of a factor of extraordinary mitigation, the trial judge presiding must then make two additional findings before an intermediate punishment may be imposed in lieu of an active sentence. The factor(s) in extraordinary mitigation must "substantially outweigh any factors in aggravation[,]" and it must be found that "[i]t would be a manifest injustice to impose an active punishment in the case." N.C. Gen. Stat. § 15A-1340.13(g)(2) & (3). The decision to find these additional factors rests in the discretion of the presiding judge. *Id.* Finally, the ultimate decision of whether to impose an intermediate punishment rests in the discretion of the presiding judge. *Id.*

A finding of extraordinary mitigation does not authorize the trial court to modify the length of a sentence imposed, *State v. Messer*, 142 N.C. App. 515, 543 S.E.2d 195 (2001), only to impose an intermediate punishment in lieu of active punishment. The trial judge is prohibited from imposing an intermediate punishment based upon a finding of extraordinary mitigation where: (1) the offense is a Class A or B1 felony; (2) the offense is a drug trafficking offense; or (3) the defendant has five or more record points. N.C. Gen. Stat. § 15A-1340.13(h).

Standard of Review

On appeal, the decisions made by the trial court under N.C. Gen. Stat. § 15A-1340.13(g) are reviewed under an abuse of discretion standard. An abuse of discretion occurs only when the trial court's ruling is "manifestly unsupported by reason or one so arbi-

trary 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) (citations omitted).

III. Presence of Factor of Extraordinary Mitigation

In his sole argument on appeal, defendant contends that the trial court erred in refusing to find factors of extraordinary mitigation to support the imposition of an intermediate punishment for defendant's multiple serious felony charges and that he is entitled to a new sentencing hearing. We disagree.

Defendant first contends that the trial court erred in holding that a large number of "mitigating factors don't add up to one extraordinary mitigating factor," and that by so holding the court failed and refused to exercise its discretion as required under N.C. Gen. Stat. § 15A-1340.13(g). We hold that the trial court correctly interpreted the provisions of the statute. Subsection (1) clearly states that to be a factor of extraordinary mitigation, the factor must be of "a kind significantly greater than in the normal case." N.C. Gen. Stat. § 15A-134.13(g)(1). The trial court must look to the quality and nature of the factor to determine whether it is an extraordinary factor in mitigation. Unless the factor is "significantly greater" it cannot be a factor of extraordinary mitigation. The sheer number of mitigating factors cannot in and of itself support a finding of extraordinary mitigation.

Defendant next argues that the trial court failed to properly exercise its discretion by holding that a statutory mitigating factor cannot be the basis for an extraordinary mitigating factor. We first note that the trial court did not expressly hold that a statutory mitigating factor could not be the basis for a factor of extraordinary mitigation. Judge Hudson merely expressed doubt as to whether it was possible.

As discussed above, a factor of extraordinary mitigation must be of a "kind significantly greater than in the normal case." The statutory mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are mitigating factors found in a normal case. While the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute, in order to be extraordinary mitigation there must be additional facts present, over and above the facts required to support a normal statutory mitigation factor.

In this case, the trial court carefully listened to all of the evidence in mitigation presented by the defendant. Of the twelve mitigating factors submitted by defendant, the trial court found the existence of six, and imposed a mid-range mitigated sentence in each of the two judgments that consolidated multiple charges. The trial court did not find the existence of any factor in extraordinary mitigation.

We hold that the record in this case clearly shows that the trial court carefully and deliberately exercised its discretion in evaluating defendant's proffered factors in extraordinary mitigation. We further hold that defendant has failed to demonstrate any abuse of discretion on the part of the trial judge in not finding extraordinary mitigation and imposing an active sentence in these cases.

AFFIRMED.

Judges McCULLOUGH and GEER concur.

STATE OF NORTH CAROLINA, Plaintiff v. RALPH DELANE CUNNINGHAM, JR., Defendant

No. COA07-520

(Filed 19 February 2008)

Appeal and Error— plain error review—matters within court's discretion

The issue of whether to exclude evidence under Rule of Evidence 403 on the ground that its probative value is substantially outweighed by unfair prejudice involved a discretionary determination by the trial court that was not subject to plain error review. N.C.G.S. § 8C-1, Rule 403.

Appeal by defendant from judgments entered on or about 20 October 2004 by Judge Richard L. Doughton from Superior Court, Cleveland County. Heard in the Court of Appeals 1 November 2007.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General Robert C. Montgomery for the State.

J. Clark Fischer for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of two counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. Defendant appeals. The dispositive question before this Court is whether the trial court erred in not allowing defendant to stipulate to the existence of a prior unspecified felony conviction. For the following reasons, we find no error.

I. Background

The State's evidence tended to show the following: On 31 December 2003, William Keith Falls ("Keith") and his brother Paul Kirk Falls, Jr. ("Kirk") were working at Linwood Produce on 805 Cleveland Avenue in Kings Mountain. At approximately 8:30 p.m. defendant and another man entered the store. Keith and Kirk recognized one of the men, Larry Bernard Smith, Jr. ("Smith") because he had been coming to the store for years. Keith also recognized defendant because he had been outside the store earlier in the week. Smith and defendant got a beer, paid for it, and then remained at the store.

After about ten minutes, defendant pulled out a gun, waved it around and said, "We're not kidding boys". Smith was telling defendant to shoot Keith and Kirk saying, "We needing money". Keith told defendant and Smith "to get the money out of the register. Smith took approximately one hundred dollars from the register. Smith and defendant forced Keith and Kirk to the back of the store and took their billfolds, then Smith and defendant ran out of the store.

On 5 January 2004, Detective Doug Shockley of the Criminal Investigative Division of the Kings Mountain Police Department showed Keith and Kirk two photographic lineups. Both Keith and Kirk identified Smith and defendant as the assailants. On 5 January 2004, a warrant was issued for defendant's arrest. On or about 15 March 2004, defendant was indicted for two counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. Trial was held on 19 October 2004.

Before trial began, after much discussion as to stipulations, the trial judge specifically asked defendant, "Well, the question is, do you want to stipulate to anything?". Defendant's attorney responded, "No, sir." Later during the trial, outside of the presence of the jury, defendant's attorney requested that a stipulation be read to the jury

that defendant had a prior conviction for a felony, but that the stipulation not specify that the felony was for common law robbery. After some further discussion as to the stipulation the following dialogue took place:

> THE COURT: The only question here is, is whether or not you want to stipulate to the prior conviction and you can or cannot. Any way you want to do it.
>
> MR. GRIFFIN: Yes, sir, we are going to stipulate to the prior conviction.
>
> THE COURT: All right, I want your client to stand up and make sure he's been fully advised about that and that he's in agreement to do that.
>
> (The defendant stood.)
>
> THE COURT: Mr. Cunningham, your attorney says that you wish to stipulate to that prior conviction in Cleveland County of common law robbery on 11-16-1995, is that correct?
>
> THE DEFENDANT: Can I see him for a second?
>
> (The defendant and Mr. Griffin appeared to speak off the record.)
>
> THE DEFENDANT: Yeah. Yes, sir.
>
> MR. GRIFFIN: He understands.
>
> THE COURT: Do you agree to that, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You heard the stipulation. You're in full agreement to stipulate to that, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you've consulted with your attorney and you're satisfied with his—
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: —advice in that regard, is that correct?
>
> (The defendant appeared to nod his head affirmatively.)
>
> THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

Later in the proceedings the prosecutor read into evidence,

The stipulation would be that on November 16th, 1995, in Cleveland County, in case number 95 CRS 5144, the defendant, Ralph Cunningham, was convicted of a felony, common law robbery.

THE COURT: All right, and you fully stipulate and agree with that, is that correct, sir?

MR. GRIFFIN: Yes, Your Honor, we do.

The jury convicted defendant on all four counts. Defendant appeals.

II. Stipulation of Prior Conviction

Defendant claims the trial court committed plain error "by refusing to allow defendant to stipulate to the existence of a prior conviction for purposes of the possession of firearm by felon charge, with the result that the jury improperly heard that defendant had a prior robbery conviction." Specifically, defendant argues that the introduction of the prior robbery conviction was irrelevant, and in the alternative, that even if this Court finds the prior robbery conviction to be relevant the evidence still should not have been admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 because the prejudicial effect of the evidence substantially outweighed its probative value.

Plain error is an error that is "so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997); *see generally* N.C.R. App. P. 9(4) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error."). A defendant must demonstrate " 'not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000), *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000) (*quoting State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). Accordingly, defendant must show that absent the erroneous admission of the challenged evidence, the jury probably would not have reached its verdict of guilty. *See id.*

Among defendant's four indictments in this case was a charge for possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1. N.C. Gen. Stat. § 14-415.1(b) states that

> [w]hen a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section.

N.C. Gen. Stat. § 14-415.1(b) (2003). "[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007). Though defendant is correct that conviction for possession of a firearm by a felon "does not require proof of any specific felony" it does require proof of a felony. *See id.* Therefore, the introduction of defendant's past conviction for common law robbery, a felony, is relevant. *State v. Mann*, 317 N.C. 164, 169, 345 S.E.2d 365, 368 (1986) ("[C]ommon law robbery is a felony[.]"); s*ee Wood* at 235, 647 S.E.2d at 686; *State v. Nelson*, 298 N.C. 573, 594, 260 S.E.2d 629, 645 (1979) ("The 'test' of relevance is whether an item of evidence tends to shed any light on the inquiry or has as its only effect the exciting of prejudice or sympathy.").

However, even relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403.

> Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible under Rule 402 unless the judge determines that it must be excluded, for instance, because of the risk of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (Commentary) (Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.)

State v. Mercer, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986) (internal quotations omitted). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on

appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). The North Carolina Supreme Court has specifically refused to apply the plain error standard of review "to issues which fall within the realm of the trial court's discretion[.]" *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000).

As defendant has already conceded, without any objection to the evidence this Court is limited to plain error review. *See* N.C.R. App. P. 9(c)(4); *see also State v. Moody*, 345 N.C. 563, 574, 481 S.E.2d at 629, 634 ("Absent an objection or motion at trial, our review of this argument on appeal is limited to that for plain error[.]"), *cert. denied*, 522 U.S. 871, 139 L. Ed. 2d 125 (1997). The balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error "to issues which fall within the realm of the trial court's discretion." *Steen* at 256, 536 S.E.2d at 18; *McCray* at 131, 463 S.E.2d at 181. Accordingly, this assignment of error is overruled.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges TYSON and JACKSON concur.

RIVERPOINTE HOMEOWNERS ASSOCIATION, INC., PETITIONER v. TANYA MALLORY, RESPONDENT

No. COA07-127

(Filed 19 February 2008)

1. Associations— homeowners association—North Carolina Planned Community Act—declaration—powers—levy of fines—foreclosure on claim of lien

The trial court erred by finding as fact that the pertinent declaration of covenants did not permit the levying of fines as a means of enforcing its terms and that petitioner homeowners association did not have the power to foreclose on a claim of lien, because: (1) the North Carolina Planned Community Act under N.C.G.S. § 47F-3-102 was amended effective 17 July 2004 to

remove the permissive words "subject to" and replaced with explicit language stating that a homeowners association may exercise the listed powers unless its articles of incorporation or declaration expressly provided to the contrary; (2) the Court of Appeals has previously determined that the retroactive application of the revised statute does not violate the contract clause of the United States Constitution; (3) petitioner was created before 1 January 1999 and its articles of incorporation and declaration do not expressly provide that it may not fine residents who violate its rules and regulations; and (4) all of the events in question occurred after 17 July 2004 when the Act was amended.

2. Notice— foreclosure hearing—waiver—presence and participation in hearing

The trial court erred in a case involving foreclosure on a claim of lien by concluding as a matter of law that respondent homeowner received improper notice and that respondent's actual notice of the hearing was irrelevant, because: (1) when the record shows that a party to a foreclosure hearing was present at the hearing and participated in it, it is well-settled that a party entitled to notice may waive notice in this way; and (2) the record and the order in the instant case revealed that respondent waived notice in that manner when she was present at the hearing and participated in it.

Appeal by petitioner from judgment entered 25 August 2006 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2007.

Michelle Price Massingale for petitioner.

Tanya Mallory, respondent, pro se.

ELMORE, Judge.

RiverPointe Homeowners Association, Inc. (petitioner), appeals an order preventing it from foreclosing its claim of lien on Tanya Mallory (respondent). For the reasons stated below, we reverse the order of the superior court.

Respondent purchased a home in the RiverPointe residential community in Charlotte. RiverPointe homeowners are subject to certain restrictive covenants in an "Amended and Restated Declaration of Covenants, Conditions and Restrictions for RiverPointe" (the

Declaration), including "[k]eeping land, including any lawns and shrub beds, well maintained and free of trash, uncut grass more than six (6") inches in height and weeds." On 9 May 2005, petitioner sent respondent a letter stating that her lawn was "in serious need of maintenance" and that other residents had complained about the condition of her lawn. The letter stated that it was a "friendly reminder that [respondent's] property needs to be maintained on a weekly basis, including lawn cutting, trimming, weed control and removal of weeds from the lawn and all plant beds."

Respondent did not undertake the suggested property maintenance and petitioner sent respondent a notice that the Executive Board of the Homeowners' Association would hold a hearing on 25 August 2005 to determine whether respondent had failed to maintain her property in accordance with the Declaration and whether she had removed landscaping without the required approval from the Architectural Control Committee (the ACC). Respondent attended the hearing. Petitioner held the hearing, pursuant to N.C. Gen. Stat. § 47F-3-102(12), and made the following determinations:

1. Respondent was in violation of two provisions of the Declaration.

2. Respondent received a $150.00 fine for failing to maintain her property.

3. Respondent received a $150.00 fine for removing landscaping without approval from the ACC.

4. Respondent was "required to submit in writing an appropriate architectural review application and landscape plan" by 4 September 2005 or face a $50.00 daily fine until an appropriate plan is submitted.

5. Respondent was required to "fully complete installation of [her] landscape plan to bring [her] property into compliance" with the Declaration by 31 October 2005. Failure to do so would result in a $150.00 daily fine until the plan was completed.

Respondent did not submit a complete landscaping plan and did not pay the fines assessed during the hearing. On 27 October 2005, petitioner sent respondent a statement showing that she owed $2,200.00 in fines. Petitioner filed a lien against respondent's RiverPointe property on 4 November 2005 securing payment of $1,150.00, which was more than thirty days past due as of 5 October

2005, together with other charges, interest at eighteen percent per annum, costs, and attorneys' fees. Petitioner initiated a foreclosure proceeding on 6 December 2005 and sent a notice to respondent informing her of the hearing date on 12 January 2006. The notice also stated that she could redeem her property and terminate petitioner's power of sale by paying the fines and expenses secured by the lien.

The Mecklenburg Sheriff's office could not deliver the foreclosure notice to respondent because she was either not at home or would not answer the door. The Sheriff's office then completed service by posting. Although respondent now disputes notice, she and her attorney attended the 12 January 2006 hearing and requested a continuance. The clerk granted the continuance and the hearing was rescheduled for 6 February 2006. Both parties appeared at the 6 February 2006 hearing, and the clerk entered an order denying foreclosure of claim of lien on 14 February 2006. Petitioner appealed to the superior court, which entered an order preventing foreclosure and ordering that the claim of lien be removed.

[1] Petitioner first argues that the superior court erred by finding as fact that the Declaration does "not permit the levying of fines as a means of enforcing its terms, and as such, Petitioner does not have the power to foreclose the . . . claim of lien." Petitioner argues that the superior court also erred by concluding as a matter of law that our Supreme Court's decision in *Wise v. Harrington Grove Community Association, Inc.*, 357 N.C. 396, 584 S.E.2d 731 (2003), precludes petitioner from pursuing the relief sought. We agree.

The North Carolina Planned Community Act (the Act) states, in relevant part:

> (c)Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association) . . . *apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary* . . . . These sections apply only with respect to events and circumstances occurring on or after January 1, 1999 . . . .

N.C. Gen. Stat. § 47F-1-102 (2005) (emphasis added). N.C. Gen. Stat. § 47F-3-102 states, in relevant part:

> Unless the articles of incorporation or the declaration expressly provides to the contrary, the association may:

> (12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association[.]

N.C. Gen. Stat. § 47F-3-102 (2005).

This section was amended, effective 17 July 2004. The Supreme Court's decision in *Wise* was based on the previous version of N.C. Gen. Stat. § 47F-3-102, which stated, "*Subject to* the provisions of the articles of incorporation or the declaration and the declarant's rights therein, the association *may*" impose reasonable fines for violations of the association's rules. N.C. Gen. Stat. § 47F-3-102 (2003) (emphasis added). The Supreme Court held that the statute's use of the words "subject to" and "may" require a permissive reading. *Wise*, 357 N.C. at 403, 584 S.E.2d at 737. "[T]his statute does not automatically grant the listed powers to all homeowners associations. Instead, it appears N.C.G.S. § 47F-3-102 merely allows the alteration of an association's declaration, articles of incorporation, and by-laws to permit the exercise of these powers by associations in existence prior to 1999." *Id*. The homeowners' association in *Wise* had not amended its declaration, articles of incorporation, or by-laws to explicitly permit it to fine anyone. *Id.* at 404, 584 S.E.2d at 737-38. Accordingly, the Supreme Court held that the homeowners' association could not levy fines on residents. *Id.* at 407, 584 S.E.2d at 739-40.

When the legislature amended N.C. Gen. Stat. § 47F-3-102, it removed the permissive words "subject to" and replaced them with explicit language stating that a homeowners' association may exercise the listed powers unless its articles of incorporation or declaration expressly provides to the contrary. N.C. Gen. Stat. § 47F-3-102 (2005). It appears that the legislature's intent was to address the concerns raised by the Supreme Court in *Wise* and clarify that homeowners' associations have the enumerated powers unless their documents expressly provide to the contrary. This Court has already examined the revised statute and determined that its retroactive application does not violate the contract clause of the United States Constitution. *Reidy v. Whitehart Ass'n, Inc.*, 185 N.C. App. 76, 83-84, 648 S.E.2d 265, 269-70 (2007).

Petitioner was created before 1 January 1999 and its articles of incorporation and declaration do not expressly provide that it may not fine residents who violate its rules and regulations. All of the

events in question occurred after 17 July 2004, when the Act was amended. Accordingly, we hold that petitioner does have the power to levy fines against respondent, to file a claim of lien, and foreclose upon that claim of lien.

[2] Petitioner next argues that the superior court erred by concluding as a matter of law that respondent received improper notice, and that respondent's "actual knowledge of the hearing [was] irrelevant." Again, we agree. We have previously held that when the record shows that a party to a foreclosure hearing "was present at the hearing and participated in it[,] [i]t is well-settled that a party entitled to notice may waive notice in this way." *In re Foreclosure of Norton*, 41 N.C. App. 529, 531, 255 S.E.2d 287, 289 (1979). Here, the record, as well as the order, reflects that respondent was present at the hearing and participated in it. Accordingly, she waived notice in that manner, and it was improper for the superior court to hold that her actual knowledge of the hearing was irrelevant.

We reverse the order of the superior court.

Reversed.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. THADDEUS ANDRE SMITH, DEFENDANT

No. COA07-487

(Filed 19 February 2008)

1. Sentencing— aggravating factors—clerical errors—remanded

A sentence for driving while impaired was remanded where there was a clerical error in the designation of aggravating factors on the sentencing form.

2. Appeal and Error— notice of appeal—dismissal when not given in writing

Defendant's appeal from civil judgments for attorney fees and appointment fees in an impaired driving prosecution was dismissed where he did not give written notice of appeal from the civil judgments. Rule of Appellate Procedure 3(a).

Appeal by defendant from judgment entered 6 December 2006 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 21 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Russell J. Hollers III for defendant-appellant.

GEER, Judge.

Defendant Thaddeus Andre Smith appeals from his conviction for driving while impaired and his sentence of two years minimum and two years maximum imprisonment. Defendant's primary argument on appeal is that the evidence does not support the trial court's finding of the two grossly aggravating factors specified on the trial court's sentencing form. There is no dispute that two grossly aggravating factors exist, and it is apparent from the record that the trial court simply inadvertently checked the wrong box on the form. We, therefore, remand for correction of that clerical error. Although defendant has also purported to appeal from the trial court's judgment imposing attorney's fees and appointment fees, since the record contains no notice of appeal from that judgment, we are required to dismiss that part of the appeal.

The State presented evidence at trial that tended to show the following facts. On 8 January 2006, a Cabarrus County deputy sheriff drove to Kannapolis to serve an arrest warrant on a Ms. Barriman. On his way to Ms. Barriman's home, he drove behind a vehicle that eventually pulled into Ms. Barriman's driveway. Defendant, who appeared to be the driver, got out of the vehicle holding a can. When the officer asked to speak with defendant about Ms. Barriman, defendant threw down the can, which turned out to be a half-empty beer can.

The officer smelled alcohol on defendant's breath as he spoke with him and noticed that defendant's eyes were glassy and bloodshot. The officer suspected defendant had been driving while impaired and, after performing field sobriety tests, arrested defendant. Defendant ultimately had an Intoxilyzer test result of .10.

[1] Although defendant pled guilty to driving while impaired in Cabarrus County District Court, following sentencing, he gave notice of appeal to superior court for a trial de novo. After the jury found defendant guilty of driving while impaired, the State presented evi-

dence during sentencing that defendant had two prior convictions for driving while impaired dated 14 February 2000 and 30 December 2003. In response, defense counsel argued that *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), required that a jury find beyond a reasonable doubt any grossly aggravating factors.

The trial court rejected defendant's argument on the grounds that *Blakely* permits a judge to determine issues related to a defendant's prior record. The court then found:

> [T]he defendant has—this is his third offense of driving while impaired. Therefore, Level I punishment and that's within the past seven years. In fact, the first one, the conviction date was in 2000, February 14th of 2000. The second one is . . . December 30th, 2003 . . . . Therefore, Level I punishment is appropriate.

Subsequently, when defense counsel asked if the trial court found "two grossly aggravating factors, just the two prior DWIs," the trial court replied:

> Yes, I did. Let's see. He has been convicted of a prior offense involving driving while impaired which occurred within seven years, that's (a). And (b), has two or more convictions. Wait a minute. Well, what you have, it should be (d), which says, if the defendant has two or more convictions within the past seven years, Level I punishment is required under those circumstances.[] So that should be (d).

On the grossly aggravating factors section of the Administrative Office of the Courts form titled "Impaired Driving Determination of Sentencing Factors" ("the sentencing form"), the trial court marked box 1.a. that finds the defendant "has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense." The trial court also marked box 1.d. that finds the defendant "has two or more convictions as described in No. 1.c. (Level One punishment is required.)." Box 1.c. in turn finds that the defendant "has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which the defendant is being sentenced but before or contemporaneously with the sentencing in this case." Thus, by checking box 1.d., the trial court effectively found that defendant had two convictions for impaired driving *after* the date of the offense in this case.

As the transcript of the sentencing hearing reveals, however, the trial court actually found that defendant had two or more convictions within the seven years prior to the date of the present offense. Defendant concedes the trial court properly found as the first grossly aggravating factor that he "has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense." The trial court also orally found a second such conviction. The court should, therefore, have checked box 1.b., stating that the defendant "has two or more convictions as described in No. 1.a." The transcript is clear that the trial court simply misread the sentencing form and checked the wrong box.

As such, the trial court committed a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining clerical error as " 'an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination' " (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000))). When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record " 'speak the truth.' " *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (quoting *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956)). Accordingly, we remand for correction of the clerical error found on the sentencing form.

[2] In his remaining argument, defendant contends the trial court erred in entering judgment against him for attorney's fees and appointment fees without giving him notice and an opportunity to be heard. Defendant's counsel submitted a fee application for 16.6 hours on 7 December 2006, and the trial court ordered the State of North Carolina to pay defendant's counsel $1,079.00 for services rendered. On 12 December 2006, the court entered a judgment against defendant in the amount of $1,079.00 for attorney fees and a judgment against defendant in the amount of $50.00 for the attorney appointment fee.

These judgments constituted "civil judgment[s]," and, accordingly, defendant was required to comply with Rule 3(a) of the Rules of Appellate Procedure when appealing from those judgments. *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007). Rule 3(a) provides: "Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special pro-

ceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule." Because defendant failed to give written notice of appeal from these civil judgments entered on 12 December 2006, this Court is without jurisdiction to address the propriety of those judgments. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 ("The provisions of [N.C.R. App. P.] 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal."), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). As a result, defendant's appeal from these civil judgments is dismissed.

No error in part; dismissed in part; remanded for correction of judgment.

Judges TYSON and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2008)

COOPER v. MCADEN No. 07-165	Wilson (05CVS704)	Affirmed
FARLOW v. FARLOW No. 07-617	Guilford (04CVD3115)	Dismissed
HEALY v. UNION CTY. BD. OF ADJUST. No. 07-526	Union (06CVS2024)	Vacated and remanded
HONACHER v. EVERSON No. 07-251	Rockingham (03CVS1334)	Affirmed
IN RE D.S.B. No. 07-572	Caldwell (00JB128)	Affirmed in part; vacated in part; and remanded
IN RE N.D.D.S. No. 07-1212	Haywood (07JT45)	Affirmed
NOLAN v. COOKE No. 07-354	Warren (04CVS260)	Dismissed
PATTERSON v. SANDERS UTIL. CONSTR. No. 07-436	Indus. Comm. (I.C. 415880)	Affirmed
ROBERSON v. TERMINIX CO. OF E. N.C. No. 07-233	Carteret (06CVS507)	Affirmed
SCOTT v. ROSS No. 07-104	Onslow (03CVS1911)	Affirmed
SHULENBERGER v. HBD INDUS., INC. No. 07-470	Indus. Comm. (I.C. 170550)	Affirmed
SMITHFIELD HOUSING AUTH. v. CREECH No. 07-669	Johnston (07CVD35)	Appeal dismissed
STATE v. ANDERSON No. 07-579	Wake (04CRS10672)	No error
STATE v. BLACKSTONE No. 07-473	Durham (06CRS40220)	No error
STATE v. BROWN No. 07-130	Northampton (02CRS51359) (03CRS625-27) (05CRS2)	No prejudicial error

STATE v. CARTER No. 07-628	Alamance (06CRS50061)	No error
STATE v. JONES No. 06-1718	Robeson (04CRS53644)	No error
STATE v. LITTLE No. 07-575	Wake (05CRS62292)	No error
STATE v. LOPEZ No. 07-986	Guilford (03CRS47920-21)	No error in part; vacated in part
STATE v. McCULLOUGH No. 07-550	Beaufort (04CRS51520)	No error
STATE v. MOSS No. 07-607	Mecklenburg (05CRS219920) (05CRS219922)	No error in part; vacated and remanded in part
STATE v. MULLINS No. 07-43	Pitt (04CRS51141)	No error in part, reversed in part
STATE v. OWENS No. 07-888	Randolph (06CRS50441) (06CRS50130-31)	No error
STATE v. PASS No. 07-584	Guilford (05CRS80738)	No error
STATE v. PATTERSON No. 07-622	Anson (05CRS51676-77) (05CRS51679)	Affirmed as to the trial court's denial of defendant's motion to suppress; Remanded for a new sentencing hearing on the charges of first-degree rape and first-degree kidnapping.
STATE v. WARD No. 07-561	Columbus (06CRS50851) (06CRS52950) (06CRS52993-94) (06CRS53135)	Affirmed and remanded in part
STATE v. WILKES No. 07-395	Caldwell (04CRS1206) (04CRS1208)	No error
STATE v. WILLIAMS No. 07-689	Stanly (07CRS373)	Affirmed
STATE v. YOUNG No. 07-234	New Hanover (05CRS50571)	No error

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

AIDING AND ABETTING
APPEAL AND ERROR
ARBITRATION AND MEDIATION
ARREST AND BAIL
ASSAULT
ASSOCIATIONS
ATTORNEYS

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

CHILD ABUSE AND NEGLECT
CHILD CUSTODY, SUPPORT, AND VISITATION
CITIES AND TOWNS
CIVIL PROCEDURE
COLLATERAL ESTOPPEL AND RES JUDICATA
COMPROMISE AND SETTLEMENT
CONFLICT OF LAWS
CONSTITUTIONAL LAW
CONTEMPT
CORPORATIONS
CRIMINAL LAW

DAMAGES AND REMEDIES
DEEDS
DENTISTS
DISCOVERY
DIVORCE
DRUGS

EVIDENCE

FIREARMS AND OTHER WEAPONS

HOMICIDE
HOSPITALS
HUSBAND AND WIFE

IMMUNITY
INDICTMENT AND INFORMATION
INJUNCTION
JURISDICTION

KIDNAPPING

LARCENY
LIBEL AND SLANDER

MALICIOUS PROSECUTION
MORTGAGES AND DEEDS OF TRUST
MOTOR VEHICLES

NOTICE

PLEADINGS
POLICE OFFICERS
PROBATION AND PAROLE
PUBLIC ASSISTANCE
PUBLIC OFFICERS AND EMPLOYEES

RAPE
REAL ESTATE
ROBBERY

SCHOOLS AND EDUCATION
SEARCH AND SEIZURE
SENTENCING
SEXUAL OFFENSES
STATUTES OF LIMITATION AND REPOSE

TERMINATION OF PARENTAL RIGHTS
TRESPASS
TRIALS

UNEMPLOYMENT COMPENSATION
UNFAIR TRADE PRACTICES

WILLS
WITNESSES
WORKERS' COMPENSATION

ZONING

AIDING AND ABETTING

Statutory rape—requested instruction—knowledge of age of victims—The trial court erred by denying defendant's requested instruction to the jury that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. **State v. Bowman, 635.**

APPEAL AND ERROR

Anticipatory judgment—not considered—An argument that the Court of Appeals should remand defendant's case for resentencing if the Supreme Court vacates his prior convictions was not ripe for review and was not properly before the Court of Appeals. **State v. Coltrane, 498.**

Appealability—defective notice of appeal—Although a juvenile contends the trial court erred in a juvenile delinquency case by failing to consider the risk and needs assessment or other predisposition reports during the disposition hearing, and/or by entering the disposition order without attaching the predisposition report as required by the disposition form, this assignment of error is dismissed because the juvenile designated error only in the adjudication order and not the disposition order in his notice of appeal. **In re A.V., 317.**

Appealability—defective notice of appeal—Although third-party defendant Williams contends the trial court erred in its 18 July 2005 judgment finding her liable for unfair and deceptive trade practices, the Court of Appeals did not have jurisdiction to review the underlying judgment entered 18 July 2005 because Williams only filed notice of appeal from the denial of her Rule 60(b) motion for relief. **Croom v. Hedrick, 262.**

Appealability—denial of partial summary judgment—trial and judgment—The denial of partial summary judgment was not addressed in an appeal after a trial and a judgment on the merits. **McIntyre v. McIntyre, 26.**

Appealability—dismissal of charges—standard of review—double jeopardy—N.C.G.S. § 15A-1445(a)(1) provides that unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division when there has been a decision or judgment dismissing criminal charges as to one or more counts. Double jeopardy does not prohibit prosecution in this case when the jury already rendered the verdicts. If the State succeeds in its appeal, then defendants would not be subject to retrial, but instead the court would reinstate the jury's verdicts. **State v. Hernandez, 193.**

Appealability—dismissal of party based on lack of personal jurisdiction—substantial right—Although plaintiff appeals from an interlocutory order that dismisses a party for lack of personal jurisdiction but does not dispose of all matters pending in the case, plaintiff is entitled to an immediate appeal because an order dismissing a party for lack of personal jurisdiction affects a substantial right. **State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302.**

Appealability—mootness—revocation of probation—discharge from custody—Defendant's appeal from judgments revoking probation is dismissed as moot because the Court of Appeals took judicial notice of the fact that the North Carolina Department of Correction records indicated that defendant's sentence expired and he was released from custody on 20 June 2007. **State v. Cross, 334.**

APPEAL AND ERROR—Continued

Appealibility—preliminary injunction without notice—substantial right affected—A preliminary injunction entered without notice, as here, affects a substantial right and is immediately appealable. **Perry v. Baxley Dev., Inc., 158.**

Appealability—school funding—mootness—Defendant county commissioners' appeal from a school funding dispute under N.C.G.S. § 115C-431 was not moot even though it involved fiscal year 2006-2007 which has ended, because: (1) N.C.G.S. § 115C-431 was amended in 2006 prior to the date of the hearing of the present appeal, and it provided that the conclusion of the school or fiscal year shall not be deemed to resolve the question in controversy between the parties while an appeal is still pending; and (2) defendant filed notice of appeal within the 2006-2007 fiscal school year. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

Issue not raised in prior appeal—not waived—Defendant did not waive review of the employer's liability for attorney fees in a workers' compensation case by not raising it in a prior appeal. The opinion from which the original appeal was taken awarded attorney fees pursuant to N.C.G.S. § 97-88.1, so that the applicability of N.C.G.S. § 97-88 to the facts of this case was not pertinent to the appeal. **Swift v. Richardson Sports Ltd. Partners, 82.**

Notice of appeal—denial of motions to set aside—underlying order not included—The appellate court had jurisdiction to review motions to set aside a preliminary injunction but not the preliminary injunction itself where defendant's notice of appeal was only to the order denying the motions. **Perry v. Baxley Dev., Inc., 158.**

Notice of appeal—dismissal when not given in writing—Defendant's appeal from civil judgments for attorney fees and appointment fees in an impaired driving prosecution was dismissed where he did not give written notice of appeal from the civil judgments. **State v. Smith, 842.**

Plain error review—matters with court's discretion—The issue of whether to exclude evidence under Rule of Evidence 403 on the ground that its probative value is substantially outweighed by unfair prejudice involved a discretionary determination by the trial court that was not subject to plain error review. **State v. Cunningham, 832.**

Preservation of issues—assignment of error—argument outside scope—An argument concerning the standard for changing the guardianship of a dependent child was not addressed where it was outside the scope of the assignment of error, which was limited to whether the trial court made the required findings. **In re T.R.M., 773.**

Preservation of issues—denial of motion for appropriate relief—notice of appeal—not timely—The appellate court was without jurisdiction to review an assignment of error to the extent it challenged the denial of a motion for appropriate relief where the record had no evidence that defendant filed a timely notice of appeal from the denial of his motion. **State v. Hagans, 799.**

Preservation of issues—failure to argue—Although defendants contend the full Commission erred in a workers' compensation case by its finding of fact number 24, this assignment of error is dismissed, because defendants failed to

APPEAL AND ERROR—Continued

make an argument in their brief relating to this assignment of error or the full Commission's findings with respect to plaintiff's teeth as required by N.C. R. App. P. 28(b)(6). **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Preservation of issues—failure to assign error—Although defendants contend the Industrial Commission erred in a workers' compensation case by its first conclusion of law stating that plaintiff had a presumption of permanent total disability even though defendants contend the presumption of disability resulting from a Form 21 agreement applies only to temporary total disability, this assignment of error is dismissed, because: (1) defendants failed to cite any authority for their proposition; (2) this argument is not properly before the Court of Appeals since defendants failed to assign error to this conclusion of law as required by N.C. R. App. P. 10(a); and (3) even after plaintiff pointed out in his brief the lack of assignment of error, defendants did not move to amend the record on appeal to add an assignment of error, nor did they ask in their reply brief for the Court of Appeals to apply N.C. R. App. P. 2. **Hunter v. APAC/Barrus Constr. Co., 723.**

Preservation of issues—failure to include record or transcript references—Defendants' third assignment of error in the record on appeal in a workers' compensation case is dismissed based on a failure to include clear and specific record or transcript references in violation of N.C. R. App. P. 10(c), because: (1) defendants made only a blanket reference to transcript volumes I and II without making reference to a particular error, and there are 3,285 transcript pages in the transcripts; and (2) defendants failed to specify which documents should have been included in the transcripts, and failed to provide specific record or transcript references. **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Preservation of issues—ground of objection not specified—To preserve a question for appellate review, a party must state the specific grounds for the desired ruling if they are not apparent from the context. Defendant could not assert that the trial court abused its discretion by not sanctioning the State for an alleged discovery violation where defendant objected to the introduction of the evidence, but did not state grounds for his objection and did not draw the trial court's attention to the alleged discovery violation. **State v. Mack, 365.**

Prior opinion of Court of Appeals—binding on subsequent panel—Subsequent panels of the Court of Appeals are bound by Court of Appeals decisions if not overturned by higher authority, and defendant's preservation assignments of error concerning aggravated sentencing were overruled. **State v. Moore, 416.**

Rule 2—confusion in case numbers and captions—notice of appeal sufficient—defendant not at fault—An appeal in a criminal contempt matter was heard to prevent manifest injustice where it arose from a civil case and there was confusion in the case numbers and captions, but the notice of appeal was sufficient to give notice of what was being appealed and the confusion was not caused by defendant. **State v. Coleman, 144.**

Standard of review—citation of authority—Defendant violated Appellate Rule 28(b)(6) by neither stating the standard of review nor citing authority supporting a standard of review; however, defendant substantially complied with other aspects of the Rules of Appellate Procedure and her appeal was not dismissed. Defendant's counsel was ordered to pay printing costs. **State v. Labinski, 120.**

ARBITRATION AND MEDIATION

Award exceeding authority—remanded—The trial court did not err by vacating an arbitration award based on its decision that the arbitration panel exceeded its authority, as allowed by N.C.G.S. § 1-567.13(a)(3) (2001), and then remanding to the arbitration panel as permitted by N.C.G.S. § 1-567.13(c) (2001). **Sprake v. Leche, 322.**

Prejudgment interest—ambiguity—interpretation against insurance company—The trial court did not err by confirming an arbitration award which contained prejudgment interest where the arbitration provision was within an insurance policy, the policy language was ambiguous as to whether prejudgment interest was available, and that ambiguity was resolved against the insurance company. **Sprake v. Leche, 322.**

ARREST AND BAIL

Pretrial release denied—violation of statutory right—not prejudicial—Defendant's pretrial motion to dismiss a DWI charge was properly denied where the magistrate substantially violated defendant's statutory right to pretrial release, but defendant did not demonstrate any prejudice to the preparation of her defense. Although defendant argued that she lost the opportunity to gather evidence by having friends and family observe her and form opinions as to her condition following her arrest, she was not denied access to friends and family, she was informed of her right to have a witness present for the intoxilyzor test but did not request one, and she had full access to a telephone and made several calls. **State v. Labinski, 120.**

ASSAULT

Strangulation—sufficiency of evidence—victim's account and photographs—The trial court properly denied defendant's motion to dismiss a charge of assault by strangulation. The victim's testimony and confirming photographs of cuts and bruises were sufficient. **State v. Little, 152.**

ASSOCIATIONS

Homeowners association—North Carolina Planned Community Act—declaration—powers—levy of fines—foreclosure on claim of lien—The trial court erred by finding as fact that the pertinent declaration of covenants did not permit the levying of fines as a means of enforcing its terms and that petitioner homeowners association did not have the power to foreclose on a claim of lien. **Riverpointe Homeowners Ass'n v. Mallory, 837.**

ATTORNEYS

Discipline—consideration of remorse—Consideration of remorse as a mitigating factor for an attorney being disciplined was within the discretion of the DHC, which did not abuse its discretion in this case by not considering defendant's remorse. **N.C. State Bar v. Ethridge, 653.**

Discipline—disbarment—protection of public—The DHC did not err by concluding that disbarment of an attorney being disciplined was the only sanction that can adequately protect the public in a case that involved transferring money

ATTORNEYS—Continued

and property from a woman with dementia to the attorney. The DHC's conclusions had a rational basis in the evidence. **N.C. State Bar v. Ethridge, 653.**

Discipline—handling of client funds—failure to deliver funds to guardian—The DHC did not err by concluding that an attorney violated the Rules of Professional Conduct in his handling of the funds of a client suffering from dementia after a guardian was appointed. Defendant's conduct in failing to immediately deliver all of the client's funds to her guardian and requiring the guardian to sign a release shows an intent to hide the client's funds from the guardian. **N.C. State Bar v. Ethridge, 653.**

Discipline—handling of client funds—intent to misappropriate—Substantial evidence in the whole record supported a DHC finding that an attorney had engaged in professional misconduct in his handling of the funds of a client with dementia. Although defendant argued otherwise, the record showed that defendant had the requisite intent to misappropriate the funds. **N.C. State Bar v. Ethridge, 653.**

Discipline—transfer of property to himself—deceitful act—The evidence supported the DHC's findings and those findings supported conclusions that an attorney violated the Rules of Professional Conduct by placing tax stamps on a deed indicating an erroneous value for property he transferred from a client with dementia to himself. Although defendant's statements contradicted the State Bar's evidence, the DHC had the opportunity to observe defendant and judge his credibility. Moreover, even if defendant's statements are taken as true, he was still engaged in an inherently deceitful act. **N.C. State Bar v. Ethridge, 653.**

Discipline—weighing aggravating and mitigating factors—Even if an attorney had not abandoned his assignments of error concerning aggravating and mitigating factors, the record shows that those facts were weighed by the DHC and it cannot be said that its valuation of these factors was arbitrary. **N.C. State Bar v. Ethridge, 653.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Felonious breaking and entering—allegation of residence—building with curtilage—no fatal variance—The trial court did not err by failing to dismiss the charge of felonious breaking and entering under N.C.G.S. § 14-54(a) based on an alleged fatal variance between the indictment and the evidence where the indictment alleged defendant broke and entered into the residence when the facts tended to show that defendant broke and entered into a building outside the residence but within the curtilage. **State v. Jones, 562.**

CHILD ABUSE AND NEGLECT

Dependent child—guardianship—mother's rights and responsibilities—The trial court adequately addressed respondent mother's rights and responsibilities in an action establishing a guardianship for a dependent child where the court provided visitation rights and clear guidance as to limitations upon those visitation rights. Respondent did not specifically challenge the remaining statutory criteria. **In re T.R.M., 773.**

CHILD ABUSE AND NEGLECT—Continued

Dependent juvenile—cessation of periodic review hearings—The trial court properly addressed each of the statutory factors concerning the cessation of periodic review hearings. **In re T.R.M., 773.**

Dependent juvenile—guardianship—cessation of reunification efforts—The trial court did not err by deciding that a dependent child was not likely to be returned home within the next six months, nor did the court err by changing the permanent plan to guardianship and relieving DSS of its obligation to continue with reunification efforts. **In re T.R.M., 773.**

Dependent juvenile—guardianship—return to home improbable—The trial court sufficiently addressed statutory criteria when it found that the return of a juvenile to the home within the next six months was "improbable" rather than the statutory "possible." **In re T.R.M., 773.**

Dependent juvenile—permanency planning hearing—The trial court did not err by not finding that a juvenile was still dependent on the date of the permanency planning hearing. **In re T.R.M., 773.**

CHILD CUSTODY, SUPPORT, AND VISITATION

Custody—best interest of the children—The trial court did not abuse its discretion in a child custody action in determining the best interest of the children. Even if the trial court erred in making challenged findings of fact, the court's conclusion regarding the best interest of the children is supported by sufficient findings of fact. **Hall v. Hall, 527.**

Custody—decision making responsibilities divided—findings required—The trial court erred when determining the custody of the children in a divorce action in its division of decision-making responsibilities. The court made no findings that a split in decision-making was warranted; on remand, the court may allocate decision-making authority between the parties, but must set out specific findings as to why deviation from pure joint legal custody is necessary. **Hall v. Hall, 527.**

Custody—findings—The trial court did not abuse its discretion by awarding primary physical custody of the children to plaintiff mother. The court is required to order custody to the person who will best promote the interest and welfare of the children and must consider all relevant factors, but need only find those facts which are material. Here, the findings challenged by defendant are supported by competent evidence. **Hall v. Hall, 527.**

Custody—parenting coordinator—The trial court did not follow the statutory mandates required before a parenting coordinator may be appointed to decide disputes concerning the children. The findings required by N.C.G.S. § 50-91 must be made. **Hall v. Hall, 527.**

CITIES AND TOWNS

Conditional use permit—construction of correctional facility—arbitrary and capricious standard—The City Council's decision granting a conditional use permit to Cabarrus County for the construction of a Law Enforcement Center, including a correctional facility, adjacent to downtown Concord was not arbitrary or capricious. **McDonald v. City of Concord, 278.**

CITIES AND TOWNS—Continued

Conditional use permit—construction of correctional facility—whole record test—The trial court did not err by affirming the City of Concord's grant of a conditional use permit to Cabarrus County for the construction of a Law Enforcement Center (LEC), including a jail, adjacent to downtown Concord based on its determination that the City had presented competent, material, and substantial evidence that the planned LEC met the City's ordinance standard relating to its conforming with the surrounding residential homes. **McDonald v. City of Concord, 278.**

CIVIL PROCEDURE

Attorney fees—Rule 60 motion improper for relief from errors of law or erroneous judgments—The trial court erred in a case arising out of breach of loan agreements by awarding $7,500 in attorney fees under N.C.G.S. § 75-16.1 to defendants in an amended order entered in response to defendant's N.C.G.S. § 1A-1, Rule 60 motion raising the issue of whether the trial court applied the correct legal standard in its ruling on defendants' motion for attorney fees, because: (1) the trial court improperly addressed an error of law raised by defendants' Rule 60 motion, and it is well-settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments; and (2) the proper remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. § 1A-1, Rule 59(a)(8). **Catawba Valley Bank v. Porter, 326.**

Motion to dismiss—standard of review—The Court of Appeals' review of a motion to dismiss for lack of personal jurisdiction was limited to the issue of whether the trial court's findings of fact support its conclusions of law that there was no personal jurisdiction over defendant on a statutory or constitutional due process basis, because appellant did not assign as error any of the trial court's findings of fact but only assigned error to the trial court's granting of defendant's motion to dismiss. **State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302.**

Rule 60 motion for relief from judgment—authenticity of signature on documents—abuse of discretion standard—The trial court did not abuse its discretion by denying defendant husband's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from a divorce judgment entered 28 October 1998 even though defendant contends the signatures on the answer and summary judgment motion were not his because there was evidence from which the trial court could have concluded that defendant signed the answer, thereby conferring personal jurisdiction upon the court in the divorce proceeding. **Macher v. Macher, 537.**

Rule 60(b)(1) motion—excusable neglect—notice of hearing—The trial court did not abuse its discretion by denying third-party defendant's Rule 60(b)(1) motion for relief from judgment based on alleged excusable neglect of no notice of the hearing where her attorney was sent a calendar setting the trial date before he was allowed to withdraw, third-party defendant did not obtain another attorney, and she assumed that opposing counsel would keep her abreast of any developments in the case. **Croom v. Hedrick, 262.**

Rule 60(b)(3) motion—fraud, misrepresentation, or other misconduct—The trial court did not abuse its discretion by denying third-party defendant's Rule 60(b)(3) motion for relief from judgment based on alleged fraud, misrepresentation or other misconduct where she contended that the third-party plaintiff

CIVIL PROCEDURE—Continued

had actual knowledge of her address but never attempted to contact her after her attorney withdrew to inform her that the matter was scheduled for a trial or hearing because there was no duty under the law for the opposing party to do so. **Croom v. Hedrick, 262.**

Rule 60(b)(6) motion—any other reason justifying relief from operation of judgment—The trial court did not abuse its discretion by denying third-party defendant's Rule 60(b)(6) motion for relief from judgment based on any other reason justifying relief from operation of the judgment where she contended that she did not receive notice of the hearing but her attorney received a calendar setting a date for the hearing before he was allowed to withdraw as counsel. **Croom v. Hedrick, 262.**

Statute of limitations—defense motion for summary judgment—The affirmative defense of the statute of limitations may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer absent prejudice to plaintiff. **Tripp v. City of Winston-Salem, 577.**

Summary judgment order—recitation of facts—The trial court did not err by including certain facts in an order granting summary judgment where the facts were not findings, which would indicate that summary judgment was improper, but recitations of undisputed facts. **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Counterclaims—no final judgment in prior action—Plaintiff did not establish collateral estoppel or res judicata concerning counterclaims in an action arising from a commercial property business in North Carolina and New York. There was not a final judgment on the merits for those counterclaims in the prior N.Y. action. **Bluebird Corp. v. Aubin, 671.**

Dismissal of action—sovereign immunity—adjudication on merits—subsequent constitutional claims barred—An action by plaintiff student who was injured on her way to a school bus stop against defendant county board of education based upon alleged state constitutional violations of her rights to due process and equal protection was barred by res judicata where plaintiff's prior action against defendant board for negligence, breach of fiduciary duty, and constructive fraud was dismissed on the ground of sovereign immunity. **Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441.**

COMPROMISE AND SETTLEMENT

Medicaid reimbursement from settlement account—immaterial settlement might be attributed to something other than medical damages—The trial court did not err in a medical malpractice and negligent infliction of emotional distress case by granting the North Carolina Division of Medical Assistance's (DMA) motion for reimbursement from the pertinent settlement account, resulting from injuries of a Medicaid recipient received at birth, and by ordering the trustee pay the requested amount of $1,046,681.94 for medical services subject to the one-third statutory limitation under N.C.G.S. § 108A-57(a) if applicable, because it was immaterial that some of plaintiffs' settlement funds might

COMPROMISE AND SETTLEMENT—Continued

have been attributed to something other than medical damages such as pain and suffering. **Andrews v. Haygood, 244.**

CONFLICT OF LAWS

Internal affairs doctrine—correct application of N.Y. law—There was no merit to plaintiff Susi's argument that the internal affairs doctrine rendered North Carolina courts devoid of jurisdiction to render a decision in an action arising from a New York corporation which had a property business in North Carolina and New York. The internal affairs doctrine is a conflict of laws issue; conflict of laws did not arise here because the North Carolina court plainly and correctly used New York law to render its judgment. **Bluebird Corp. v. Aubin, 671.**

Relitigation of claim—procedural rights—law of the forum—North Carolina law applied in an action concerning operation of a commercial property business in North Carolina and New York because North Carolina is the forum state. The North Carolina conflict of laws rule is that procedural rights are determined by the law of the forum, and whether a claim is being relitigated is a procedural issue. **Bluebird Corp. v. Aubin, 671.**

CONSTITUTIONAL LAW

Double jeopardy—attempt and completed act—multiple shots toward vehicle—one bullet hole—Defendant's double jeopardy rights were not violated by three separate sentences for three counts of attempted discharge of a firearm into occupied property where the evidence was that seven shots were fired toward the car with one bullet hole found in the car. **State v. Hagans, 799.**

Double jeopardy—multiple attempts, one completion—Defendant was not convicted and sentenced for both attempting and completing the same offense where seven shots were fired and one struck the vehicle. Each shot fired constituted a separate offense; defendant was culpable for six attempted offenses and one completed offense. **State v. Hagans, 799.**

Effective assistance of counsel—failure to inform defense counsel of contents of questions from jury—Although the trial court erred by refusing to inform defense counsel of the contents of the questions from the jury in a first-degree murder case, it did not violate defendant's Sixth Amendment right to effective assistance of counsel. **State v. Smith, 207.**

Effective assistance of counsel—failure to offer evidence of defendant's state of mind—failure to request instruction on diminished capacity—Defendant was denied his constitutional right to effective assistance of counsel in a first-degree murder case based on his counsel's failure to offer any evidence as to defendant's state of mind at the time of the crime and his failure to request an instruction on diminished capacity. **State v. Duncan, 508.**

Full Faith and Credit Clause—counterclaims not addressed in New York—The Full Faith and Credit clause of the U.S. Constitution did not arise from a North Carolina court addressing counterclaims for breach of fiduciary duty and constructive fraud after a New York court order approved the sale of New York properties owned by plaintiff corporation. The New York court did not dispose of those counterclaims. **Bluebird Corp. v. Aubin, 671.**

CONSTITUTIONAL LAW—Continued

Possession of firearm by felon—not double jeopardy—A conviction for possession of a firearm by a felon was not double jeopardy. While the prior conviction is a part of the new offense, the punishment is for the new element of possessing a firearm. **State v. Coltrane, 498.**

Right to be present—refusing to allow defendant to review jury questions—Although the trial court violated defendant's right under Article I, § 23 of the North Carolina Constitution to be present at every stage of the proceeding in a first-degree murder case by refusing to allow defense counsel to review jury questions before giving supplemental instructions in response thereto, the State met its burden to show the violation was harmless beyond a reasonable doubt. **State v. Smith, 207.**

Right to confrontation—insufficiently explained absence from trial—waiver—Defendant's voluntary and unexplained absence from his trial after it began constitutes a waiver of his right to confrontation. The only explanations of the absence were second or third hand, and defense counsel was not in a position to verify what was told to her by other people. A letter from a doctor that defendant was in the hospital did not have any kind of diagnosis or prognosis, only the statement that defendant was being kept for observation. **State v. Russell, 625.**

Right to unanimous verdict—double jeopardy—overlapping dates of sexual offenses—Defendant was not denied his right to a unanimous verdict and his right against double jeopardy in a double statutory sex offense of a person who is fifteen years old and double incest case based on the alleged overlap in the dates of the offenses. **State v. Ware, 790.**

Statements in political campaign—not shielded—Statements in a political campaign (which were not defamatory per se) were not constitutionally shielded; defendant was not free to make whatever assertions it desired. **Craven v. SEIU COPE, 814.**

Takings—interest on unclaimed property—The trial court correctly granted defendant's Rule 12(b)(6) motion to dismiss an action alleging an unconstitutional taking in the State retaining the interest from unclaimed funds after they were returned to the owners. This property is unique in that the State did not take possession through its own action, but as a result of the owner's neglect. The capture of interest on the property is not a taking. **Rowlette v. State, 712.**

CONTEMPT

Criminal—findings—events after show cause order—Findings of fact in a criminal contempt matter based solely on acts which occurred after the issuance of the show cause order were not sufficient. The trial court must make findings of fact beyond a reasonable doubt as to whether defendant committed the acts alleged in each show cause motion; although the record here contained evidence that defendant committed the acts alleged, the appellate court is not at liberty to make findings for the trial court. **State v. Coleman, 144.**

CORPORATIONS

Breach of fiduciary duty by officer—no assignment of error to findings—Based on the unchallenged findings, the trial court did not err by determining in

CORPORATIONS—Continued

a dispute between the two shareholders of a commercial property company that defendant had not breached her fiduciary duty by refusing to reveal the identity of a prospective buyer or by refusing to attend board meetings. Plaintiff did not assign error to the trial court's conclusion as to the lack of evidence of damage to the corporation, or to the finding that defendant's absence was excusable under the circumstances. **Bluebird Corp. v. Aubin, 671.**

Fiduciary duties—not addressed in prior action—A North Carolina trial court did not err in an action arising from a commercial property business in New York and North Carolina by addressing the conduct of plaintiff Susi in the sale of New York properties and awarding damages. A New York court had approved the sale of the New York properties, but did not address the conduct which defendant claims depreciated the properties. **Bluebird Corp. v. Aubin, 671.**

CRIMINAL LAW

Conspiracy to traffic cocaine—instructions—omission of "by possession"—unanimity of verdict—The trial court's instruction in a prosecution for conspiracy to traffic in cocaine by possession that referred only to conspiracy to traffic in cocaine without specifying "by possession" did not create a risk of a nonunanimous verdict because it did not constitute a disjunctive instruction, and any danger of a nonunanimous verdict was removed when defense counsel's closing argument repeatedly identified the charge against defendant as conspiracy to traffic by possession, defendant's conspiracy instruction was linked to the preceding conspiracy instruction relating to a codefendant which specified that the conspiracy involved an agreement to traffic in cocaine by possession, and the verdict form required the jury to decide whether defendant was guilty of conspiracy to traffic in cocaine by possession of more than 28 grams but less than 200 grams of cocaine. **State v. Davis, 735.**

Information revealed day of trial—outcome of trial not affected—The disclosure of a police report the State intended to introduce on the day of trial did not materially affect the trial and the assignment of error was overruled. The focus should be on the import of the undisclosed evidence at trial rather than on defendant's ability to prepare for trial. **State v. Mack, 365.**

Jury questions—supplemental instructions—review by defense counsel not required—The trial court did not violate defendant's statutory rights under N.C.G.S. § 15A-1234 by refusing to allow defense counsel to review questions from the jury before providing instructions in response to the questions because a review of the court's instructions in response to the jury questions in the instant case revealed that they were simply a reiteration of the court's original instructions and cannot be characterized as additional instructions. **State v. Smith, 207.**

Motion for appropriate relief—juror misconduct—motion for new trial—conversation with third party meant to influence or prejudice jury—The trial court abused its discretion in a first-degree sexual offense, armed robbery and felony breaking and entering case by denying defendant's motion for appropriate relief based on the discovery of a previously undisclosed communication between a detective and a deputy who served as a juror on the case which informed the deputy that defendant failed a polygraph test even though the deputy already knew this information. **State v. Lewis, 308.**

CRIMINAL LAW—Continued

No mistrial ex mero motu—identification of defendant—There was no abuse of discretion in the denial of a mistrial ex mero motu in a prosecution for cocaine offenses where one of the State's witnesses could not identify defendant as the person from whom he had tried to purchase crack. Another witness, an officer, testified that defendant's clothes matched that of an individual whom he saw engaging in a drug transaction. **State v. Mack, 365.**

Prosecutor's closing argument—improper comments about counsel and witnesses—not prejudicial—The prosecution's closing argument in a cocaine prosecution contained improper comments regarding witnesses and defense counsel, but was not extreme and calculated to prejudice the jury such that the trial court should have intervened ex mero motu. **State v. Thompson, 102.**

Right to remain silent—prosecutor's argument—defendant's failure to present evidence of alibi—The trial court in a first-degree murder case did not improperly allow the prosecutor to comment on defendant's decision not to testify because the prosecutor's comments did not touch on defendant's decision not to testify, but instead reminded the jury that no alibi witnesses had been presented; furthermore, the prosecutor's opening statement that defendant was the last person to see the victim alive was supported by the evidence. **State v. Smith, 207.**

Supplemental instructions—no coercion of verdict—The trial court's supplemental instructions to the jury in a first-degree murder case were not coercive. **State v. Smith, 207.**

Use of informants—issues not preserved—credibility for jury—The trial court properly denied defendant's motions to dismiss cocaine charges arising from the use of informants based on improper delegation of authority and outrageous government conduct. Defendant did not preserve for appellate review constitutional issues or the question of entrapment, and the credibility of the informants was an issue for the jury. **State v. Moore, 416.**

DAMAGES AND REMEDIES

Booting of car—attempt at removal—The trial court did not err by granting summary judgment for defendants on a claim for damages to personal property arising from the booting of plaintiff's car. Defendants were within their rights to boot the car, and plaintiff inflicted the damage on his car himself by resorting to a bludgeon rather than a legal remedy. **Kirschbaum v. McLaurin Parking Co., 782.**

DEEDS

Restrictive covenants—service fees—authority not inferred—The trial court erred by granting summary judgment for plaintiff-developer in an action to collect service charges for a real estate development. The covenants in the deeds of defendants Huffman and Emerson do not explicitly authorize assessments and such power cannot be inferred from the ability to set rules and regulations, which was established in the deeds. **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

Restrictive covenants—service fees—covenants not sufficiently definite—The trial court erred by granting summary judgment to plaintiff developer

DEEDS—Continued

in an action to collect service charges where the deed covenants in question did not give sufficient information to determine the amount of the assessment, did not describe with particularity the property to be maintained, and did not give guidance as to the facilities actually maintained. **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

DENTISTS

Malpractice—standard of care—specialized defendant—general practice witness—The record contained competent evidence sufficient to qualify a dentist as a standard-of-care witness in a malpractice case against an oral surgeon. Given his training and experience, and the fact that he chose to perform oral surgery in addition to other general dentistry work, the witness was a general dentist who specializes in oral surgery, including the extraction of molars (the subject of this case). **Roush v. Kennon, 570.**

Standard of care—familiarity with Charlotte—A dentist from Atlanta was qualified to offer an opinion on the standard care for Charlotte in a malpractice claim against an oral surgeon. Although the witness indicated in a deposition that he knew nothing about the dental community in Charlotte and believed in a national standard of care, he subsequently reviewed demographic data for Charlotte, the rules of the North Carolina State Board of Dental Examiners, and the deposition of defendant and concluded that the standard of care for Atlanta, where he practiced, was the same as the similar community of Charlotte. **Roush v. Kennon, 570.**

DISCOVERY

Expert testimony regarding substance in defendant's shoe—harmless error—The trial court committed harmless error in a double misdemeanor possession of up to one-half ounce of marijuana, possession of drug paraphernalia, and possession of a controlled substance on the premises of a local confinement facility case by allowing the State to introduce expert testimony by an SBI agent regarding the substance in defendant's shoe in violation of discovery requirements under N.C.G.S. § 15A-903(a)(2). **State v. Moncree, 221.**

DIVORCE

Alimony—modification—ability to pay—parties' relative assets and liabilities—The trial court did not abuse its discretion in an alimony case by denying defendant husband's motion to decrease the award because: (1) the trial court considered defendant's ability to pay alimony and made findings as to the parties' relative assets and liabilities; (2) while the order did not contain an itemized list of the court's findings as to defendant's current reasonable expenses and liabilities, it expressly stated that the trial court found no significant change in the parties' assets and liabilities except as recited in the order, thus reincorporating its 2002 findings as current findings of defendant's reasonable expenses and liabilities; (3) the trial court's consideration of income received by defendant's new spouse was properly restricted to weighing the extent to which it reduced defendant's reasonable expenses and increased his ability to pay; (4) although there was no rational basis to support the finding that defendant voluntarily left his prior job and that any decrease in income was the result of his voluntary

DIVORCE—Continued

choices, it was harmless error when the court made other sufficient findings to support its decision not to decrease the alimony award; and (5) the fact that defendant's salary or income has been reduced substantially does not automatically entitle him to a reduction in alimony or maintenance if he is still able to make the payments as originally ordered and the other facts of the case make it proper to continue the payments. **Harris v. Harris, 477.**

Alimony—modification—changed circumstances—cessation of child support—fairness to parties—The trial court did not abuse its discretion in an alimony case by granting plaintiff wife's motion to increase the award based on its consideration of termination of child support payments as a factor in deciding whether a modification of the alimony award was warranted. **Harris v. Harris, 477.**

Alimony—modification—findings of fact—income and reasonable expenses—The trial court did not abuse its discretion in an alimony case by granting plaintiff wife's motion to increase the award based on its finding of fact as to plaintiff wife's income and reasonable expenses even though defendant contends the court improperly considered household expenses that included food consumed by his adult daughter, plaintiff's voluntary tithes to her church, and tax consequences based upon an arbitrary 25% tax rate. **Harris v. Harris, 477.**

Alimony—modification—substantial change of circumstances—The trial court did not err by modifying a previous alimony order because: (1) just as the trial court found plaintiff's listed shared family expenses to be excessive, the trial court had the right to determine that plaintiff's listed individual expenses were inadequate; (2) the trial court made numerous findings of fact demonstrating that there had been a substantial change of circumstances since the entry of the previous alimony judgment; (3) while it appeared from the trial court's findings of fact that plaintiff's expenses had decreased since the original alimony judgment, plaintiff still had a considerable shortfall between her income and her expenses; and (4) the trial court found that defendant's financial condition had improved considerably since the original alimony judgment and that plaintiff was more than able to pay plaintiff's monthly shortfall of $1,660. **Pierce v. Pierce, 488.**

Breach of support agreement—cohabitation—conflicting evidence—summary judgment—subjective intent—The trial court erred by granting summary judgment in favor of plaintiff wife an action for breach of a family support agreement where defendant husband cited plaintiff's cohabitation as an affirmative defense because viewing the evidence in the light most favorable to defendant husband revealed there was a genuine issue of material fact regarding plaintiff's alleged cohabitation as defined under N.C.G.S. § 50-16.9. **Craddock v. Craddock, 806.**

Equitable distribution—denial of motion to compel filing of affidavit—The trial court did not abuse its discretion by dismissing defendant wife's motion to compel plaintiff husband to file an equitable distribution (ED) affidavit because defendant's alleged oral motion made during the 22 September 2003 divorce hearing did not constitute the filing of a motion in the cause as permitted by either N.C.G.S. § 50-11(e) or (f), and defendant failed to specifically assert any claim for ED by any method permitted by N.C.G.S. § 50-21(a); and no ED claim existed after plaintiff dismissed his claim on 6 June 2005 and defendant failed to file a claim for ED within six months thereafter. **Webb v. Webb, 621.**

DIVORCE—Continued

Prenuptial agreement—classification of property as marital—The trial court did not err in its classification of property as marital in an action involving the interpretation of a prenuptial agreement. **McIntyre v. McIntyre, 26.**

Rule 60 motion for relief from judgment—authenticity of signature on documents—abuse of discretion standard—The trial court did not abuse its discretion by denying defendant husband's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from a divorce judgment entered 28 October 1998 even though defendant contends the signatures on the answer and summary judgment motion were not his because there was evidence from which the trial court could have concluded that defendant signed the answer, thereby conferring personal jurisdiction upon the court in the divorce proceeding. **Macher v. Macher, 537.**

DRUGS

Cocaine sale with intermediary—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges against defendant for possession of cocaine with intent to sell or deliver, delivery of cocaine, and sale of cocaine where there was evidence from which a reasonable jury might conclude that defendant possessed cocaine, intended to sell the cocaine, and then sold and delivered it to a witness. The dismissal of the additional charge of possession of cocaine does not demonstrate insufficient evidence. **State v. Mack, 365.**

Dwelling for keeping and using—use of dwelling as residence—sufficiency of evidence—There was sufficient evidence of maintaining a dwelling for keeping and selling cocaine where defendant used, treated, and perceived the dwelling he shared with his fiancée as his residence, and not merely as a place he occupied from time to time. **State v. Moore, 416.**

Maintaining dwelling for keeping or selling controlled substances—insufficient evidence—A motion to dismiss a charge of maintaining a building for the keeping or selling of controlled substances should have been granted. There was insufficient evidence of drug use in the apartment, of the sale of drugs, or of keeping drugs in the house over time. **State v. Thompson, 102.**

Multiple counts of possession of marijuana—simultaneous possession and same purpose—The Court of Appeals determined ex mero motu that the trial court erred by denying defendant's motions to dismiss and entering judgments against him for three counts of possession of marijuana including misdemeanor possession of up to one-half ounce of marijuana found in an officer's automobile, misdemeanor possession of up to one-half ounce of marijuana found in his shoe, and felony possession of marijuana on the premises of a local confinement facility, and defendant's convictions of the lesser two offenses should be arrested, because all three counts arose from one continuous act of possession. **State v. Moncree, 221.**

Possession of controlled substance on premises of local confinement facility—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a controlled substance on the premises of a local confinement facility, because: (1) contrary to defendant's assertion, the Court of Appeals has never concluded the State must prove the offense occurred in an area accessible only to officers and

DRUGS—Continued

their detainees in order for the area to be determined a local confinement facility under N.C.G.S. § 90-95(e)(9); and (2) after defendant was taken before a magistrate, he was taken to the sheriff's department, a local confinement facility, as standard procedure to be processed since he was given a secured bond. **State v. Moncree, 221.**

Trafficking—instruction on lesser offense—not required—The trial court did not err by not giving an instruction on a lesser offense in a prosecution for conspiracy to traffic in cocaine. Although defendant argued that she was entrapped into the greater offense, sentencing entrapment was not raised at trial and was not properly before the appellate court, and the evidence supported an instruction only on the greater offense. **State v. Davis, 735.**

EVIDENCE

Certified copies of convictions for sexual battery—plain error analysis—Although the trial court erred in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting into evidence under N.C.G.S. § 8C-1, Rule 404(b) certified copies of defendant's convictions for sexual battery when there was already significant testimony regarding the facts underlying his prior conviction, it did not commit plain error. **State v. Bowman, 635.**

Discrepancies—two separate actions—credibility rather than admissibility—The trial court did not abuse its discretion by admitting defendant's testimony about the value of corporate property in New York which had been sold in a dispute between the corporation's two shareholders. Defendant had given a deposition in an earlier New York action which arrived at a different conclusion about those values and included different properties, but she was contending that plaintiff Susi had deliberately suppressed the value of the properties, accounting for the change in value, and the New York action involved the sale of specific properties while the North Carolina addressed an alleged breach of fiduciary duty to the corporation and constructive fraud. **Bluebird Corp. v. Aubin, 671.**

Drunken driving accident—defense testimony that defendant driving—irrelevancy—In a prosecution arising from an automobile accident and death involving drunken driving, the trial court did not err by excluding as irrelevant testimony from two defense witnesses who had been told by a passenger that defendant was the driver. The testimony does not create even an inference that the passenger was driving the car and is not inconsistent with the guilt of defendant. **State v. Lopez, 553.**

Exclusion of testimony—failure to show prejudice—Even assuming error in a felonious breaking and entering and felonious larceny case based on the trial court's exclusion of the testimony of two witnesses who would allegedly have corroborated defendant's alibi testimony that he was given and loaned the pertinent electric cords by the witnesses, defendant failed to show prejudice as required by N.C.G.S. § 15A-1443(a) when: (1) the evidence supporting defendant's conviction was strong and tended to show that the power cords were specifically identifiable with specific notations of the victim's initials on them; and (2) it cannot be concluded that a different result would have been reached if this testimony had been admitted. **State v. Jones, 562.**

EVIDENCE—Continued

Exclusionary rule—officer's eyewitness account of events after unlawful entry—not barred—The trial court did not err by denying defendant's motion to suppress evidence of an assault on an officer with a firearm inside a house. The officers' entry was with the permission of the spouse who was outside the house but against the express wishes of the spouse inside the house with the firearm. Even if the entry was unlawful, the exclusionary rule does not bar an officer's eyewitness account of events after the entry. **State v. Parker, 616.**

Expert DNA testimony—analysis based on data collection by another expert—The trial court properly allowed an SBI DNA expert to testify in a rape and assault trial where she personally analyzed the data collected by another agent before offering her opinion, and defendant had the opportunity to cross-examine her. **State v. Little, 152.**

Expert testimony—questioning by trial court—clarification of testimony—foundation questions—The trial court did not err in a double statutory sex offense of a person who is fifteen years old and double incest case by questioning the State's expert witness while the prosecutor was laying the foundation for admitting the witness as an expert and by asking questions to clarify the witness's testimony once she was properly admitted. **State v. Ware, 790.**

Lab reports—nontestifying witness—admissible—There was no error in a cocaine prosecution in the admission of evidence of lab tests performed by a witness who did not testify. An expert may base an opinion on tests performed by others if the tests are of the type reasonably relied upon in the field, the S.B.I. agent who testified was qualified as an expert, and defendant had the opportunity to cross-examine him. **State v. Thompson, 102.**

Prior crimes or bad acts—intent inferred from bare fact of prior convictions—Although the trial court did not err or commit plain error by admitting into evidence the bare fact of defendant's prior convictions and by instructing the jury that this evidence could be used to prove malice or intent as to the charge of second-degree murder, the trial court committed plain error and defendant is entitled to a new trial for the remaining charges including assault with a deadly weapon inflicting serious injury, felony fleeing/eluding arrest with a motor vehicle, double assault with a deadly weapon, driving while license revoked, and misdemeanor larceny, because: (1) the trial court's erroneous instruction allowed the jury to infer the intent requirement of these crimes from the bare fact of defendant's prior convictions; and (2) the error had a probable impact on the jury's verdicts of guilty. **State v. Maready, 169.**

Prior crimes or bad acts—remoteness in time—beyond sixteen years—The trial court committed plain error by admitting defendant's prior convictions including his entire driving record, based on remoteness in time, and defendant is entitled to a new trial on the charge of second-degree murder. **State v. Maready, 169.**

Prior crimes or bad acts—sexual battery—absence of mistake of age—specific intent—sexual gratification—remoteness in time—The trial court did not abuse its discretion in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting a prior victim's testimony regarding defendant's prior conviction for sexual battery for an incident in 1997 because: (1) the testimony was

EVIDENCE—Continued

admissible under N.C.G.S. § 8C-1, Rule 404(b) to show absence of mistake of age, specific intent for kidnapping, and an intent for sexual gratification; (2) the evidence was sufficiently similar to the present case based on the relative likeness in age between the past and present victims and also the sexually related nature of the incidents; and (3) the former incident was temporally proximate to the present one since defendant was incarcerated for a period of three years after his conviction and then relocated to another state, the passage of time only evidenced the existence of a continuing plan, the evidence showed defendant resumed the same activities as soon as possible after being released from jail and relocating to North Carolina, and the time period between these incidents was less than ten years. **State v. Bowman, 635.**

Questioning by trial court—opinion—clarification of testimony—The trial court did not err in a double statutory sex offense of a person who is fifteen years old and double incest case by allegedly impermissibly commenting on a question of fact to be decided by the jury when one question asked by the court included the fact that the victim was eight at the time of previous abuse by a neighbor because none of the questions asked by the trial judge in the instant case related to any question of fact to be decided by the jury. **State v. Ware, 790.**

Subsequent acts—drugs sales—sufficiently similar—The trial court did not err in a cocaine prosecution by admitting evidence concerning the subsequent acts of defendant. There was substantial evidence from which a reasonable jury could find that defendant had committed a similar act; the fact that defendant played a different role in the two transactions (which involved intermediaries) was not sufficient by itself to classify the two transactions as dissimilar. **State v. Mack, 365.**

Victim impact testimony—no probative value during guilt phase—The trial court erred in a multiple aiding and abetting statutory rape, multiple taking indecent liberties with a child, and double second-degree kidnapping case by admitting into evidence the alleged emotional impact on others as a result of defendant's prior misconduct, and defendant is entitled to a new trial because: (1) although a victim has the right to offer admissible evidence of the impact of the crime during sentencing, victim impact testimony has little, if any, probative value during the guilt phase of a trial; and (2) the inflammatory nature of the impact evidence, combined with the emotions displayed during each witness's testimony, created a reasonable possibility that, had the error in question not been committed, a different result would have been reached. **State v. Bowman, 635.**

FIREARMS AND OTHER WEAPONS

Possession by felon—new offense—The possession of a firearm by a felon statute creates is a new substantive offense, even though its is directed at recidivism. **State v. Coltrane, 498.**

HOMICIDE

Conspiracy—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss a charge of conspiracy to murder her mother for insufficient evidence. **State v. Crowe, 765.**

HOMICIDE—Continued

First-degree murder—instruction on second-degree—invited error—The trial court in a first-degree murder prosecution did not commit plain error by instructing the jury on the offense of second-degree murder because defendant expressly requested an instruction on second-degree murder during the charge conference. **State v. Smith, 207.**

Murder—motion to dismiss—sufficiency of evidence—The trial court did not commit plain error by denying defendant's motion to dismiss the charge of murder because the State presented substantial evidence of an unlawful killing and that defendant was the perpetrator. **State v. Smith, 207.**

Solicitation—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss a charge of solicitation to commit murder. The State presented no evidence that defendant counseled, enticed, or induced another to murder her mother. **State v. Crowe, 765.**

HOSPITALS

Certificate of need—earlier certificate—hospital not built—The Certificate of Need section of the Department of Health and Human Services did not err by approving Harnett Health's application for a certificate for a new hospital where petitioner alleged that the Agency did not consider its earlier certificate of need. Petitioner's position assumes that the Agency had no authority to conclude, based on the available evidence, that petitioner was not going to build the hospital permitted by its prior certificate of need. **Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs., 68.**

Certificate of need—CT scanner—rule not valid as applied—The Certificate of Need section of the Department of Health and Human Services did not err by adopting the action of the administrative law judge voiding an administrative rule as applied to a CT scanner. N.C.G.S. § 150B-33(b) allows the agency to determine that a rule as applied in a particular case is void when the rule is not reasonably necessary in a particular case to enable the agency to fulfill its duty. **Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs., 68.**

HUSBAND AND WIFE

Prenuptial agreement—equitable distribution—free traders—There was competent evidence, even though there was evidence to the contrary, to support the trial court's findings that a prenuptial agreement allowed plaintiff and defendant to be "free traders," but did not bar defendant's equitable distribution claim. **McIntyre v. McIntyre, 26.**

Prenuptial agreement—interpretation—reliance on evidence not admitted—no prejudice—There was no prejudice in an action involving a prenuptial agreement where the court referred to a form book not admitted into evidence when discussing the language of the agreement. The reference was not included in the findings and conclusions, which were supported by competent evidence, and the court could have drawn the same comparison by relying on cases involving agreements with similar language. **McIntyre v. McIntyre, 26.**

Prenuptial agreement—waiver of equitable distribution—ambiguous—A prenuptial agreement was not interpreted as a matter of law on the question of

HUSBAND AND WIFE—Continued

whether it waived equitable distribution where the agreement was ambiguous. **McIntyre v. McIntyre, 26.**

IMMUNITY

Sovereign—insurance policy exclusions—negligence and emotional distress—Summary judgment was properly granted for defendant county department of human services based on sovereign immunity in a negligence and emotional distress action arising from defendant's alleged failure to investigate reports of sexual abuse of a child. Defendants' insurance policy excluded claims for negligence and negligent infliction of emotional distress and so did not waive immunity. **Patrick v. Wake Cty. Dep't of Human Servs., 592.**

INDICTMENT AND INFORMATION

Amendment—date of offense—not a substantial alteration—Alteration of an indictment for possession of a firearm by a felon to change the date of the offense did not substantially alter the charge, as the date of the offense is not a substantial element of the charge. **State v. Coltrane, 498.**

Amendment—possession of firearm by felon—county of underlying offense—The trial court did not err by allowing the State to amend an indictment for possession of a firearm by a felon by changing the county of the underlying felony conviction. The indictment sufficiently notified defendant of the prior felony conviction. **State v. Coltrane, 498.**

Amendment—prior stalking conviction—separate count—not substantial alteration—The State's amendment of a stalking indictment by striking the allegation of a prior stalking conviction from the existing single count and adding the allegation of a prior conviction of a stalking offense as a second count did not amount to a substantial alteration of the charge against defendant in violation of N.C.G.S. § 15A-923(e). **State v. Stephens, 286.**

INJUNCTION

Preliminary—motion to set aside—notice not sufficient—The trial court abused its discretion by denying defendant's motion to set aside a preliminary injunction when defendant had no notice of the hearing in which the preliminary injunction was imposed. Defendant was not served with notice of the hearing until the day after, and although the attorney served for defendant was the attorney of record for defendant in an unrelated matter, he never made an appearance or representations or filed pleadings for defendant in this case. The fact that the clerk of court stated that the attorney was aware of the hearing is insufficient to satisfy the notice requirement. **Perry v. Baxley Dev., Inc., 158.**

JURISDICTION

Personal jurisdiction—out-of-state corporate defendant—failure to show availed itself of laws and privileges of state—The trial court did not err by dismissing plaintiffs' claims against defendant foreign corporation under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction, because: (1) plaintiff's conclusory allegation in the second amended complaint was insuffi-

JURISDICTION—Continued

cient to establish that defendant is the alter ego of a North Carolina corporation for purposes of determining whether North Carolina courts have jurisdiction over defendant; (2) plaintiff failed to cite authority for its proposition that North Carolina courts have personal jurisdiction over an out-of-state corporation if it is the alter ego of a North Carolina corporation; and (3) plaintiff failed to allege that the out-of-state corporate defendant was present in North Carolina at the time of the alleged transaction or otherwise availed itself of the laws and privileges of this State. **State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302.**

KIDNAPPING

Second-degree—instructions—defining unlawfully—plain error analysis—The trial court did not commit plain error by failing to define the term "unlawfully" in the jury instructions for the charge of second-degree kidnapping because: (1) N.C.G.S. § 14-39 does not require a person to know the victim is under the age of sixteen and was removed without the parent's consent in order to be convicted for the crime of second-degree kidnapping; and (2) the State must only prove the elements provided under N.C.G.S. § 14-39 since defendant was charged as a principal. **State v. Bowman, 635.**

LARCENY

Felonious larceny—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss the charge of felonious larceny even though defendant contends the value of stolen goods was below $1,000 because N.C.G.S. § 14-72(b) states that the crime of larceny is a felony, without regard to the value of the property in question, if the larceny was committed pursuant to a felonious breaking and entering in violation of N.C.G.S. § 14-54 such as in this case. **State v. Jones, 562.**

LIBEL AND SLANDER

Political campaign—rhetorical hyperbole and opinion—Statements in a political campaign did not support a claim of defamation per se where they were either matters of personal opinion or rhetorical hyperbole no reasonable reader would believe. **Craven v. SEIU COPE, 814.**

MALICIOUS PROSECUTION

Booting of car—taking of boot—malice not shown—Summary judgment was correctly granted for defendants on a claim for malicious prosecution arising from plaintiff's car being booted in a private parking lot. Plaintiff did not show malice: defendants had no desire to press charges once the boot was recovered, the police department proceeded on its own in proceeding with a misdemeanor larceny charge, and there was probable cause to believe that defendant had committed larceny in taking the boot. **Kirschbaum v. McLaurin Parking Co., 782.**

Punitive damages—willful or wanton conduct—malice—The trial court erred by granting judgment notwithstanding the verdict (JNOV) in a malicious prosecution case in regard to the jury's punitive damages award, and the grant of JNOV as to punitive damages is reversed because an employer's failure to fully investigate an incident before causing an employee to be prosecuted for

MALICIOUS PROSECUTION—Continued

embezzlement is sufficient for a finding of reckless and wanton disregard of the employee's rights; there was sufficient evidence of willful or wanton conduct and malice; and the requirement under N.C.G.S. § 1D-15(c) that the officers, directors, or managers participated in or condoned the conduct giving rise to punitive damages was satisfied since the store manager participated in the conduct constituting the aggravating factors of willful and wanton conduct and malice. **Scarborough v. Dillard's Inc., 430.**

MORTGAGES AND DEEDS OF TRUST

Fraudulent cancellation—failure to respond to Administrative Demand—The failure of a lender (Household) to respond to an "Administrative Demand" by the perpetrator of a fraudulent mortgage cancellation did not preclude Household from having its deed of trust reinstated as the superior lien. It would not have occurred to anyone of ordinary business judgment and prudence to make any inquiry into the information contained in the 38-page Administrative Demand, which was bizarre, confusing, and absurd. **Household Realty Corp. Lambeth, 545.**

Priorities—fraudulent cancellation—In an action to determine the priority between two lenders arising from a fraudulent mortgage elimination scheme, the trial court correctly determined that the deed of trust from the first lender, which was cancelled by an unauthorized act, was entitled to priority over a subsequent deed of trust from an innocent third party. The case is controlled by *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456 (1927) rather than *Monteith v. Welch*, 244 N.C. 415 (1956). **Household Realty Corp. Lambeth, 545.**

MOTOR VEHICLES

Accident—giving false report—The trial court erred by granting defendants' motion to dismiss the charge of giving a false report in violation of N.C.G.S. § 20-279.31(b), and the conviction on this charge against Pedro should be reinstated, because the State presented sufficient evidence for a rational juror to determine that Hernandez was the driver, and thus, a rational juror could also infer Pedro gave false information knowing that information was false when she told a trooper that she was driving, and it can be inferred that the identity of the driver is required to be included in a reportable accident report under N.C.G.S. § 20-279.31(b) in order to impose financial responsibility. **State v. Hernandez, 193.**

Driving under influence—driving without operator's license—motion to dismiss improperly granted—The trial court erred by granting defendants' motion to dismiss the charges of driving under the influence and driving without an operator's license against defendant Hernandez, and the jury's guilty verdicts should be reinstated for these charges, because: (1) the State presented substantial evidence for a rational juror to infer that Hernandez was the driving including physical evidence such as the officers' observations of defendant Pedro's right shoulder burn consistent with a passenger side seatbelt injury, the lack of blood on the passenger's side, the blood on the driver's side of the air bag and blood on Hernandez, and the driver's seat was pushed back too far for Pedro to drive; and (2) the fact that Pedro and her sister-in-law insisted Pedro was the driver did not prevent a rational juror from inferring from the physical evidence that Hernandez was the driver. **State v. Hernandez, 193.**

MOTOR VEHICLES—Continued

Driving with revoked license—notice of revocation—The evidence was sufficient for a charge of driving with a revoked license where the notice of revocation did not go to the address shown for defendant in DMV records. However, pursuant to a prior Court of Appeals opinion, the State raised prima facie evidence of receipt and defendant did not rebut the presumption, so that the evidence was sufficient. **State v. Coltrane, 498.**

NOTICE

Foreclosure hearing—waiver—presence and participation in hearing—The trial court erred in a case involving foreclosure on a claim of lien by concluding as a matter of law that respondent homeowner received improper notice and that respondent's actual notice of the hearing was irrelevant because respondent waived notice when she was present at the hearing and participated in it. **Riverpointe Homeowners Ass'n v. Mallory, 837.**

PLEADINGS

Rule 11 sanctions—complaint well-grounded in fact and warranted by existing law or good faith argument for extension, modification or reversal of existing law—The trial court in a student's action against a county board of education based upon state constitutional claims erred by sanctioning plaintiff's attorneys under N.C.G.S. § 1A-1, Rule 11, because plaintiff's complaint was well-grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. **Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441.**

POLICE OFFICERS

Death of prisoner—sheriff's sovereign immunity—The trial court did not err by denying a sheriff's motion for summary judgment based on sovereign immunity in an action which arose from a prisoner's death from cocaine poisoning while in custody. Plaintiffs' negligence claims in excess of the sheriff's bond was not barred by exclusions to the North Carolina Counties and Property Insurance Pool Fund. **Myers v. Bryant, 585.**

Disabled former officer—loss of retirement benefits—amendment of retirement code—no impairment of contract—Plaintiff disabled former police officer cannot make a claim for impairment of contract based on a 1990 amendment to the retirement code where plaintiff was a nonvested member of the retirement plan at the time of the amendment. **Tripp v. City of Winston-Salem, 577.**

Disabled former officer—loss of retirement benefits—breach of contract—statute of limitations—A provision in a city retirement ordinance that no action shall be commenced against the city or the plan by any retired member or beneficiary with respect to any deficiency in the payment of benefits more than three years after the deficiency did not extend the two-year statute of limitations in N.C.G.S. § 1-53(1) applicable to a disabled former police officer's action against the city for breach of contract arising from the retirement plan. **Tripp v. City of Winston-Salem, 577.**

POLICE OFFICERS—Continued

Disabled former officer—loss of retirement benefits—good faith and fair dealing—A city's denial of plaintiff disabled former police officer's retirement benefits was not a breach of the implied duty of good faith and fair dealing that constituted a material breach of contract where the retirement code provided that a disabled officer could be transferred to other duties within the police department or another position within the city, the city offered plaintiff both options, and plaintiff did not pursue the option to apply for a position outside the department. **Tripp v. City of Winston-Salem, 577.**

Disabled former officer—loss of retirement benefits—substantive due process—not protected property interest—A former city police officer's loss of police officer retirement benefits when she became disabled did not violate her substantive due process rights because her interest in her retirement benefits was not a protected property interest since the city reserved the option to transfer a disabled officer to another position in the police department or elsewhere in the city. **Tripp v. City of Winston-Salem, 577.**

Disabled former officer—loss of retirement benefits—substantive due process—rational relation to legitimate government interest—A former city police officer's loss of retirement benefits upon disability did not violate the former officer's substantive due process rights based upon her claims that the city's failure to offer her a position outside the police department and the police chief's unfettered discretion to approve positions to be offered to disabled police officers bore no rational relation to a legitimate government interest where the city provided a mechanism for the officer to pursue employment with the city outside the police department and informed the officer of that right, and the police chief's recommendation of transfer of a disabled officer to other duties was subject to review and recommendation by the retirement commission to the city manager. **Tripp v. City of Winston-Salem, 577.**

PROBATION AND PAROLE

Revocation—sentence changed from concurrent to consecutive—The trial court did not err by activating defendant's suspended sentences and specifying that the sentences should run consecutively instead of concurrently as originally imposed pursuant to N.C.G.S. § 15A-1344(d) and *State v. Paige*, 90 N.C. App. 142. **State v. Hanner, 137.**

PUBLIC ASSISTANCE

Medicaid reimbursement—characterization of state and/or county's interest in settlement account as lien instead of claim—The trial court did not err in a medical malpractice and negligent infliction of emotional distress case by characterizing the North Carolina Division of Medical Assistance's in terest in the settlement account as a lien as opposed to a claim. **Andrews v. Haygood, 244.**

Medicaid reimbursement—settlement account—DMA as beneficiary rather than claimant—absence of prejudice—Although the trial court erred in a medical malpractice and negligent infliction of emotional distress case by determining the North Carolina Division of Medical Assistance (DMA) is a beneficiary of the settlement account as opposed to a claimant, the trustee failed to

PUBLIC ASSISTANCE—Continued

establish how such a technical error would require a remand. **Andrews v. Haygood, 244.**

Medicaid reimbursement—settlement account—immaterial settlement might be attributed to something other than medical damages—The trial court did not err in a medical malpractice case by granting the North Carolina Division of Medical Assistance's motion for reimbursement from the pertinent settlement account, resulting from injuries of a Medicaid recipient received at birth, and by ordering the trustee pay the requested amount of $1,046,681.94 for medical services subject to the one-third statutory limitation under N.C.G.S. § 108A-57(a) if applicable, because it was immaterial that some of plaintiffs' settlement funds might have been attributed to something other than medical damages such as pain and suffering. **Andrews v. Haygood, 244.**

PUBLIC OFFICERS AND EMPLOYEES

Retaliatory discharge—whistleblower action—conduct not protected—Summary judgment was correctly granted for defendants in a whistleblower action alleging retaliatory discharge where plaintiff was not able to establish that her conduct was protected within the meaning of the Whistleblower Act. Plaintiff alleged protected activity in stating that she would testify truthfully if a dismissed employee brought litigation, but the dispute ultimately was an individual termination action that did not implicate broader matters of public policy. **Holt v. Albemarle Reg'l Health Servs. Bd., 111.**

Retaliatory discharge—whistleblower action—legitimate reason for discharge—Summary judgment was properly granted in a whistleblower action where defendant offered a legitimate, nonretaliatory reason for plaintiff's discharge. Plaintiff, who worked for a regional health services board, committed a breach of confidentiality in disclosing patient records, and there was also evidence that termination was appropriate. **Holt v. Albemarle Reg'l Health Servs. Bd., 111.**

Retaliatory discharge—whistleblower action—no issue of pretext—Summary judgment was properly granted in a whistleblower action for retaliatory discharge where, after defendants established a nonretaliatory reason for the discharge, plaintiff was not able to raise a factual issue of pretext. **Holt v. Albemarle Reg'l Health Servs. Bd., 111.**

RAPE

Sufficiency of evidence—victim's testimony and DNA evidence—The trial court did not err by denying defendant's motion to dismiss a charge of first-degree rape. Viewed in the light most favorable to the State, the victim's account of the attack, corroborated by DNA evidence, was sufficient. **State v. Little, 152.**

REAL ESTATE

Slander of title—no forecast of malice—The trial court correctly dismissed a counterclaim for slander of title involving disputed real estate service charges where the counterclaim did not allege or forecast any element of malice, an

REAL ESTATE—Continued

essential element. **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—arm in coat to simulate weapon—The trial court did not err by failing to dismiss the charge of robbery with a dangerous weapon involving Circle K even though defendant contends the State failed to prove that he used or threatened use of a dangerous weapon and obtained property by endangering or threatening the victim's life because: (1) the evidence demonstrated that defendant kept his arm in his coat to simulate a weapon, and the victim observed defendant keep his hand on an object with a black texture or grip inside his coat; (2) the State was entitled to a presumption that the instrument was what defendant's conduct represented it to be, an implement endangering or threatening the life of the person being robbed; and (3) defendant did not present evidence that unequivocally rebutted the presumption. **State v. Marshall, 744.**

Dangerous weapon—sufficiency of indictment—common law robbery—keeping hand in coat while demanding money—An indictment alleging the use of "an implement, to wit, keeping his hand in his coat demanding money" was insufficient to charge the offense of robbery with a dangerous weapon, and the case is remanded for entry of judgment and resentencing on common law robbery. **State v. Marshall, 744.**

SCHOOLS AND EDUCATION

Appealability—school funding—mootness—Defendant county commissioners' appeal from a school funding dispute under N.C.G.S. § 115C-431 was not moot even though it involved fiscal year 2006-2007 which has ended because N.C.G.S. § 115C-431 was amended in 2006 prior to the date of the hearing of the present appeal, and it provided that the conclusion of the school or fiscal year shall not be deemed to resolve the question in controversy between the parties while an appeal is still pending. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

Charter school funding by county—allocation of pre-kindergarten funds—The trial court erred by excluding an at-risk pre-kindergarten appropriation from amounts to be apportioned between charter schools and the Charlotte-Mecklenburg Board of Education (with its superintendent, known as CMS). **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454.**

Charter school funding by county—allocation of under-achieving high school program—The trial court did not err in an action to determine a county's funding for charter schools by concluding that an under-achieving high school program was not a special program, and therefore correctly determined that the money should have been included in the local current expense fund, from which the funds for the school systems and charter schools were appropriated. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454.**

Charter school funding by county—fund from which money appropriated—not all appropriations included—The statutory scheme for calculating a

SCHOOLS AND EDUCATION—Continued

county's per pupil funding for charter schools allows the transfer of local appropriations among funds so that not all of the appropriations to the school system are included in the current local expense fund, from which the charter school funding is appropriated. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454.**

Charter school funding—statute of limitations—determination of correct amount at end of year—The trial court did not err by ruling that plaintiff charter school was not barred by the statute of limitations from filing its claim concerning funding. The action was filed within the three-year limitations period because the school system made payments in such a way that plaintiff could not determine whether the correct statutory amount had been paid until the end of the fiscal year. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454.**

Distribution of funds to charter schools—calculation of enrollment—The trial court did not err in an action to determine the distribution of county funds to charter schools by holding that the method of calculating the funding was inconsistent with N.C.G.S. § 115C-238.29H, which required the county to transfer to the charter schools an amount equal to the per pupil local expense appropriation received by the Charlotte-Mecklenburg Board of Education. **Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 454.**

School funding dispute—motion for continuance—trial scheduled for next session of court—The trial court did not abuse its discretion or err by denying defendant board of commissioners' motion for a continuance of the trial of a school funding dispute even though defendant contends it denied defendant's due process rights under the North Carolina and United States Constitutions by holding the trial so quickly after plaintiff board of education filed the action instead of waiting for the first succeeding term of the superior court in the county as provided under N.C.G.S. § 115C-431. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

School funding dispute—motion for directed verdict—The trial court did not err by denying defendant county commissioners' two motions for directed verdict, one based on the same grounds as the N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss that plaintiff board of education allegedly failed to allege or prove that defendant did not adequately fund school current expenses in a category the General Assembly has established a positive duty for a county to fund, and another under N.C.G.S. § 1A-1, Rule 50 at the close of plaintiff's case, because plaintiff presented evidence as to the amount of money needed from sources under the control of defendant, and plaintiff was not required to present evidence as to the amount of money needed from the State Public School Fund. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

School funding dispute—motion to dismiss—School Budget Act—The trial court did not err by denying defendant county commissioners' motion to dismiss plaintiff board of education's complaint in a school funding dispute case even though defendant contends the complaint and action are contrary to the North Carolina Constitution as interpreted in *Leandro I* and *Leandro II*, because: (1) contrary to defendant's reliance on *Leandro I* and *Leandro II*, this case is governed by the School Budget Act under N.C.G.S. § 115C-431(c); and (2) plaintiff's complaint was sufficient to state a claim upon which relief could be granted,

SCHOOLS AND EDUCATION—Continued

and it also included as attachments the plaintiff's budget request with allegations of detailed information as to the amounts of funding needed to support the county's public schools. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

School funding dispute—necessary parties—The trial court did not err by failing to grant defendant county commissioners' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(7) based on an alleged failure to join necessary parties including the State of North Carolina and the North Carolina Board of Education. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

School funding dispute—subject matter jurisdiction—The trial court had subject matter jurisdiction over plaintiff board of education's action in a school funding dispute case because: (1) plaintiff's claim is specifically authorized by N.C.G.S. § 115C-431(c); and (2) neither *Leandro I*, 346 N.C. 336 (1997), nor *Leandro II*, 358 N.C. 605 (2004), contain any suggestion that the trial court lacked jurisdiction to adjudicate this dispute under N.C.G.S. § 115C-431. **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

SEARCH AND SEIZURE

Investigatory stop—anonymous tipster—lack of reasonable suspicion—fruit of poisonous tree—Deputies did not have a reasonable suspicion of criminal activity to conduct an investigatory stop of a vehicle driven by defendant, and all evidence and the testimony derived from the stop and related to defendant leaving the stop must be suppressed as fruits of unlawful conduct by the deputies, where a minivan driver told the deputies that they might want to stop defendant's car because he was driving erratically and was running through stoplights and stop signs; the anonymous tip standard must be applied, and the deputies' investigation did not corroborate the tip but actually discredited it in that they testified that they did not observe defendant driving in an erratic or illegal manner when they followed his car before stopping it; and the informant's tip thus did not provide the deputies with reasonable suspicion necessary to stop defendant. **State v. Maready, 169.**

Investigatory stop—reasonable suspicion—drug neighborhood, aimless walking and gun in car—not sufficient—Defendant's motion to suppress evidence in a prosecution for possession of heroin and possession of a firearm by a felon should have been granted where heroin and a firearm were seized in searches after an investigatory stop of defendant, and the officer could not point to articulable facts giving rise to a reasonable suspicion that a crime was taking place. The officer became suspicious because defendant and his companion were walking back and forth on the sidewalk without going anyplace in particular in an area where drug-related arrests had been made, and the officer saw a gun under the seat of the car defendant and his companion had recently left. Defendant's later resistence and flight cannot be used as retroactive justification for the stop. **State v. Hayes, 313.**

Investigatory stop—reasonable suspicion—scope—handcuffs—frisking—probable cause for arrest—The trial court properly denied defendant's motion to suppress physical evidence found on defendant's person and in his backpack at the time of his investigatory stop and subsequent arrest where: (1) an officer

SEARCH AND SEIZURE—Continued

had a reasonable suspicion that defendant was engaged in criminal activity so that her investigatory stop of defendant was lawful; (2) the officers' act of handcuffing defendant and searching his person did not constitute an unreasonable seizure; and (3) officers had probable cause to arrest defendant for possession of burglary tools. **State v. Campbell, 701.**

Miranda warnings not applicable—consent—admitting fruits of search harmless error—The trial court did not err in a second-degree murder, first-degree burglary, and attempted robbery with a firearm case by denying defendant's motion to suppress evidence found by officers during the initial search of his vehicle at the Marine Corps Air Station even though defendant consented to the search after he invoked his right to consult with an attorney because Miranda warnings are not applicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent. **State v. Cummings, 598.**

Motion to suppress—probable cause—totality of circumstances—sexually explicit instant message conversations with officers posing as minor children—The trial court did not err in a first-degree sexual exploitation of a minor and statutory rape case by denying defendant's motion to suppress all evidence seized as a result of a search warrant for defendant's computer, including sexually explicit instant message conversations between defendant and police officers posing as a twelve-year-old girl, and a video that defendant transmitted to one of the undercover officers of defendant masturbating while continuing to IM chat with the detective who defendant believed to be a twelve-year-old girl, although defendant contends there was no probable cause to believe he violated or attempted to violate N.C.G.S. § 14-202.1 and former N.C.G.S. § 14-202.3 when there was no minor child involved based on an officer playing the role of a minor child. **State v. Ellis, 820.**

Traffic stop—justification exceeded—A motion to suppress was erroneously denied, and the resulting guilty plea to trafficking in marijuana was ordered vacated, where a traffic stop resulted in the discovery of marijuana in the trunk of a car driven by defendant. The stop was for weaving, but the purpose of the stop was fulfilled with no evidence of violations, and further detention required suspicion based solely on information obtained during the lawful stop. Viewed through the eyes of a reasonable, cautious officer, the only suspicious fact was nervousness, but nervousness alone has not been held sufficient for reasonable suspicion. Since the continued detention was unconstitutional, defendant's consent to a search was not voluntary. **State v. Myles, 42.**

Warrant application—attempted indecent liberties with children—attempted solicitation of minor—The trial court did not err in a first-degree sexual exploitation of a minor and statutory rape case by concluding that the warrant application contained evidence of attempted indecent liberties with children or attempted solicitation of a minor because: (1) the evidence proffered by the Special Agent showed defendant committed the inchoate crime of attempt since defendant had the specific intent to take immoral, improper, or indecent liberties with a child he believed to be twelve years old by sending her a video of himself masturbating and inviting her to do the same, but an essential element of the crime, the child's age, was missing, causing defendant to fall short of completing the offense; and (2) the evidence showed that defendant had the specific

SEARCH AND SEIZURE—Continued

intent to entice eleven- and twelve-year-old children by means of a computer to meet him for the purpose of committing an unlawful sex act, and the legislature merely increased the severity of the crime by making attempted computer solicitation a felony instead of creating a new crime of attempt. **State v. Ellis, 820.**

SENTENCING

Aggravating factor—*Blakely* error—harmless beyond reasonable doubt standard—The trial court erred in a robbery with a dangerous weapon case by sentencing defendant in the aggravated range without submitting the aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy under N.C.G.S. § 15A-1340.16(d)(2) to the jury as required by *Blakely v. Washington*, 542 U.S. 296 (2004), and defendant is entitled to a new sentencing proceeding when the error was not harmless beyond a reasonable doubt. **State v. Walker, 331.**

Aggravating factor—use of weapon hazardous to more than one person—automobile—The trial court did not err in a prosecution arising from a death involving drunken driving by submitting the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device normally hazardous to the lives of more than one person. **State v. Lopez, 553.**

Clerical errors—remanded—A sentence for driving while impaired was remanded where there was a clerical error in the designation of aggravating factors on the sentencing form. **State v. Smith, 842.**

Consolidated sentence—additional sentencing point—The trial court erred by including an additional sentencing point on a conviction for selling cocaine in a prosecution which resulted in consolidated convictions for sale of cocaine and resisting and officer, and possession with intent to sell or deliver and delivery. The addition of a sentencing point in accord with N.C.G.S. § 15A-1340.149b)(6) was appropriate for the conviction of delivering cocaine, but defendant had never been convicted of any offense containing all of the elements of selling cocaine. **State v. Mack, 365.**

Extraordinary mitigating factors—abuse of discretion standard—The trial court did not abuse its discretion by refusing to find factors of extraordinary mitigation and by imposing an active punishment for defendant's two Class C felony convictions, three Class D felony convictions, one Class E felony conviction, and one Class F felony conviction. **State v. Melvin, 827.**

Habitual felon status—facially defective indictment—stipulation—The trial court lacked subject matter jurisdiction to accept and enter defendant's plea to attaining habitual felon status based on a facially defective indictment, and the case is remanded for resentencing based on this issue, because the indictment failed to set forth three predicate felony offenses as required by N.C.G.S. § 14-7.1 since defendant's conviction in New Jersey was considered a high misdemeanor and not a felony. **State v. Moncree, 221.**

Offense committed while on probation and pretrial release—legislative argument—There is no statutory support for defendant's argument that his rights were violated by increasing his prior record level and aggravating his sen-

SENTENCING—Continued

tence based on his being on probation and pretrial release when these offenses were committed. **State v. Moore, 416.**

On remand—bias by judge—not demonstrated—Defendant did not demonstrate bias by a judge in a resentencing after a remand where the sentence on remand was actually less than the original sentence, the sentencing judge carefully weighed the arguments by counsel and the mitigating factors offered by defendant, and there is no indication that the judge attempted to calculate a sentence that mirrored the original. **State v. Hagans, 799.**

Prior offenses—out-of-state—stipulations not effective—issue of law—Stipulations to questions of law are generally not binding on the courts. Defendant's stipulation here to out-of-state prior convictions was not effective, the State failed to present evidence that defendant's prior Ohio offenses were substantially similar to North Carolina offenses, and the case was remanded for resentencing. **State v. Moore, 416.**

Probation revoked—sentence changed from concurrent to consecutive—defendant not present—The trial court erred when revoking defendant's probation by changing some of defendant's terms to consecutive from concurrent (which it had the authority to do) but without defendant's presence. **State v. Hanner, 137.**

Prosecutor's closing argument—not prejudicial—There was no prejudicial error from the prosecutor's closing argument in defendant's sentencing for involuntary manslaughter and other offenses arising from an automobile accident involving driving. The argument involved the sentencing grid and a discussion of the merger doctrine, and its clear import was to ask the jury to find the aggravator so that the court could impose a higher sentence. While the trial court abused its discretion in allowing the argument, there was overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while illegally intoxicated, and no reasonable possibility of a different result without the instruction. **State v. Lopez, 553.**

Stipulation to prior record level—sufficiency—Defendant stipulated to his prior record level where the judge inquired about the correct level, suggesting level III; the prosecutor said that defendant would be a record level IV; and defense counsel said, "IV." **State v. Mack, 365.**

SEXUAL OFFENSES

Statutory sex offense of person fifteen years old—incest—motion to dismiss—sufficiency of evidence—paternity—age—temporal variance—The trial court did not err by denying defendant's motion to dismiss two counts of statutory sex offense of a person who is fifteen years old and two counts of incest because: contrary to defendant's assertion, both the victim's testimony and her birth certificate were direct evidence of defendant's paternity of the victim; the victim testified that defendant was her biological father and it was biologically impossible for defendant to be less than six years older than the victim; there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was fifteen years of age; and defendant failed to demonstrate that his ability to present a defense was impaired by the temporal variances in the evidence presented at trial. **State v. Ware, 790.**

STATUTES OF LIMITATION AND REPOSE

Relation back—amended complaint filed after statute of limitations expired—The trial court did not err in a negligence case arising out of a motor vehicle accident by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12 based on plaintiff's failure to file the amended complaint within the three-year statute of limitations under N.C.G.S. § 1-52(16) where the estate administrator was not served until after the statute of limitations had expired, and there was no indication of any subterfuge or delay by him which prevented plaintiff from amending the complaint prior to the expiration of the statute of limitations. **Reece v. Smith, 605.**

TERMINATION OF PARENTAL RIGHTS

Lack of subject matter jurisdiction—failure to issue summons to juvenile—The trial court lacked subject matter jurisdiction over a termination of parental rights proceeding because DSS failed to issue a summons to the juvenile under N.C.G.S. § 7B-1106(a)(5). Thus, the order terminating respondent father's parental rights is vacated. If DSS had filed a motion to terminate in the ongoing juvenile abuse, neglect, and dependency case as provided under N.C.G.S. § 7B-1102, the issuance of a summons would not have been required. **In re I.D.G., 629.**

TRESPASS

Against personal property—booting of car—The trial court did not err by granting summary judgment for defendants on a trespass against personal property claim arising from the booting of plaintiff's car in a private parking lot. Defendants were privileged to attach a boot to plaintiff's car to protect their right to exclusive possession of the lot. **Kirschbaum v. McLaurin Parking Co., 782.**

TRIALS

Motion to dismiss—reserving ruling until after jury verdict—Although the trial court erred in a driving under the influence, driving without an operator's license, and giving a false report case by reserving its ruling on defendants' motions to dismiss at the close of all evidence under N.C.G.S. § 15A-1227(c), the error did not warrant reversal, because: (1) defendants would not be subject to retrial if the dismissal was reversed on appeal; and (2) the judge's comments both before and after the jury verdicts suggested that he would have denied the motions had he ruled before the verdicts, and there was sufficient evidence in the record to withstand a motion to dismiss. **State v. Hernandez, 193.**

UNEMPLOYMENT COMPENSATION

Breach of attendance policy—illness—not substantial fault—Petitioner was not discharged from her employment for substantial fault and was thus not partially disqualified for unemployment compensation under N.C.G.S. § 96-14(2a) where petitioner received her third and final infraction which caused her discharge when she was fifteen minutes late returning to her work area after lunch, but the Employment Security Commission found that she was late solely "due to illness" in that petitioner had become sick and needed to go to the bathroom before returning to her work area, and petitioner thus did not have reasonable

UNEMPLOYMENT COMPENSATION—Continued

control over this failure to conform to respondent employer's attendance policy. **Applewhite v. Alliance One Int'l, Inc., 271.**

UNFAIR TRADE PRACTICES

Attorney fees—Rule 60 motion improper for relief from errors of law or erroneous judgments—The trial court erred in a case arising out of breach of loan agreements by awarding $7,500 in attorney fees under N.C.G.S. § 75-16.1 to defendants in an amended order entered in response to defendant's N.C.G.S. § 1A-1, Rule 60 motion raising the issue of whether the trial court applied the correct legal standard in its ruling on defendants' motion for attorney fees because: (1) the trial court improperly addressed an error of law raised by defendants' Rule 60 motion, and it is well-settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments; and (2) the proper remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. § 1A-1, Rule 59(a)(8). **Catawba Valley Bank v. Porter, 326.**

Booting of car—summary judgment—Summary judgment was correctly granted for defendants on an unfair and deceptive trade practices claim arising from the booting of plaintiff's car in a private parking lot. **Kirschbaum v. McLaurin Parking Co., 782.**

Political campaign—underlying defamation claim—without merit—A claim for unfair and deceptive trade practices arising from statements made in a political campaign was correctly dismissed where the underlying defamation claim was correctly dismissed and there were no other allegations of tortious conduct. **Craven v. SEIU COPE, 814.**

WILLS

Contested—testamentary capacity—summary judgment—The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of testamentary capacity. The propounder showed occasional moments of confusion by testator, but not evidence that the testator lacked testamentary capacity when the will was executed. Claims based on general testimony concerning deteriorating physical health and mental confusion do not meet the requirement of specific evidence establishing that testator did not understand his property, to whom he wished to give it, and the effect of the will. **In re Will of Jones, 1.**

Contested—undue influence—summary judgment—The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of undue influence. The propounder failed to show that the testator was susceptible to undue influence at the time he executed the will. **In re Will of Jones, 1.**

Devisavit vel non—summary judgment—The trial court did not err by granting summary judgment against the propounder of a contested will on the issue of devisavit vel non where the propounder failed to show the existence of a continuing dispute. **In re Will of Jones, 1.**

Standing of executor—aggrieved party—The executor of a contested will, who was also the propounder, was an aggrieved party and had standing to appeal

WILLS—Continued

an adverse decision of the lower court. The executor is the personal representative of the decedent, stands in the place of the deceased person, and occupies the position of trustee for the persons beneficially interested in the estate. **In re Will of Jones, 1.**

WITNESSES

Expert—qualifications—licensed clinical social worker—sexual abuse—The trial court did not abuse its discretion in a double statutory sex offense of a person who is fifteen years old and double incest case by admitting a licensed clinical social worker as the State's expert. **State v. Ware, 790.**

WORKERS' COMPENSATION

Asbestosis—failure to apportion award—The Industrial Commission did not err in a workers' compensation case by failing to apportion plaintiff's award of compensation based upon the portion of the disability caused by the occupational-related asbestosis. **Bolick v. ABF Freight Sys., Inc., 294.**

Attorney fees—entity responsible—further findings needed—A workers' compensation case was remanded for further findings where defendant argued that the Industrial Commission erred by entering its Opinion and Award in violation of a stay order against an insolvent insurer, but the relevance of the argument depends on whether the Commission was imposing attorney fees against an insolvent insurer (Legion), the insurance guaranty association (TIGA), defendant employer, or more than one of these. **Swift v. Richardson Sports Ltd. Partners, 82.**

Attorney fees—findings—not sufficient—Although the Industrial Commission acts in its discretion in a workers' compensation case in deciding whether to award attorney fees under N.C.G.S. § 97-88, its opinion must contain sufficient findings of fact for the court to resolve appellate issues. The Commission's findings and conclusions here are not sufficient to allow resolution of several appellate issues presented by the facts of this case, including the identity of the entity ordered to pay attorney fees. **Swift v. Richardson Sports Ltd. Partners, 82.**

Attorney fees—placement of liability—order not clear—The issue of whether an employer can ever be liable for payment of attorney fees under N.C.G.S. § 97-88 was not reached because the Industrial Commission did not state clearly whether it was imposing attorney fees on TIGA (Tennessee Insurance Guaranty Association) or on defendant-employer. **Swift v. Richardson Sports Ltd. Partners, 82.**

Calculation of average weekly wage—public school employee—exceptional reasons method—The average weekly wage of a public school bus driver who drove a bus for 10 months out of the year, was paid for 10 months of work, and did not work or get paid during the summer when school was out should be calculated by dividing by 52 the wages she earned in the 52 week period prior her accident (the amount she was paid for 10 months). **Conyers v. New Hanover Cty. Schools, 253.**

Carpel tunnel syndrome—compensable occupational disease—sufficiency of evidence—The evidence in a workers' compensation case was sufficient to

WORKERS' COMPENSATION—Continued

support the Industrial Commission's finding that plaintiff's carpal tunnel syndrome was a compensable occupational disease. **Johnson v. City of Winston-Salem, 383.**

Causation—competent evidence—headaches—hand and wrist—knee—breast implants—Although the Industrial Commission did not err in a workers' compensation case by finding there was competent evidence that causally related plaintiff's various injuries to her motor vehicle accident of 16 May 2001 including for headaches, her right hand and wrist, and her knee, it erred when it concluded plaintiff sustained compensable injuries to her bilateral breast implants. The case is remanded for a determination of the appropriate amount of compensation for the replacement of plaintiff's right breast implant, because although breast implants satisfy the statutory requirement under N.C.G.S. § 97-2(6) as compensable prosthetic devices that function as part of the body, plaintiff's breast implant surgeon testified unequivocally that the rippling in the left breast implant most likely was due to the original implant's being underfilled and that the rippling was not caused or aggravated by the accident. **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Causation—guess or mere speculation—The Industrial Commission erred in a workers' compensation case by finding and concluding plaintiff's disability was ongoing after 7 March 2002, and the opinion and award is vacated and remanded, because the medical evidence failed to support the requisite causal connection between the accident and plaintiff's physical impairment since it did not rise above the level of a guess or mere speculation. **Williams v. Law Cos. Grp., Inc., 235.**

Disability—burden of proof—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff carried her burden of proving disability because plaintiff showed that defendant did not provide light-duty work to her other than for two days in June 2002, a doctor testified that plaintiff would have difficulty performing her regular job until at least February 2003 following her knee surgery in June 2002, and plaintiff showed she was placed on one-handed work restrictions by a doctor that was scheduled to continue until at least January 2004. **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Disability—economic downturn—misconduct—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee was disabled after 17 December 2001 and in awarding temporary total indemnity benefits until 31 October 2004 even though defendants contend plaintiff failed to prove work-related disability for any time after 17 December 2001, and that plaintiff's termination was allegedly due to an economic downturn or personal misconduct, because: (1) the Commission could conclude plaintiff had proven his disability based on plaintiff's testimony and documentation of the numerous jobs plaintiff had inquired into after his hip replacement surgery until his Social Security Disability began, thus showing he was incapable of earning the same wages he had earned in the same or other employment; (2) the evidence including plaintiff's testimony also showed plaintiff's incapacity to earn was causally related to his physical restrictions from the hip injury; (3) even assuming arguendo that plaintiff was terminated for an economic downturn, this fact would not preclude a finding that plaintiff was disabled and thus eligible to receive indemnity bene-

WORKERS' COMPENSATION—Continued

fits during the term of his disability; and (4) the Commission's finding that plaintiff's termination was not due to poor job performance was supported by the evidence that showed plaintiff had received positive feedback from his supervisor regarding his work performance and that his company was aware of his workers' compensation claims at the time of his termination. **Graham v. Masonry Reinforcing Corp. of Am., 755.**

Failure of Commission to expressly rule on reimbursement—past out-of-pocket medical expenses—The Industrial Commission erred in a workers' compensation case by failing to expressly rule on whether defendant was required to reimburse plaintiff for past out-of-pocket medical expenses, and the decision is remanded for an explicit ruling on this issue. **Bolick v. ABF Freight Sys., Inc., 294.**

Failure to hold in civil contempt—discretionary ruling—The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to hold defendant in contempt for its failure to comply with June 2002 order and for not sanctioning defendant for failure to comply with the order. **Bolick v. ABF Freight Sys., Inc., 294.**

Lien—reduction—findings—A case involving a wrongful death settlement and a workers' compensation lien was remanded where the trial court did not make the required findings for adjusting a workers' compensation lien. **In re Estate of Bullock, 518.**

Lien—third-party settlement—The Industrial Commission erred in a workers' compensation case by failing to award defendants a lien on all amounts accepted by plaintiff in her third-party settlement with her uninsured motorist carrier because, contrary to the full Commission's conclusion, defendants' credit does not depend upon an award by the superior court since N.C.G.S. § 97-10.2(h) clarifies that the lien is automatic, and instead plaintiff may apply to the superior court for a determination of the lien amount under N.C.G.S. § 97-10.2(j); and unless and until plaintiff applies to the superior court for a determination of the subrogation amount, defendants are entitled to a lien on all corresponding uninsured motorist benefits received by plaintiff, less the portion expended for the cost of replacing plaintiff's left breast implant. **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Lien—third-party wrongful death settlement—subrogation—In an action involving a wrongful death settlement and a workers' compensation lien, the trial court improperly concluded that the rights of respondents (the deceased's employer and its insurance company) were subrogated to those of the decedent's minor nephews (whom the Industrial Commission found to be entitled to death benefits). There is no language in N.C.G.S. § 97-10.2 subrogating the rights of an employer to that of the beneficiaries of a workers' compensation award. **In re Estate of Bullock, 518.**

Maximum medical improvement—treatment discontinued—lost health insurance—The Industrial Commission correctly determined that a workers' compensation plaintiff had not reached maximum medical improvement from his carpel tunnel syndrome. Plaintiff discontinued his treatment when his health insurance expired after he left work due to his medical conditions, hardly a voluntary decision, and the evidence indicates that he will resume treatment when he is financially able. **Johnson v. City of Winston-Salem, 383.**

WORKERS' COMPENSATION—Continued

Notice of accident—timeliness—findings of fact—reasonable excuse for failing to provide written notice—prejudice based on delay in written notification—The Industrial Commission erred in a workers' compensation case by failing to address whether plaintiff employee timely reported her claim under N.C.G.S. § 97-22 and whether her case should be barred for her failure to do so because: (1) although the evidence demonstrated, and the full Commission found, that defendant had actual knowledge of plaintiff's accident, the Commission failed to make the crucial finding that plaintiff provided a reasonable excuse for her failure to timely provide written notice of her accident; and (2) N.C.G.S. § 97-22 also requires that the Commission be satisfied that the employer has not been prejudiced by the delay in written notification, and the mere existence of actual notice without more cannot satisfy the statutorily required finding with respect to prejudice. **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Occupational disease—increased risk—significant causal factor—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff university lab researcher sustained a compensable occupational disease based on its determination that plaintiff's employment placed her at an increased risk for developing her symptoms and that a viral vaccine taken for her employment significantly contributed to her symptoms. **Fu v. UNC Chapel Hill, 610.**

Permanent total disability—wage earning capacity—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was entitled to permanent total disability benefits as a result of a brain injury he sustained during his employment with defendant even though defendants contend plaintiff was actively involved in running a family farm which allegedly established that plaintiff possessed wage earning capacity. **Hunter v. APAC/Barrus Constr. Co., 723.**

Prescription medical expenses—treatment for both work-related and non-work-related conditions—The Industrial Commission did not err in a workers' compensation case by ordering defendant to pay for prescription expenses that treat both work-related and non-work-related conditions. **Bolick v. ABF Freight Sys., Inc., 294.**

Settlement agreement—Commission's failure to undertake full investigation to determine fairness—The Industrial Commission erred in a workers' compensation case by failing to set aside a compromise settlement agreement based on the full Commission's failure to undertake a full investigation to determine if it was fair and just as required by N.C.G.S. § 97-17, and the case is reversed and remanded to the full Commission to enter an order vacating the approval of the agreement and for further proceedings as necessary. **Kyle v. Holston Grp., 686.**

Settlement agreement—failure to include required biographical and vocational information—The Industrial Commission erred in a workers' compensation case by failing to set aside a compromise settlement agreement based on a failure to comply with Industrial Commission Rule 502, and the case is reversed and remanded to the full Commission to enter an order vacating the approval of the agreement and for further proceedings as necessary, because: plaintiff had not returned to work and was unrepresented at the time he entered into the agreement on 1 November 2004, and thus, the more specific require-

WORKERS' COMPENSATION—Continued

ments of Rule 502(2)(h) applied to the agreement; and defendants admit the agreement did not contain the required information including plaintiff's age, educational level, past vocational training, or past work experience, nor did it contain a certification that plaintiff was not claiming total wage loss due to his injury. **Kyle v. Holston Grp., 686.**

Sufficiency of findings of fact—causation—back injury—The Industrial Commission erred in a workers' compensation case by finding that plaintiff employee's back condition was compensable and by ordering defendants to pay for back treatment, and the case is remanded for further findings as to the actual condition which created plaintiff's back pain and whether that condition is causally linked to plaintiff's workplace injury. **Graham v. Masonry Reinforcing Corp. of Am., 755.**

Temporary disability—carpel tunnel syndrome—recreational center custodian—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is temporarily disabled and entitled to compensation under N.C.G.S. § 97-29. Given plaintiff's limited education, limited work experience, and limited training, in addition to his poor health, his compensable injury causes him a greater degree of incapacity than the same injury would cause another person. **Johnson v. City of Winston-Salem, 383.**

Third party wrongful death settlement—written consent of employer—In an action remanded on other grounds, the Court of Appeals did not consider whether a third-party wrongful death settlement should have been set aside for failure to obtain the written consent of the decedent's employer (and workers' compensation defendant). **In re Estate of Bullock, 518.**

Total disability—multiple medical conditions—benefits not apportioned—The Industrial Commission correctly awarded plaintiff full compensation for his total disability, without apportioning plaintiff's benefits for non-work related medical conditions. There was competent evidence to support the Commission's finding that plaintiff was disabled as a result of his bilateral carpal tunnel syndrome, and insufficient evidence was presented from which the Commission could apportion the award. **Johnson v. City of Winston-Salem, 383.**

Vocational rehabilitation—unwillingness to participate—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's alleged refusal to cooperate with vocational rehabilitation did not preclude an award of disability benefits under N.C.G.S. § 97-25 and N.C.I.C. Rule 703, because defendants failed to demonstrate that plaintiff's unwillingness to participate in a sheltered workshop was unreasonable and mandated a denial of benefits. **Hunter v. APAC/Barrus Constr. Co., 723.**

ZONING

Apartment complex—special exception permit—evidence to rebut prima facie case—not substantial—The superior court correctly concluded that the evidence presented to the Weaverville Board of Adjustment rebutting petitioner's prima facie entitlement to a special exception permit for an apartment complex was not supported by competent, material and substantial evidence. At the public hearing, the opponents based their conclusions solely upon their own observations and opinions without providing any expert opinion to quantitatively link

ZONING—Continued

their observations to the Boards' denial of the permit. **Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust., 55.**

Conditional district exceptions—less restrictive conditions—The superior court properly found a town to have complied with a requirement in an ordinance allowing exceptions and less restrictive conditions in a conditional district. **Rakestraw v. Town of Knightdale, 129.**

Denial of permit—arbitrary and capricious—insufficient supporting evidence—A board of adjustment acted arbitrarily and capriciously in denying a special exception permit to build an apartment complex where there was no competent, material and substantial evidence in the whole record to support the board's conclusion. **Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust., 55.**

Notice of change—newspaper, sign, mailing—Summary judgment was properly granted for defendant town on a zoning matter where plaintiff contended that the town had not given proper notice. The town had published a notice of a public hearing in a local newspaper, posted a sign, and provided notification of the hearing by mail. There was no evidence tending to show a substantial change to the proposed ordinance, that those interested were not informed of when the additional meetings would be held, or of fraud in the mailing. **Rakestraw v. Town of Knightdale, 129.**

Remand—clarification of subjective criteria—The trial court did not err in remanding a zoning matter for a new hearing where the remand was for clarification of subjective criteria in the town ordinance. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Subdivision application—impact on local schools—Respondent town's decision to deny petitioner's subdivision application was not supported by competent, material, and substantial evidence on the question of impact on local schools. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Subdivision application—impact on traffic—A finding by the town council in a zoning dispute that the proposed subdivision does not encourage a safer flow of traffic is not supported in the record. Testimony from a consultant indicated that the expected increase in traffic would not impact the safety of the road, while residents who testified to an adverse effect on the community seemed more concerned about noise and did not have a mathematical or factual basis for rebutting the consultant's testimony. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Subdivision ordinance—advantageous development—single family homes—The subdivision ordinance criteria of "advantageous development" to the surrounding area is vague, but the proposed subdivision here would be an advantageous development for the entire neighboring area because it provided for the development of single family homes, one goal of respondent's Land Use Plan. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Subdivision plan—smaller lot size—improved open space—The smaller lot sizes and improved open space of a proposed subdivision comported with the existing plan for subdivisions in the Land Use Plan. Respondent town's decision to deny the application on the basis of incompatibility with the existing neighbor-

ZONING—Continued

hood and nonconformity with existing plans and polices is not supported by competent evidence. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Superior court review of board of adjustment—standards of review—Although the superior court employed both the whole record and de novo standards when reviewing a board of adjustment decision, the court properly separated the two standards and separately applied them to different issues. **Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust., 55.**

Trial court review—standards—de novo for legality—whole record for findings—The trial court in a zoning matter used the proper standard of review by applying de novo review to the legality of the general requirements of the ordinance and the whole record test to challenged findings made by a town council. **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

WORD AND PHRASE INDEX

AFFIRMATIVE DEFENSE

Cohabitation, **Craddock v. Craddock, 806.**

AGGRAVATING FACTORS

Joined with others, **State v. Walker, 331.**

Use of car as hazardous weapon, **State v. Lopez, 553.**

AIDING AND ABETTING

Statutory rape, **State v. Bowman, 635.**

ALIMONY

Consideration of cessation of child support payments, **Harris v. Harris, 477.**

Modification, **Harris v. Harris, 477.**

Parties' relative assets and liabilities, **Harris v. Harris, 477.**

Substantial change of circumstances for modification, **Pierce v. Pierce, 488.**

ANONYMOUS TIPSTER

Investigatory stop, **State v. Maready, 169.**

APPEALS

Anticipatory judgment, **State v. Coltrane, 498.**

Appealability of party dismissal, **State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302.**

Failure to appeal underlying judgment, **Perry v. Baxley Dev., Inc., 158; Croom v. Hedrick, 262; In re A.V., 317.**

Failure to assign error, **Hunter v. APAC/Barrus Constr. Co., 723.**

Failure to include record references, **Richardson v. Maxim Health-Care/Allegis Grp., 337.**

APPEALS—Continued

Issue not raised in prior appeal, **Swift v. Richardson Sports Ltd. Partners, 82.**

Standard of review and citation of authority, **State v. Labinski, 120.**

ARBITRATION

Award exceeding authority, **Sprake v. Leche, 322.**

Prejudgment interest, **Sprake v. Leche, 322.**

ARMED ROBBERY

Hand in coat not dangerous weapon, **State v. Marshall, 744.**

ASSAULT

By strangulation, **State v. Little, 152.**

ATTORNEY DISCIPLINE

Mishandling of funds of client with dementia, **N.C. State Bar v. Ethridge, 653.**

ATTORNEY FEES

Rule 60 motion improper for relief from errors of law, **Catawba Valley Bank v. Porter, 326.**

***BLAKELY* ERROR**

Not harmless beyond reasonable doubt, **State v. Walker, 331.**

BOOTING CAR

Trespass and unfair practices, **Kirschbaum v. McLaurin Parking Co., 782.**

CERTIFICATE OF NEED

CT scanner, **Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs., 68.**

CERTIFICATE OF NEED—Continued

Earlier certificate, **Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs., 68.**

CHILD CUSTODY

Divided decision-making responsibility, **Hall v. Hall, 527.**

Parenting coordinator, **Hall v. Hall, 527.**

CLAIM OF LIEN

Foreclosure by homeowners association, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

CLINICAL SOCIAL WORKER

Sexual abuse testimony, **State v. Ware, 790.**

COCAINE

Sale with intermediary, **State v. Mack, 365.**

COHABITATION

Breach of family support agreement, **Craddock v. Craddock, 806.**

COLLATERAL ESTOPPEL

Counterclaims, **Bluebird Corp. v. Aubin, 671.**

COMPUTER

Search for messages, **State v. Ellis, 820.**

CONDITIONAL USE PERMIT

Construction of correctional facility, **McDonald v. City of Concord, 278.**

CONFLICT OF LAWS

Relitigation of claim, **Bluebird Corp. v. Aubin, 671.**

CONSOLIDATED SENTENCING

Additional point, **State v. Mack, 365.**

CORRECTIONAL FACILITY CONSTRUCTION

Conditional use permit, **McDonald v. City of Concord, 278.**

CRIMINAL CONTEMPT

Events after show cause order, **State v. Coleman, 144.**

CURTILAGE

Felonious breaking or entering, **State v. Jones, 562.**

DEFAMATION

Political campaign, **Craven v. SEIU COPE, 814.**

DENTISTS

Standard of care witness, **Roush v. Kennon, 570.**

DEPENDENT JUVENILE

Mother's rights and responsibilities, **In re T.R.M., 773.**

Permanency planning, **In re T.R.M., 773.**

Return to home, **In re T.R.M., 773.**

DISCOVERY VIOLATION

Expert testimony harmless error, **State v. Moncree, 221.**

DIVORCE

Authenticity of signature on answer, **Macher v. Macher, 537.**

DOUBLE JEOPARDY

Overlapping dates of sexual offenses, **State v. Ware, 790.**

State's appeal from vacation of jury verdicts, **State v. Hernandez, 193.**

DOUBLE JEOPARDY—Continued

Three attempts at discharging weapon into property, **State v. Hagans, 799.**

DRIVERS LICENSE

Notice of revocation, **State v. Coltrane, 498.**

DRIVING WHILE IMPAIRED

Motion to dismiss improperly granted, **State v. Hernandez, 193.**

Pretrial release, **State v. Labinski, 120.**

DRIVING WITHOUT LICENSE

Motion to dismiss improperly granted, **State v. Hernandez, 193.**

DRUGS

Maintaining dwelling for keeping or selling, **State v. Thompson, 102.**

Possession on premises of confinement facility, **State v. Moncree, 221.**

Simultaneous possession as one offense, **State v. Moncree, 221.**

DWELLING

For keeping drugs, **State v. Moore, 416.**

EFFECTIVE ASSISTANCE OF COUNSEL

Failure to inform counsel of jury's questions, **State v. Smith, 207.**

Failure to offer evidence of defendant's state of mind, **State v. Duncan, 508.**

Failure to renew motion to dismiss, **In re A.V., 317.**

Failure to request diminished capacity instruction, **State v. Duncan, 508.**

EQUITABLE DISTRIBUTION

Denial of motion to file affidavit, **Webb v. Webb, 621.**

EXCUSABLE NEGLECT

Failure to obtain attorney, **Croom v. Hedrick, 262.**

Notice of hearing, **Croom v. Hedrick, 262.**

EXPERT TESTIMONY

Data collection by another expert, **State v. Little, 152.**

Sexual abuse profiles and victim's symptoms, **State v. Ware, 790.**

Use of lab reports, **State v. Thompson, 102.**

EXTRAORDINARY MITIGATING FACTORS

Abuse of discretion standard, **State v. Melvin, 827.**

FALSE ACCIDENT REPORT

Driver's identity, **State v. Hernandez, 193.**

FAMILY SUPPORT AGREEMENT

Cohabitation by wife, **Craddock v. Craddock, 806.**

FELONIOUS BREAKING AND ENTERING

Buildings in curtilage of dwelling house, **State v. Jones, 562.**

FELONIOUS LARCENY

Property less than $1,000, but incident to felonious breaking and entering, **State v. Jones, 562.**

FIREARMS

Possession by felon, **State v. Coltrane, 498.**

FORECLOSURE

Waiver of notice by participating in hearing, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

FRUIT OF POISONOUS TREE

Unreliable informant, **State v. Maready, 169.**

HABITUAL FELON STATUS

Facially defective indictment, **State v. Moncree, 221.**

HOMEOWNERS' ASSOCIATION

Power to foreclose on claim of lien, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

Power to levy fines, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

HOMICIDE

Conspiracy, **State v. Crowe, 765.**

Solicitation, **State v. Crowe, 765.**

INCEST

Paternity, **State v. Ware, 790.**

INDECENT LIBERTIES

Attempt, **State v. Ellis, 820.**

INFORMANTS

Credibility for jury, **State v. Moore, 416.**

INTEREST

Unclaimed property, **Rowlette v. State, 712.**

INTERNAL AFFAIRS DOCTRINE

Not applicable, **Bluebird Corp. v. Aubin, 671.**

INVESTIGATORY STOP

Anonymous tip insufficient for reasonable suspicion, **State v. Maready, 169.**

Reasonable suspicion of criminal activity, **State v. Campbell, 701.**

Use of handcuffs on defendant, **State v. Campbell, 701.**

INVITED ERROR

Request for second-degree murder instruction, **State v. Smith, 207.**

JUDGE

Bias not demonstrated, **State v. Hagans, 799.**

JURY MISCONDUCT

Conversation with third party about polygraph test, **State v. Lewis, 308.**

LIBEL

Political campaign, **Craven v. SEIU COPE, 814.**

LOCAL CONFINEMENT FACILITY

Possession of controlled substance, **State v. Moncree, 221.**

MALICIOUS PROSECUTION

Punitive damages, **Scarborough v. Dillard's Inc., 430.**

MEDICAID

Reimbursement from settlement account, **Andrews v. Haygood, 244.**

MIRANDA WARNINGS

Inapplicable to search and seizure, **State v. Cummings, 598.**

MOOTNESS

Probation revocation, **State v. Cross, 334.**

School funding dispute, **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

MORTGAGES

Priority after fraudulent cancellation, **Household Realty Corp. v. Lambeth, 545.**

NECESSARY PARTIES

School funding dispute, **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

NOTICE

Waiver by presence at hearing, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

NOTICE OF APPEAL

Failure to designate judgment or order, **In re A.V., 317.**

Not given in writing, **State v. Smith, 842.**

PERSONAL JURISDICTION

Out-of-state corporation, **State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 302.**

PLAIN ERROR

Matters outside court's discretion, **State v. Cunningham, 832.**

POLICE OFFICER RETIREMENT PLAN

Breach of contract claim, **Tripp v. City of Winston-Salem, 577.**

Substantive due process claim, **Tripp v. City of Winston-Salem, 577.**

POLICE REPORT

Revealed day of trial, **State v. Mack, 365.**

POSSESSION OF FIREARM BY FELON

Amendment of indictment changing county of conviction, **State v. Coltrane, 498.**

Not double jeopardy, **State v. Coltrane, 498.**

PRELIMINARY INJUNCTION

Notice, **Perry v. Baxley Dev., Inc., 158.**

PRENUPTIAL AGREEMENT

Waiver of equitable distribution, **McIntyre v. McIntyre, 26.**

PRETRIAL RELEASE

Violation of statutory right, **State v. Labinski, 120.**

PRIOR CRIMES OR BAD ACTS

Absence of mistake of age, **State v. Bowman, 635.**

Certified copies of convictions, **State v. Bowman, 635.**

Intent inferred from bare fact of prior convictions, **State v. Maready, 169.**

Malice, **State v. Maready, 169.**

Remoteness in time, **State v. Maready, 169; State v. Bowman, 635.**

Sexual battery, **State v. Bowman, 635.**

PROBABLE CAUSE

Search warrant for computer, **State v. Ellis, 820.**

PROBATION REVOCATION

Change from concurrent to consecutive, **State v. Hanner, 137.**

Mootness, **State v. Cross, 334.**

RAPE

Sufficiency of evidence, **State v. Little, 152.**

REASONABLE SUSPICION

Anonymous tipster, **State v. Maready, 169.**

Drug neighborhood, aimless walking, **State v. Hayes, 313.**

RELATION BACK

Amended complaint filed after statute of limitations expired, **Reece v. Smith, 605.**

RES JUDICATA

Ruling on sovereign immunity, **Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441.**

RESTRICTIVE COVENANTS

Service fees, **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

RETALIATORY DISCHARGE

Legitimate reason for discharge, **Holt v. Albemarle Reg'l Health Servs. Bd., 111.**

RIGHT TO CONFRONTATION

Unexplained absence from trial, **State v. Russell, 625.**

RIGHT TO IMPARTIAL JURY

Not a coerced verdict, **State v. Smith, 207.**

RIGHT TO REMAIN SILENT

Prosecutor's comment on defendant's failure to present alibi evidence, **State v. Smith, 207.**

RIGHT TO UNANIMOUS VERDICT

Overlapping dates of sexual offenses, **State v. Ware, 790.**

ROBBERY

Hand in coat not dangerous weapon, **State v. Marshall, 744.**

RULE 11 SANCTIONS

Case of first impression, **Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441.**

RULE 60 MOTION

Authenticity of signature on documents, **Macher v. Macher, 537.**

RULE 60 MOTION—Continued

Motion improper for relief from errors of law, **Catawba Valley Bank v. Porter, 326.**

RULE 60(b)(1) MOTION

Excusable neglect, **Croom v. Hedrick, 262.**

RULE 60(b)(3) MOTION

Fraud, misrepresentation, or other misconduct, **Croom v. Hedrick, 262.**

RULE 60(b)(6) MOTION

Any other reason justifying relief, **Croom v. Hedrick, 262.**

SCHOOL FUNDING DISPUTE

Necessary parties, **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

Subject matter jurisdiction, **Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 399.**

SEARCH AND SEIZURE

Computer conversations with officers posing as children, **State v. Ellis, 820.**

Improper investigatory stop, **State v. Maready, 169.**

Miranda warnings inapplicable, **State v. Cummings, 598.**

SECOND-DEGREE KIDNAPPING

Failing to define "unlawfully" in instructions, **State v. Bowman, 635.**

SENTENCING

Clerical errors, **State v. Smith, 842.**

Entrapment not raised at trial, **State v. Davis, 735.**

Prior out-of-state offenses, **State v. Moore, 416.**

Prosecutor's argument about sentencing grid, **State v. Lopez, 553.**

SENTENCING—Continued

Use of car as hazardous weapon, **State v. Lopez, 553.**

SEXUAL OFFENSES

Sexually explicit instant message conversations with officers, **State v. Ellis, 820.**

Statutory sex offense of person fifteen-years old, **State v. Ware, 790.**

Temporal variances for offenses, **State v. Ware, 790.**

SLANDER OF TITLE

Malice, **Southeastern Jurisdictional Admin. Council, Inc. v. Emerson, 93.**

SOLICITATION OF MINOR

Attempt, **State v. Ellis, 820.**

SOVEREIGN IMMUNITY

Death of prisoner in sheriff's custody, **Myers v. Bryant, 585.**

Failure to investigate child abuse, **Patrick v. Wake Cty. Dep't of Human Servs., 592.**

Ruling on merits for purposes of res judicata, **Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ., 441.**

STALKING

Amendment of indictment, **State v. Stephens, 286.**

STANDARD OF CARE

Charlotte oral surgeon, **Roush v. Kennon, 570.**

STATUTE OF LIMITATIONS

Relation back inapplicable to amended complaint filed after expiration, **Reece v. Smith, 605.**

STATUTORY RAPE

Aiding and abetting, **State v. Bowman, 635.**

STIPULATION

Habitual felon status, **State v. Moncree, 221.**

SUBDIVISION

Denial of application, **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

SUBSEQUENT ACTS

Drug sales, **State v. Mack, 365.**

TERMINATION OF PARENTAL RIGHTS

Failure to issue summons to juvenile, **In re I.D.G., 629.**

TRAFFIC STOP

Justification exceeded, **State v. Myles, 42.**

UNANIMOUS VERDICT

Conspiracy to traffic cocaine, **State v. Davis, 735.**

UNCLAIMED PROPERTY

State's taking of interest, **Rowlette v. State, 712.**

UNEMPLOYMENT COMPENSATION

Lateness due to illness, **Applewhite v. Alliance One Int'l, Inc., 271.**

UNFAIR TRADE PRACTICES

Political campaign, **Craven v. SEIU COPE, 814.**

UNLAWFUL ENTRY

Officer's eyewitness account of subsequent events, **State v. Parker, 616.**

VICTIM IMPACT TESTIMONY

No probative value during guilt phase, **State v. Bowman, 635.**

WAIVER

Notice of foreclosure hearing, **Riverpointe Homeowners Ass'n v. Mallory, 837.**

WARRANT

Computer search, **State v. Ellis, 820.**

WHISTLEBLOWER

Conduct not protected, **Holt v. Albemarle Reg'l Health Servs. Bd., 111.**

WILLS

Standing of executor, **In re Will of Jones, 1.**

Undue influence and testamentary capacity, **In re Will of Jones, 1.**

WORKERS' COMPENSATION

Asbestosis, **Bolick v. ABF Freight Sys., Inc., 294.**

Attorney fees, **Swift v. Richardson Sports Ltd. Partners, 82.**

Average weekly wages for school bus driver, **Conyers v. New Hanover Cty. Schools, 253.**

Back injury, **Graham v. Masonry Reinforcing Corp. of Am., 755.**

Brain injury, total disability, **Hunter v. APAC/Barrus Constr. Co., 723.**

Breast implants, **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Carpel tunnel syndrome, **Johnson v. City of Winston-Salem, 383.**

Causation of back pain, **Graham v. Masonry Reinforcing Corp. of Am., 755.**

Economic downturn, **Graham v. Masonry Reinforcing Corp. of Am., 755.**

Failure to apportion award, **Bolick v. ABF Freight Sys., Inc., 294.**

WORKERS' COMPENSATION—Continued

Failure to hold in civil contempt, **Bolick v. ABF Freight Sys., Inc., 294.**

Fairness of settlement agreement, **Kyle v. Holston Grp., 686.**

Multiple medical conditions, **Johnson v. City of Winston-Salem, 383.**

Occupational disease caused by vaccination required by employment, **Fu v. UNC Chapel Hill, 610.**

Permanent total disability, **Hunter v. APAC/Barrus Constr. Co., 723.**

Prejudice based on delay in written notification, **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Prescriptions for work-related and nonwork-related conditions, **Bolick v. ABF Freight Sys., Inc., 294.**

Reduction of lien, **In re Estate of Bullock, 518.**

Settlement agreement required information, **Kyle v. Holston Grp., 686.**

Third-party settlement lien, **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Vocational rehabilitation, **Hunter v. APAC/Barrus Constr. Co., 723.**

Written notice of accident, **Richardson v. Maxim Healthcare/Allegis Grp., 337.**

Wrongful death settlement, **In re Estate of Bullock, 518.**

ZONING

Conditional use permit for correctional facility, **McDonald v. City of Concord, 278.**

Denial of subdivision, **Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**

Less restrictive conditions, **Rakestraw v. Town of Knightdale, 129.**

Notice of public hearing, **Rakestraw v. Town of Knightdale, 129.**

Special exception permit for apartments, **Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjust., 55; Blue Ridge Co., L.L.C. v. Town of Pineville, 466.**