NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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Kimberly Woodell Sieredzki

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SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole[1]	Hertford
2	Wayland Sermons	Washington
3A	W. Russell Duke, Jr.	Greenville
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6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
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7BC	Walter H. Godwin, Jr.	Tarboro
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	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Morehead City
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4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II	Goldsboro
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9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
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10	Donald W. Stephens	Raleigh
	Abraham P. Jones	Raleigh
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	Paul C. Ridgeway	Raleigh
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	Ronald L. Stephens	Durham
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15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Pittsboro

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	Fourth Division	
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11B	Thomas H. Lock	Smithfield
12	E. Lynn Johnson	Fayetteville
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	James F. Ammons, Jr.	Fayetteville
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13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
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17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
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	R. Stuart Albright	Greensboro
	Patrice A. Hinnant[3]	Greensboro
19B	Vance Bradford Long	Asheboro
19D	James M. Webb	Whispering Pines
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	William Z. Wood, Jr.	Clemmons
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	Ronald E. Spivey	Winston-Salem
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	Kevin M. Bridges	Oakboro
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22B	Mark E. Klass	Lexington
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	Alan Z. Thornburg	Asheville
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29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
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1. Appointed and sworn in 1 September 2009.
2. Appointed and sworn in 22 September 2009.
3. Appointed and sworn in 15 October 2009.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	J. Carlton Cole[1]	Hertford
	Edgar L. Barnes	Manteo
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	Christopher B. McLendon	Williamston
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	Melinda Haynie Crouch	Wilmington
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	J. Calvin Hill	Asheville
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	J. Thomas Davis	Rutherfordton
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	Thomas M. Brittain, Jr.	Hendersonville
	Peter Knight	Hendersonville

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	Monica Hayes Leslie	Waynesville
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SAMUEL M. TATE	Morganton
JOHN L. WHITLEY	Wilson

1. Appointed and sworn in as Superior Court Judge 1 September 2009.
2. Appointed and sworn in 31 August 2009.
3. Appointed and sworn in 29 September 2009.
4. Appointed and sworn in as Superior Court Judge 15 October 2009.
5. Resigned 15 October 2009.

ATTORNEY GENERAL OF NORTH CAROLINA

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KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

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CASES REPORTED

JUDICIAL STANDARDS COMMISSION ADVISORY OPINION

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEFFREY BERNARD LINEBERGER, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, A NORTH CAROLINA STATE AGENCY, AND THE NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION, A NORTH CAROLINA STATE AGENCY, DEFENDANTS

No. COA07-3

(Filed 4 March 2008)

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

Although defendants appealed from the trial court's order denying summary judgment in favor of defendants and granting a declaratory judgment in favor of plaintiff in a recalculation of parole eligibility case caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system, the Court of Appeals' review is limited to whether the trial court erred in its declaratory judgment because defendants did not assign error to the ruling in their summary judgment motion as required by N.C. R. App. P. 10(a).

2. Evidence— judicial notice—inmate petitions, grievances, prior actions

The Court of Appeals will not take judicial notice of petitions, grievances and prior actions filed by an inmate which were not a part of the record on appeal from a declaratory judgment entered for the inmate on his claim challenging the calculation of his parole eligibility date.

3. Declaratory Judgments; Probation and Parole— standard of review—interpretation of parole eligibility statutes

The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Further, the trial court's interpretation of the parole eligibility statutes as applied to this case is a question of law subject to de novo review.

4. Probation and Parole— interpretation of parole eligibility statutes—challenging calculation of date instead of validity of judgment not a collateral attack

The trial court did not err by concluding that plaintiff's declaratory judgment action was not a collateral attack on his habitual felon status as well as the robbery, kidnapping, and conspiracy convictions because: (1) plaintiff filed a declaratory judgment action to determine how the sentencing and parole eligibility statutes should be applied to his convictions for robbery, conspiracy to commit robbery, kidnapping, and attaining the status of an habitual felon instead of challenging the validity of the convictions; (2) plaintiff's complaint for declaratory relief challenged the Parole Commission's calculation of his eligibility date and not his forty-year sentence; and (3) declaratory relief seeking clarification or construction of legal principles without denying the validity of the judgment is not a collateral attack.

5. Appeal and Error— appealability—guilty plea—basis of review—application of parole eligibility statutes

The trial court did not err by concluding that plaintiff's complaint was not barred by N.C.G.S. § 15A-1027 in a recalculation of parole eligibility case caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system because: (1) N.C.G.S. § 15A-1027 provides that noncompliance with procedures required in guilty pleas may not be a basis for review of a conviction after the appeal period for the conviction has expired; and (2) plaintiff challenged the application of the parole eligibility statutes to his forty-year sentence and did not directly challenge the forty-year sentence itself.

6. Probation and Parole— immaterial conclusion—statutory violation—calculation of parole eligibility

Although defendant contends the trial court erred by concluding that plaintiff's sentence violated former N.C.G.S.

§ 15A-1340.4 in a recalculation of parole eligibility case caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system, this conclusion was immaterial because the Court of Appeals determined that the trial court's calculation of plaintiff's parole eligibility did not disturb his forty-year sentence.

7. Probation and Parole— habitual felon—calculation of parole eligibility

The trial court did not err in a recalculation of parole eligibility case, caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system, by determining that the Parole Commission should either apply the ninety-day parole to only fifteen years for a presumptive term for kidnapping as an habitual felon or treat the forty-year sentence as an habitual felon sentence and not apply the ninety-day parole rule, because the trial court's conclusion of law comported with the statutory provisions of N.C.G.S. §§ 15A-1340.4, 15A-1380.2(a) & (h) since the second-degree kidnapping conviction was not subject to community service parole.

8. Declaratory Judgments— findings of fact—sufficiency of evidence—recalculation of parole eligibility

The trial court's findings of fact were sufficient to support the pertinent declaratory judgment entered in favor of plaintiff inmate in a recalculation of parole eligibility case caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system, because: (1) finding 4 was supported in the record by the sentencing hearing transcript attached to plaintiff's complaint; (2) a copy of the plea arrangement supported finding 5 where it stated the sentence was capped at forty years; (3) finding 7 was supported by competent evidence when one could interpret the plea agreement, which stated plaintiff's sentence would be capped at forty years, did not equate to an agreement to a forty-year sentence; (4) findings 9 and 10 were supported by the Parole Commission's 1994 letter to plaintiff informing him of his parole eligibility status and the NC DOC's August 2000 letter to plaintiff; (5) finding 11 was supported by plaintiff's exhibit D which defendants admitted as true in their answer; and (6) additional findings of fact were not required where the facts supporting the conclusion of law are not disputed, and it was undisputed for conclusion of law 2 that plaintiff filed an earlier motion for

appropriate relief, sought declaratory relief, and his complaint was not procedurally barred.

Judge GEER concurring in result only.

Judge JACKSON dissenting.

Appeal by defendants from order and judgment entered 7 June 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 August 2007.

Glover & Petersen, P.A., by Ann B. Petersen, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for defendants-appellants.

CALABRIA, Judge.

The North Carolina Department of Correction ("NCDOC") and the North Carolina Post-Release Supervision and Parole Commission ("Parole Commission") (collectively "defendants") appeal from an order and judgment denying defendants' motion for summary judgment and entering a declaratory judgment in favor of Jeffrey Bernard Lineberger ("plaintiff"). We affirm.

On 5 January 1994, in Mecklenburg County Superior Court, pursuant to a plea agreement, plaintiff was convicted of one count of common law robbery, one count of second-degree kidnapping, and one count of conspiracy to commit common law robbery. Plaintiff attained the status of an habitual felon on the common law robbery and second-degree kidnapping charges. The plea agreement provided that the charges be consolidated and the sentence not exceed forty years. Mecklenburg County Superior Court Judge Robert O. Lewis sentenced plaintiff to forty years in the NCDOC pursuant to the Fair Sentencing Act.

On 13 April 1994, plaintiff's parole case analyst informed plaintiff his earliest parole eligibility date would be 11 December 2000 and, because of the second-degree kidnapping offense, his case would be reviewed for parole 270 days prior to his maximum release date, 12 December 2013. On 22 August 2000, the NCDOC informed plaintiff his parole eligibility date was 10 December 2000. Plaintiff alleges this date was based on N.C. Gen. Stat. § 14-7.6 and N.C. Gen. Stat. § 15A-1371, providing that habitual felons are eligible for parole

after serving seven years of their sentence. At that time, plaintiff was held in minimum custody, granted work release and preparing for a December 2000 review for release on parole.

On 28 November 2000, the Parole Commission informed plaintiff that his second-degree kidnapping offense had not been entered into the computer system and his parole eligibility date changed due to the addition of the kidnapping offense. The Parole Commission calculated plaintiff's eligibility date to be ninety days prior to his final release date, or 2 September 2011. The effect of this change resulted in plaintiff's demotion to medium custody and removal from work release.

On 19 February 2004, plaintiff filed a motion for appropriate relief to withdraw his guilty plea on the basis that the recalculation of his parole date disregarded the consolidated sentence and therefore was a breach of the plea agreement. On 27 April 2004, the court denied the motion for appropriate relief.

On 23 November 2005, plaintiff filed a complaint in Wake County Superior Court seeking, *inter alia*, "a declaratory judgment interpreting and construing N.C.G.S. § 14-1.1 (1993), N.C.G.S. § 14-7.1 et seq. (1993), N.C.G.S. § 15A-1340.4(b) & (f), N.C.G.S. § 15A-1371 (1993) and N.C.G.S. § 15A-1380.2 (1993); as those statutes relate to the calculation of Plaintiff's parole eligibility date." Defendants answered the complaint asserting that the recalculation corrected a computer error in parole eligibility dates.

On 8 March 2006, defendants moved for summary judgment. After a hearing on 11 April 2006, Superior Court Judge Donald W. Stephens denied defendants' motion for summary judgment and entered a declaratory judgment for the plaintiff. The trial court ordered defendants to recalculate plaintiff's parole eligibility date by either (1) considering plaintiff's forty-year sentence as an habitual felon sentence without regard to the ninety-day end of term parole provisions of N.C.G.S. § 15A-1380.2, or (2) if the Parole Commission applied N.C.G.S. § 15A-1380.2, then the ninety-day end-of-term parole provisions must be applied on the basis that plaintiff received a fifteen-year sentence for kidnapping not a forty-year sentence for kidnapping.

[1] Defendants appeal the trial court's order denying summary judgment for defendants and granting a declaratory judgment in favor of plaintiff. Defendants did not assign error to the ruling on their sum-

mary judgment motion. Therefore, our review is limited to whether the trial court erred in its declaratory judgment in favor of the plaintiff. N.C.R. App. P. 10(a) (2007).

[2] The dissent supplements the facts listed above by including prior grievances, actions, and petitions filed by the plaintiff before the commencement of the appeal. As to the supplemented proceedings, which were filed *pro se*, only the prior actions are mentioned in the record on appeal.[1] None of the petitions and grievances cited by the dissent could be located in the record.

Rule 9 of the North Carolina Rules of Civil Procedure limits our review to the record, transcript and any items filed with the record. "In appeals from the trial division of the General Court of Justice, *review is solely upon the record on appeal*, the verbatim transcript of proceedings,. . . and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)." N.C.R. App. P. 9(a) (2007) (emphasis added). In addition to the record on appeal, appellate courts may take judicial notice of their own filings in an interrelated proceeding. However, judicial notice of an interrelated proceeding is limited to proceedings with the same parties, the same issues, and the parties refer to the interrelated case in the case under consideration. *West v. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981). Appellate courts may take judicial notice *ex mero motu* on "any occasion where the existence of a particular fact is important . . . ." *Id.*, 302 N.C. at 203, 274 S.E.2d at 223. Facts which are either so notoriously true as not to be the subject of reasonable dispute or "capable of demonstration by readily accessible sources of indisputable accuracy" are subject to judicial notice. *Id.* (citing *Kennedy v. Parrott*, 243 N.C. 355, 358, 90 S.E.2d 754, 756 (1956)).

Here, there was no request by defendants to take judicial notice of the petitions, grievances, and prior actions. Most of the federal opinions cited by the dissent are brief and unpublished, and do not provide enough information to determine that the issues are the same. *See Lineberger v. York*, No. 03-6456 (4th Cir. Nov. 25, 2003); *Lineberger v. York*, No. 03-6771 (4th Cir. Sept. 24, 2003); *see also State*

1. Specifically, the record included an affidavit and a motion for summary judgment by defendants in plaintiff's suit against Michael York filed in United States District Court, Middle District of North Carolina, file No. 1:02CV00210, asserting a § 1983 claim under Title 42 of the Civil Rights Act. (Counsel for defendants also referenced this action at the hearing on the declaratory judgment action in the context of introducing the affidavit as an exhibit). In addition, defendants' brief in support of their motion for summary judgment references two federal actions and a state court action filed by plaintiff.

v. Lineberger, —— N.C. ——, 597 S.E.2d 771 (2004) (dismissing plaintiff's petition without analysis).

In *Lineberger v. York*, filed in the United States District Court, Middle District of North Carolina in 2003, plaintiff asserted a claim under 42 U.S.C. § 1983 and sought a declaratory judgment. However, the Middle District of North Carolina granted defendants' motion for summary judgment against plaintiff, in part because declaratory relief on the issue of parole calculation is not available under 42 U.S.C. § 1983. *Lineberger v. York*, No. 1:02CV00210 (M.D.N.C. filed April 25, 2003). Since the federal court dismissed plaintiff's claim in part because declaratory relief was not available under 42 U.S.C. § 1983, and did not determine whether his parole was erroneously calculated, judicial notice of plaintiff's prior action in federal court is not "important" to his current action seeking declaratory relief. *West*, 302 N.C. at 203, 274 S.E.2d at 223.

Since copies of plaintiff's petitions, grievances, and prior actions (with the exception of *Lineberger v. York*, No. 1:02CV00210) were not included with the record on appeal and since the appellants did not make a request for judicial notice of the petitions, grievances and prior actions, we respectfully decline to base our review on matters outside the record as that would require deviation from the North Carolina Rules of Appellate Procedure.

I. Standard of Review

[3] The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. *Cartner v. Nationwide Mutual Fire Ins. Co.*, 123 N.C. App. 251, 253, 472 S.E.2d 389, 390 (1996); *Walker v. Penn Nat'l Sec. Ins. Co.*, 168 N.C. App. 555, 559, 608 S.E.2d 107, 110 (2005). Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Walker*, 168 N.C. App. at 559, 608 S.E.2d at 110. This is true even when there is evidence which "sustain[s] findings to the contrary." *Cartner*, 123 N.C. App. at 253, 472 S.E.2d at 390.

Whether or not the trial court's interpretation of the parole eligibility statutes as applied to this case was correct is a question of law, subject to *de novo* review. *Teasley v. Beck*, 155 N.C. App. 282, 288, 574 S.E.2d 137, 141 (2002) (citing *County of Durham v. N.C. Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998)).

II. Defendants' First Argument

Defendants argue the declaratory judgment in favor of plaintiff was in error because: (a) a declaratory judgment may not be used to collaterally attack a prior judgment; (b) plaintiff's claim is barred by § 15A-1027; and (c) the trial court's interpretation of § 15A-1340.4 was in error.

A. Collateral Attack

[4] Defendants argue that plaintiff's suit is a collateral attack on his habitual felon status as well as the robbery, kidnapping, and conspiracy convictions. We disagree.

"Questioning the validity of the original conviction is an impermissible collateral attack." *State v. Flemming*, 171 N.C. App. 413, 417, 615 S.E.2d 310, 313 (2005) (citing *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996)). "A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid. A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 601, 646 S.E.2d 826, 830 (July 17, 2007) (No. COA06-690) (citations and internal quotations omitted).

Defendants cite *State v. Flemming*, *inter alia*, in support of their argument. *Flemming* involved a criminal defendant who appealed his habitual felon conviction on numerous legal arguments, including insufficient evidence to prove the trial court's jurisdiction to enter a felony conviction. *Flemming*, 171 N.C. App. at 417, 615 S.E.2d at 313. This Court overruled that assignment of error because defendant's argument questioned the validity of the original conviction. *Id.*

Here, plaintiff filed a declaratory judgment action to determine how the sentencing and parole eligibility statutes should be applied to his convictions for robbery, conspiracy to commit robbery, kidnapping, and attaining the status of an habitual felon. Plaintiff does not challenge the validity of his convictions.

The dissent concludes that the relief granted by the trial court altered plaintiff's forty-year sentence. The plaintiff's forty-year sentence imposed in 1994 remains in effect. Plaintiff's complaint for declaratory relief challenges the Parole Commission's calculation of his eligibility date and not his forty-year sentence.

Declaratory relief seeking clarification or construction of legal principles without denying the validity of the judgment is not a collateral attack. *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 72, 407 S.E.2d 607, 609 (1991) (declaratory relief not a collateral attack where the plaintiff was not attacking the validity of the will but was asking the court to construe the will to determine who could take under it); *compare State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (one superior court judge prohibited from changing the judgment of another judge made in the same action).

At plaintiff's hearing on the declaratory judgment action, Judge Stephens recognized the Superior Court in Mecklenburg County had denied plaintiff's motion for appropriate relief. Plaintiff's *pro se* motion for appropriate relief requested vacating his conviction and withdrawing his guilty plea. Judge Stephens stated that he "can't do anything about that." Judge Stephens entered a declaratory judgment for the plaintiff but this relief did not vacate plaintiff's conviction or withdraw his plea; that would have been an impermissible collateral attack. We conclude that defendants' argument that plaintiff is using the declaratory judgment act to collaterally attack his convictions is without merit. Any error on this ground is overruled.

B. N.C. Gen. Stat. § 15A-1027

[5] Next defendants argue that plaintiff's complaint is barred by N.C. Gen. Stat. § 15A-1027. N.C. Gen. Stat. § 15A-1027 provides that noncompliance with procedures required in guilty pleas "may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2007). The only case cited by defendants in support of this argument is *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003). We find this case distinguishable.

In *State v. Rush*, the defendant pled guilty to two counts of assault with a deadly weapon on a law enforcement officer and one count of common law robbery. 158 N.C. App. at 739, 582 S.E.2d at 38. The defendant was sentenced to a minimum of twenty-four months and maximum of thirty-eight months on each count. That sentence was suspended and she was placed on probation. *Id.* Her plea agreement provided for two twenty-four month suspended sentences. *Id.* The defendant violated her probation twice. *Id.*, 158 N.C. App. at 740, 582 S.E.2d at 38. The court activated her sentence and she was ordered to serve twenty-four to thirty-eight months for each offense.

Id. Defendant did not object that the sentence was inconsistent with the plea agreement. Furthermore, rather than appealing the inconsistency, the defendant appealed the activation of her sentence. 158 N.C. App. at 739, 582 S.E.2d at 38. This Court held that defendant could not challenge the activation of the sentence on the basis that it is inconsistent with the plea agreement, because, *inter alia*, N.C. Gen. Stat. § 15A-1027 does not allow noncompliance with procedures governing guilty pleas as a basis for review of a conviction after the appeal period has expired. 158 N.C. App. at 741, 582 S.E.2d at 39.

Unlike the defendant in *Rush*, here, plaintiff is seeking declaratory relief in the form of a ruling on whether the trial court correctly applied the parole eligibility statutes to plaintiff's sentence, and not challenging the sentence itself. Interpretation of parole eligibility statutes is considered proper subject matter for a declaratory judgment. *See Price v. Beck*, 153 N.C. App. 763, 765, 571 S.E.2d 247, 249 (2002) (inmate seeks declaratory relief from incorrect calculation of his parole date); *Robbins v. Freeman*, 127 N.C. App. 162, 163-64, 487 S.E.2d 771, 772 (1997) (inmate sought declaratory judgment determining his parole eligibility); *Teasley*, 155 N.C. App. at 284, 574 S.E.2d at 139 (inmate seeking declaratory judgment on application of credit to calculate parole eligibility).

Although the trial court found the forty-year sentence exceeded the total of presumptive terms for each felony offense and concluded that the maximum sentence the court could impose for the kidnapping charge was fifteen years, the order was limited to the calculation of parole eligibility based on a forty-year sentence and did not change plaintiff's original sentence. Plaintiff's complaint is not barred by N.C. Gen. Stat. § 15A-1027, because plaintiff is challenging the application of the parole eligibility statutes to his forty-year sentence, and not directly challenging the forty-year sentence itself. This assignment of error is overruled.

C. Presumptive Prison Term

[6] Defendants contend the trial court erred in concluding that plaintiff's sentence violates N.C. Gen. Stat. § 15A-1340.4 (1993) (Cum. Supp. 1994) (repealed effective Oct. 1, 1994). N.C. Gen. Stat. § 15A-1340.4(f) provides the presumptive prison term for felonies under Chapter 14 and "any other specific penalty statutes." Under this section, the presumptive prison term for a Class C felony is imprisonment for fifteen years. *Id.*

In its order, the trial court concluded that:

> 4. Because the sentence the Court imposed for Plaintiff's kidnapping conviction only comprised a portion of the forty (40) year consolidated sentence, the most that can be said is that fifteen (15) years of the forty (40) year sentence should be treated as a sentence for kidnapping. This is so because, under N.C.G.S. §15A-1340.4, a sentence imposed for a felony offense, such as the kidnapping offense here, may not exceed the presumptive term unless the Court specifically finds in the record aggravating factors to justify a sentence greater than the presumptive. The presumptive term on the kidnapping charge was fifteen (15) years. FN2 In this case, the Court did not make any findings in aggravation or mitigation, but rather imposed the forty (40) year consolidated sentence without making such findings. (See, N.C.G.S §15A-1340(4).)
>
> FN2 The presumptive term under the Fair Sentencing Act for second degree kidnapping is nine (9) years. However, since the kidnapping charge was enhanced to a Class C felony due to Plaintiff's habitual felon status, the presumptive term was fifteen (15) years.

Defendants argue that this conclusion of law is in error because the sentencing court could have sentenced in excess of the presumptive term without considering aggravating or mitigating factors if "[it] imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter . . . ." N.C. Gen. Stat. § 15A-1340.4(a). This conclusion is based on the interpretation that the forty-year sentence was not imposed "pursuant to any plea arrangement as to sentence." Even if this conclusion were in error, since we determine that the trial court's calculation of plaintiff's parole eligibility does not disturb his forty-year sentence, whether the trial court erred in concluding the forty-year sentence violates N.C. Gen. Stat. § 15A-1340.4 is immaterial.

III. Defendants' Second Argument

[7] Defendants next argue that under the Fair Sentencing Act and habitual felon sentencing statutes, (1) plaintiff's parole eligibility date was correctly calculated by the Parole Commission, and (2) any ambiguity in § 15A-1380.2(h) should be resolved in favor of the agency's interpretation of the statute so long as that interpretation is reasonable. We disagree.

"Legislative intent controls the meaning of statutes." *Teasley*, 155 N.C. App. at 288, 574 S.E.2d at 141 (citing *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 345, 563 S.E.2d 92, 97 (2002)). In determining legislative intent, a court "must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Id.* (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)).

Defendants contend that plaintiff's kidnapping conviction "permeates the entirety of his consolidated sentence" and therefore his parole eligibility should be calculated as ninety days before the expiration of his term, without eligibility for community service parole. N.C. Gen. Stat. § 15A-1380.2(a) & (h) (1993) (Cum. Supp. 1994) (repealed effective Oct. 1, 1994). Defendants assert that the trial court should have deferred to the Parole Commission's interpretation of the parole eligibility statutes citing *County of Durham*, 131 N.C. App. at 396, 507 S.E.2d at 311 and *Teasley*, 155 N.C. App. at 289, 574 S.E.2d at 141.

In *County of Durham*, this Court affirmed a declaratory ruling issued by the NCDENR pursuant to N.C. Gen. Stat. § 150B-45 (1991), recognizing "a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers 'so [] long as the agency's interpretation is reasonable and based on a permissible construction of the statute.' " 131 N.C. App. at 397, 507 S.E.2d at 311 (quoting *Carpenter v. N.C. Dept. of Human Resources*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992)).

In *Teasley v. Beck*, this Court deferred to the Parole Commission's interpretation of the parole statutes, evidenced by affidavits submitted by the Parole Commission, namely whether gain or meritorious time applied to alter parole eligibility for life sentences. *Teasley*, 155 N.C. App. at 289, 574 S.E.2d at 142. In that case, this Court found the Parole Commission's interpretation to be reasonable. *Id.*

Here, defendants submitted an affidavit by Melita Groomes, Executive Director of the Post-Release Supervision and Parole Commission, which explained that plaintiff is eligible only for end-of-term parole based on the Parole Commission's interpretation of N.C. Gen. Stat. § 15A-1380.2(h). N.C. Gen. Stat. § 15A-1380.2(h) states "[n]o prisoner convicted under Article 7A of Chapter 14 of a sex offense, under G.S. 14-39, 14-41, or 14-43.3, or under G.S. 90-95(h) of a drug

trafficking offense shall be eligible for community service parole." N.C. Gen. Stat. § 15A-1380.2(h). If a prisoner is not eligible for community service parole, he is eligible for ninety-day parole. N.C. Gen. Stat. § 15A-1380.2(a).

Plaintiff argues that because plaintiff's kidnapping conviction is only part of the forty-year consolidated sentence, his habitual felon status should determine parole eligibility, under N.C. Gen. Stat. § 15A-1371. Plaintiff contends defendants' interpretation of the statutes is incorrect. Specifically, it would result in eligibility for discretionary parole in twenty years for a life imprisonment (the maximum term) sentence when a person is convicted of second-degree kidnapping and attaining the status of an habitual felon. However, the plaintiff, who is sentenced to a total of forty years, is not eligible for parole until ninety days before completion of his forty-year sentence. We agree. Defendants' interpretation, unlike *Teasley*, is not reasonable.

The next question is whether the trial court properly applied the statutes to plaintiff's sentence. The trial court determined that the Parole Commission should either apply the ninety-day parole to only fifteen years for a presumptive term for kidnapping as an habitual felon, or treat the forty-year sentence as an habitual felon sentence and not apply the ninety-day parole rule.

The most serious offense here was attaining habitual felon status, which carries a presumptive term of fifteen years. N.C. Gen. Stat. § 15A-1340.4(f) (Class C felonies have a presumptive term of fifteen years imprisonment; Class E felonies have presumptive term of nine years).

Here, Judge Stephens ordered:

> For purposes of calculating Plaintiff's parole eligibility, the Department of Correction and the Parole Commission must either consider Plaintiff's forty (40) year consolidated sentence as an habitual felon sentence without regard to the 90-day end of term parole provisions of N.C.G.S. § 15A-1380.2 (1995) applicable to kidnapping sentences or if they consider Plaintiff's sentence as a kidnapping sentence subject to the end of term parole provisions of N.C.G.S. § 15A-1380.2 (1995), they must apply the 90-day end of term parole provisions only on the basis that Plaintiff received a fifteen (15) year sentence for kidnapping, rather than a forty (40) year sentence for kidnapping.

This conclusion of law comports with the statutory provisions of N.C. Gen. Stat. §§ 15A-1340.4, 15A-1380.2(a) & (h), because the second-degree kidnapping conviction is not subject to community service parole. We affirm.

IV. Defendants' Third Argument

[8] Defendants argue that the trial court's findings of fact are insufficient "to support the declaratory judgment entered." We disagree.

Our question on review is whether the findings of fact are supported by any competent evidence and whether those findings support the conclusions of law. *Walker*, 168 N.C. App. at 559, 608 S.E.2d at 110. Findings supported by "any competent evidence" are conclusive, even when there is evidence which "sustain[s] findings to the contrary." *Cartner*, 123 N.C. App. at 253, 472 S.E.2d at 390.

Defendants challenge findings of fact 4, 5, 7, 9, 10, 11 and the lack of findings on the issue of procedural bar.

Finding of fact number four states:

> 4. During the plea colloquy, Plaintiff's counsel informed the Court of the terms and conditions of the plea agreement between the State and the Plaintiff; to wit: that the counts would be consolidated for sentencing and the sentence to be imposed by the Court could not exceed forty (40) years.

This finding is supported in the record by the sentencing hearing transcript attached to plaintiff's complaint. This is competent evidence and we affirm.

Finding of fact number five states: "5. The plea agreement did not contain any agreement as to the sentence Plaintiff would receive upon his guilty plea, except that it stated the sentence would not exceed forty (40) years." A copy of the plea arrangement supports this finding where it states the sentence is capped at forty years, "(i.e. sentence not to exceed 40 years)." We affirm.

Finding of fact number seven states:

> Because there was no plea agreement as to the sentence Plaintiff would receive, the Court was required under N.C.G.S. § 15A-1340.4 to make findings of aggravating factors before imposing a sentence that exceeded the presumptive term for each of the three (3) counts. (See N.C.G.S. § 15A-1340.4 (1993).) Under

> N.C.G.S. § 15A-1340.3, the Court was prohibited from imposing a consolidated sentence on the three (3) separate felony convictions that exceeded the total of the presumptive terms of each felony so consolidated, without first making findings in aggravation to support such a sentence. The presumptive term on the common law robbery conviction was fifteen (15) years, due to the fact that under the habitual felon statute it was enhanced to a Class C felony. See, N.C.G.S. § 15A-1340.4(f); 14-7.6. The presumptive term on the kidnapping conviction was also fifteen (15) years, because it too was enhanced to a Class C felony under the habitual felon statute. *Id*. The presumptive term on the conspiracy to commit common law robbery conviction was three (3) years, due to the fact that this charge was not subject to the habitual felon enhancement. The total of the presumptive terms for the three (3) consolidated counts was thirty-three (33) years. The Court's imposition of the consolidated sentence of forty (40) years exceeded that allowed under N.C.G.S. § 15A-1340.4 because it exceeded the total of the presumptive terms for each felony offense so consolidated.

This finding is supported by competent evidence because one could interpret the plea agreement which stated plaintiff's sentence would be capped at forty years does not equate to an agreement to a forty-year sentence. We affirm.

Finding of fact number nine states:

> Upon Plaintiff's admission to the Department of Correction, Defendants, as required by law, calculated Plaintiff's parole eligibility date. Defendants originally treated Plaintiff's sentence as a forty (40) year habitual felon sentence and applied the parole eligibility statutes applicable to habitual felon sentences in calculating his parole eligibility date; to wit: N.C.G.S. § 14-7.6 and N.C.G.S. § 15A-1380.1.

Finding of fact number ten states: "[b]ecause a person sentenced as an habitual felon under the Fair Sentencing Act is eligible for parole after serving seven (7) years of his sentence, Defendants initially calculated Plaintiff's parole eligibility date to be December 10, 2000. (See N.C.G.S. §14-7.6 and N.C.G.S. §15A-1371)."

We find competent evidence to support findings of fact numbers nine and ten. Specifically, the Parole Commission's 1994 letter to plaintiff informing him of his parole eligibility status and

the NCDOC's August 2000 letter to plaintiff. This assignment of error is overruled.

Finding of fact number eleven states: "On August 22, 2000, the Department of Correction, informed Plaintiff by letter that his parole eligibility date on the forty (40) year sentence was December 10, 2000. At the time Plaintiff received this letter, he was in minimum custody, on work release and preparing to be reviewed for release on parole in December 2000."

We find competent evidence to support finding of fact number eleven in the form of plaintiff's exhibit D, which defendants admitted as true in their answer.

Defendants assign error to conclusion of law number two, that plaintiff is not procedurally barred from filing his complaint for a declaratory judgment and his issues could not be properly raised in a motion for appropriate relief and failure to raise issues does not constitute a procedural bar. Defendants argue this case is barred by *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971) and that the trial court was required to make specific findings on this issue. We disagree.

Additional findings of fact are not required where the facts supporting the conclusion of law are not disputed. *See Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520-21, 581 S.E.2d 94, 96 (2003). It is undisputed that plaintiff filed an earlier motion for appropriate relief, and that plaintiff seeks declaratory relief. As we discussed in Section II of this opinion, plaintiff's complaint is not procedurally barred. Affirm.

As a final matter we note that defendants assigned forty errors in the record on appeal but argued thirty-one assignments of error in their brief. When assignments of error are not argued, they are abandoned pursuant to N.C.R. App. P. 28(b)(6) (2007). Therefore, nine assignments of error are deemed abandoned.

Affirmed.

Judge GEER concurs in the result only in a separate opinion.

Judge JACKSON dissents in a separate opinion.

GEER, Judge, concurring in the result only.

With respect to the merits of this appeal, I agree that the trial court should be affirmed, but I reach this conclusion on different grounds than that of the majority opinion. I concur fully with the majority opinion's conclusion that this case does not represent a collateral attack on plaintiff's 1994 criminal judgment imposing a sentence of 40 years. In order for this case to constitute a collateral attack, Lineberger would have to be seeking relief from his 40-year sentence. He is not. Regardless of the outcome of this case, Lineberger's 40-year sentence remains intact. The only material question presented by Lineberger is how his parole eligibility should be calculated—an issue that the parties do not dispute may properly be resolved by an action for a declaratory judgment.

As support for their "collateral attack" contention, defendants rely upon the trial court's determination that the 40-year sentence was unlawful. The trial court did not, however, purport to take any action or grant any relief after making that observation.

More importantly, that finding is simply immaterial to the resolution of this appeal. This appeal presents a forest-and-trees problem. Defendants' various contentions on appeal distract from the core question: Whether defendants have presented any authority to support their contention that parole eligibility should be calculated based on an assumption that the 40-year sentence represented a 40-year sentence for second degree kidnapping? Since defendants have cited no authority supporting their fundamental position, I would affirm the trial court.

In this case, defendants take the position that, under the Fair Sentencing Act, N.C. Gen. Stat. § 15A-1380.2(h) (1994), Lineberger's conviction for second degree kidnapping precludes him from receiving community service parole. That statute states simply: "No prisoner convicted under Article 7A of Chapter 14 of a sex offense, under G.S. 14-39, 14-41, or 14-43.3, or under G.S. 90-95(h) of a drug trafficking offense shall be eligible for community service parole." There is no question that Lineberger was convicted under § 14-39 of second degree kidnapping.

The statute does not, however, specifically address the situation present in this case in which a consolidated judgment was entered for three separate charges, only one of which was second degree kidnapping. Defendants acknowledge that their calculation of parole eligibility is based on the assumption that § 15A-1380.2(h) bars commu-

nity service parole simply "[b]ecause the consolidated sentence *is based in part* on a kidnapping conviction." (Emphasis added.)

Defendants' argument in support of this interpretation of the statute states in its entirety:

> When a defendant is convicted of two or more counts, the court may consolidate the offenses and impose a single judgment. *See State v. Stonestreet*, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955). Under a consolidated sentence, if one of the counts upon which the conviction is based is set aside, the entire judgment must be remanded for resentencing even if the remaining counts would have been sufficient, standing alone, to justify the consolidated sentence. *Id.* In essence, a consolidated judgment stands as a unified whole.
>
> Because Lineberger is serving a consolidated sentence, each day that he is incarcerated is service against the unified whole of the sentence, even though based on three convictions—common law robbery, conspiracy to commit armed robbery, and kidnapping. Because the consolidated sentence is a unified whole, it is not possible or rational to identify one day of incarceration as being service against Lineberger's robbery conviction, the next day as being service against his conspiracy conviction, or the next day as being service against his kidnapping conviction. *Each day of incarceration is simply service against the whole sentence and is not allocated to any individual conviction that supports the consolidated sentence.* The kidnapping conviction stands as just as much a part of the reason that Lineberger is incarcerated pursuant to the consolidated sentence on day one of his prison term as it does on the last day when he is incarcerated under that consolidated sentence.
>
> *Given that Lineberger's kidnapping conviction permeates the entirety of his consolidated sentence*, it is rational and reasonable for the Commission to conclude that Lineberger is not eligible for parole until ninety days before his unconditional release date. The plain language of the applicable statutes demonstrates that Lineberger is barred from being considered for parole prior to this date.

(Emphasis added.)

This argument is noticeably lacking in the citation of applicable authority. Although defendants correctly describe *Stonestreet*, that

opinion does not in any manner relate to or support defendants' theory of "a unified whole." Further, the reasoning contained in the following paragraphs of defendants' brief—containing no citation of authority at all—is in fact directly contrary to the reasoning of our Supreme Court in *Stonestreet* and in other decisions.

In *Stonestreet*, the Supreme Court held that when two or more charges are consolidated for the purpose of a single judgment, "even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. Presumably this (the single judgment) was based upon consideration of guilt on both charges." 243 N.C. at 31, 89 S.E.2d at 737 (internal quotation marks omitted). This basic principle regarding consolidated sentences was reiterated more recently by our Supreme Court in *State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999) (emphasis added):

> [W]e further conclude that the judgment on this offense [of murder as an accessory] must be remanded for resentencing because the trial court consolidated it with the solicitation conviction, which we have now vacated, in imposing a single sentence of thirty years, *and we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect on the sentence imposed.*

I fail to see how this principle regarding resentencing supports defendants' contention that the kidnapping conviction so permeates the single 40-year sentence that we must assume that parole eligibility should be calculated on the assumption that the entire 40 years was a sentence for second degree kidnapping.

The holdings would seem to support precisely the opposite proposition: that we cannot assume that the other two non-kidnapping convictions did not play a role in the length of the sentence. Defendants' argument asks us to assume that the common law robbery (a class C felony because of Lineberger's habitual felon status) and conspiracy convictions made no contribution to the 40-year sentence. I cannot reconcile defendants' reasoning with *Stonestreet* or *Brown*. *See also State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's

judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.").

Because defendants have not demonstrated any legal basis for construing the 40-year sentence as being entirely attributable to the kidnapping charge, there is no reason to decide whether the trial court properly found, in finding of fact 7, that "there was no plea agreement as to the sentence Plaintiff would receive . . . ." I note, however, that the record suggests that there is an issue of fact as to that question.

The transcript of plea states that the State and Lineberger agreed only to "cap the sentence at 40 years (*i.e.* sentence not to exceed 40 years)." In the hearing, Lineberger's counsel confirmed "that the State recommends that the cases be consolidated for sentencing and the sentence is not to exceed forty years . . . ." These statements would suggest no agreement on a specific sentence apart from a cap. The trial judge, however, stated that he could "live with" 40 years. He then asked whether Lineberger understood that he would, in exchange for his plea of guilty, receive a 40-year sentence and whether he accepted that arrangement. In imposing the sentence, the trial judge stated that the charges would be "consolidated for purposes of judgment pursuant to the negotiated plea and negotiated sentence" and that "pursuant to that negotiated sentence, the judgement [sic] of the Court is that the Defendant be imprisoned in the State Department of Corrections for a term of forty years." This statement could be construed as indicating the trial judge believed that he was imposing the 40-year sentence pursuant to a plea arrangement. On the other hand, however, the trial judge allowed Lineberger's counsel to present argument on sentencing—argument that would be unnecessary if the parties had agreed to a 40-year sentence.

In short, although I believe the record would permit a finding that there was no plea arrangement as to a specific sentence, I cannot conclude that the issue is resolvable on summary judgment. Nevertheless, I do not believe that defendants have demonstrated that this is a *material* issue of fact. Even if the 40-year sentence is a lawful sentence, defendants have failed to establish that the entire 40 years should be considered attributable to the kidnapping charge and that the parole provisions relating to kidnapping should apply to the entire 40-year term.

Moreover, even if we assume, as the State contends, that the trial court acted under N.C. Gen. Stat. § 15A-1340.4(a) and imposed "a prison term pursuant to any plea arrangement as to sentence under Article 58 of [that] Chapter," the State has made no showing that the State and Lineberger intended that the 40-year sentence be attributed entirely to kidnapping. Nothing in the record factually supports a finding that the 40-year sentence was reached by agreeing to a sentence of 40 years for kidnapping based on Lineberger's habitual felon status, as opposed to calculating sentences for each charge and totaling them.

The latter approach is more consistent with the parties' agreement that the State would not treat Lineberger as a habitual felon with respect to the conspiracy charge. Since habitual felon status would have only affected Lineberger's sentence on the conspiracy charge, such a concession would be meaningless if the parties intended that the kidnapping charge account for the entire 40-year sentence. *See State v. Hemby*, 333 N.C. 331, 336, 426 S.E.2d 77, 79-80 (1993) (holding, with respect to a sentence imposed pursuant to a judgment consolidating indictments or convictions with equal presumptive terms, that "*nothing else appearing in the record*," the Court would "for purposes of appellate review" allocate a Fair Sentencing Act sentence equally among each indictment or conviction (emphasis added)); *State v. Nixon*, 119 N.C. App. 571, 575, 459 S.E.2d 49, 51 (1995) (applying *Hemby* to hold that only 12 years of 36-year sentence was attributable to conviction of first degree kidnapping).

Rather than supply this Court with legal authority or evidence of the parties' intent with respect to the 40-year sentence, defendants urge this Court simply to defer to their interpretation of the controlling statute. They have not, however, pointed to any statute or case authority to support their position. Nevertheless, their argument overlooks the rule of lenity.

"In general, when a criminal statute is unclear, the long-standing rule of lenity 'forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.' " *State v. Crawford*, 167 N.C. App. 777, 780, 606 S.E.2d 375, 377-78 (quoting *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985)), *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005). Although our courts have not specifically considered the question, numerous other jurisdictions have applied the rule of lenity to statutes addressing parole eligibility. *See*,

e.g., *Bifulco v. United States*, 447 U.S. 381, 400-01, 65 L. Ed. 2d 205, 209, 100 S. Ct. 2247, 2259 (1980) (to the extent questions existed regarding the availability of special parole terms as punishment for drug conspiracies, "they must be resolved in accord with the rule of lenity"); *State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (Ariz. 1996) ("The rule of lenity suggests an interpretation that permits parole eligibility."); *Fields v. Suthers*, 984 P.2d 1167, 1172 (Colo. 1999) (holding that rule of lenity applies in construing parole eligibility statute).

By arguing that we should defer to defendants' construction of the statutes, defendants are necessarily contending that the statutes are ambiguous and subject to construction. *See Ledwell v. N.C. Dep't of Human Res.*, 114 N.C. App. 626, 631, 442 S.E.2d 367, 370 (1994) (" 'Only where the language of the statute is unclear, ambiguous, or fails to answer the specific question at issue should deference be paid to a contested agency interpretation.' " (quoting *Anderson v. N.C. Dep't of Human Res.*, 109 N.C. App. 680, 683, 428 S.E.2d 267, 269 (1993))), *disc. review improvidently allowed*, 340 N.C. 103, 455 S.E.2d 159 (1995). Yet, if a penal statute is ambiguous, it must be construed in favor of lenity.[2] Since defendants have failed to make any attempt to demonstrate that the General Assembly intended the result that they advocate, I see no basis for construing the statute in the manner urged by defendants, with its harsh results.

In sum, I believe that defendants have presented no legal authority that supports their calculation of Lineberger's parole eligibility. Indeed, the sole case that they cite—like other opinions within that line of authority—contradicts defendants' reasoning. Further, defendants' approach cannot be reconciled with the rule of lenity. Because of the lack of support for the position that underlies all of defendants' arguments, I believe it is unnecessary to address those arguments. I agree with the majority opinion that we should affirm the trial court. Because the question whether Linberger's sentence is legal or not is immaterial to the issues in this appeal, I cannot agree with the dissent that this appeal represents a collateral attack on a judgment.

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2. *Teasley v. Beck*, 155 N.C. App. 282, 574 S.E.2d 137 (2002), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 755 (2003), upon which defendants rely, did not address the rule of lenity. Significantly, although that opinion applied the United Supreme Court's principle of deference to agency interpretations of ambiguous statutes, *see Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 703, 104 S. Ct. 2778, 2782 (1984), the Supreme Court has, as noted above, determined that the rule of lenity applies when parole eligibility is at issue.

JACKSON, Judge, dissenting.

I must respectfully dissent from the majority's opinion. Although I agree that the interpretation of whether parole eligibility statutes are properly applied may be a question of law subject to the Declaratory Judgment Act, I would hold that the complaint in the instant case is properly a matter for a motion for appropriate relief, and that the trial court's order was an impermissible collateral attack on plaintiff's conviction. I also believe it is necessary to clarify the factual background of this case.

During a 24 June 1996 status review, a parole case analyst certified plaintiff's parole eligibility date as 23 September 2012, and noted that his eligibility was limited to 270 days prior to his release date due to the second-degree kidnapping conviction. Subsequently, plaintiff's parole eligibility date was recalculated erroneously as 10 December 2000 due to a computer error. As a result, plaintiff was transferred to a minimum security prison and granted work release.

The computer error was discovered on 26 July 2000. The error was corrected in the "test region" of the Offender Population Unified System ("OPUS")—DOC's inmate tracking system—on 4 August 2000, but the technician noted that he did not know when it would be "placed in production." The 22 August 2000 letter informing plaintiff of a 10 December 2000 parole eligibility date was based on a review of plaintiff's computer record on 11 August 2000—apparently before the correction had been "placed in production." As a result of the correction, plaintiff was returned to medium security, and his work release privilege was revoked. This correction was explained to plaintiff in a letter dated 28 November 2000. No parole eligibility date was given to plaintiff at that time. The 2 September 2011 parole eligibility date stated in the majority's recitation of the facts is shown on a 5 June 2002 OPUS printout prepared as an attachment to a motion for summary judgment served on plaintiff on 17 June 2002 in conjunction with one of plaintiff's federal cases explained below.

Between the time the computer error was corrected and the filing of the instant action, plaintiff made several attempts to clarify his parole eligibility date. Reference to the following facts is not intended to serve as part of our review. These facts are included merely to illustrate plaintiff's history on this subject. Although the facts are not contained within the record on appeal brought before this Court in the instant appeal, as the majority opinion concedes, appellate courts may take judicial notice of their own filings in interrelated proceed-

ings, and on "any occasion where the existence of a particular fact is important[.]" *West v. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (citation omitted). I believe these facts are important to a clear understanding of the factual background of this case. To reiterate, I do not base my opinion on matters outside the record, but provide the information as background for a more complete history of events leading up to the instant appeal.

First, plaintiff filed a state *habeas corpus* action in Mecklenburg County on 3 January 2001, which was denied on 9 February 2001 for failure to exhaust administrative remedies. Second, he filed two prison grievances. The first was filed 28 January 2001 and alleged that plaintiff's case analyst had changed his sentence. It was denied, twice appealed, and ultimately dismissed on 21 March 2001. The second was filed 3 November 2001 and alleged his sentence was not properly reflected in DOC's records. It was denied also, twice appealed, and ultimately denied on 11 January 2002.

On 29 March 2001, plaintiff filed a federal *habeas corpus* action in the Western District of North Carolina ("Western District") pursuant to section 2254 of Title 28 of the United States Code. Plaintiff alleged that the recalculation of his parole eligibility date violated his Fifth Amendment rights and subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The district court granted summary judgment against plaintiff and dismissed plaintiff's *habeas corpus* petition. *Linberger v. York*, No. 3:01CV151-1-MU (W.D.N.C. Mar. 7, 2003).

Plaintiff also filed a federal discrimination action in the Middle District of North Carolina ("Middle District"), pursuant to section 1983 of Title 42 of the United States Code. The federal magistrate stated in his recommendation: "Under § 1983, Plaintiff cannot obtain the principal relief that he appears to seek—recalculation of his parole eligibility date to the December 2000 date that he believes is proper." The magistrate recommended that summary judgment be granted against plaintiff and that the action be dismissed. *Lineberger v. York*, No. 1:02CV210 (M.D.N.C. Mar. 19, 2003). Plaintiff objected to the recommendation, and the district court made a *de novo* determination, adopting the magistrate's recommendation. *Lineberger v. York*, No. 1:02CV210 (M.D.N.C. Apr. 25, 2003).

Both federal actions were appealed. The Western District appeal was dismissed by the Fourth Circuit Court of Appeals in *Lineberger v. York*, 81 Fed. Appx. 460 (4th Cir. 2003), and a petition for rehearing

en banc was denied. *Lineberger v. York*, No. 03-6456 (4th Cir. Dec. 30, 2003). The Middle District decision was affirmed by the Fourth Circuit in *Lineberger v. York*, 76 Fed. Appx. 497 (4th Cir. 2003) and a petition for rehearing *en banc* was denied. *Lineberger v. York*, No. 03-6771 (4th Cir. Nov. 4, 2003).

Plaintiff also has filed five petitions with this Court. The first, filed 14 January 2004 and captioned "Petition to Compel and Instruct," sought an order compelling DOC to comply with his sentence as he understood it—a forty year sentence as an habitual felon, not a forty year sentence for second-degree kidnapping. The petition was dismissed on 3 February 2004 without prejudice in order to allow plaintiff to file it in the Mecklenburg County Superior Court. Apparently unknown to this Court, an identical motion already had been filed in Mecklenburg County on 13 January 2004. It was dismissed on 20 January 2004 for failure to state a cause of action. The second petition, filed with this Court on 3 February 2004, sought review of the 20 January 2004 dismissal of plaintiff's Mecklenburg County "Petition to Compel and Instruct." We denied the petition on 20 February 2004.

Plaintiff filed his third petition on 19 April 2004 and sought a writ of *mandamus* to force the Mecklenburg County court to rule on his 19 February 2004 motion for appropriate relief ("MAR") and petition to withdraw plea. This Court dismissed the petition as moot on 7 May 2004, after the lower court denied the MAR.

Plaintiff sought review of the denial of his 19 February 2004 MAR by way of his fourth petition before this Court, filed 14 May 2004. This Court denied the petition for a writ of *certiorari* to permit our review. In plaintiff's MAR, he sought to withdraw his plea pursuant to North Carolina General Statutes, sections 15A-1415(b)(3) and (5). Section 15A-1415(b)(3) allows a defendant to file an MAR more than ten days after entry of judgment when "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2003). Section 15A-1415(b)(5) permits the filing of an MAR more than ten days after entry of judgment when "[t]he conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(5) (2003). The Mecklenburg County Superior Court had denied plaintiff's MAR on 27 April 2004, concluding that it did not state a cause of action in the cause for which the court could provide relief.

Finally, plaintiff sought a writ of *mandamus* by his fifth petition, filed 14 February 2005, to compel a ruling in Wake County Superior Court as to whether he could proceed as an indigent in his declaratory judgment action. On 1 March 2005, this petition also was denied. Defendant had presented a *pro se* declaratory judgment complaint to the Wake County Superior Court on 25 June 2004. The complaint in the instant case was filed by plaintiff's attorney on 23 November 2005.

The majority contends that because the validity of plaintiff's sentence was not challenged in the declaratory judgment action, there is no collateral attack on the sentence imposed by Judge Lewis in Mecklenburg County on 5 January 1994. A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal; esp[ecially] an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." Black's Law Dictionary 278 (8th ed. 2004).

Although he did not ask the trial court to invalidate his sentence by way of his declaratory judgment action, plaintiff effectively challenged the validity of his sentence in seeking to have his parole eligibility date determined, in part because of his allegation that his sentence violated the Fair Sentencing Act. Conclusions of law numbers 3, 4, 5, and 6 of the trial court's order discuss the statute allegedly violated and conclude that "the most that can be said is that fifteen (15) years of the forty (40) year sentence should be treated as a sentence for kidnapping." The trial court could not reach this conclusion without attacking the sentence imposed on 5 January 1994. The order also concludes that plaintiff's parole had been calculated erroneously, further evidencing the court's intent to invalidate a portion of plaintiff's sentence. Contrary to what the concurring opinion states, the trial court *did* take action or grant relief after making that "observation." The trial court effectively *un*consolidated plaintiff's consolidated sentence.

Once a consolidated sentence is imposed, the offenses are inextricably intertwined. It is impossible for the reviewing court to go back on the cold record and parse out the intentions of the trial court at the time of sentencing. As noted in *State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999), "we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *See State v. Parker*, 143 N.C. App. 680, 684, 550 S.E.2d 174, 177 (2001).

The trial court's conclusions of law numbers 3, 4, 5, and 6 relate to issues that are properly the subject of a motion for appropriate relief. Their interrelationship with the other conclusions of law in the 23 May 2006 order render it impossible for this Court to separate the two for purposes of addressing them.

Central to the trial court's determination in favor of plaintiff was that there was no plea agreement as to the sentence plaintiff would receive and that the sentencing court was required to make findings of aggravating factors prior to imposition of a sentence exceeding the presumptive term for each of the three counts. *See* N.C. Gen. Stat. § 15A-1340.4 (1993) (repealed effective 1 October 1994). However, a review of the Judgment and Commitment included in the record on appeal reveals that Judge Lewis made "no written findings because the prison term imposed is pursuant to a plea arrangement as to sentence under Article . . . G.S. Chapter 15A." Therefore, in order to reach its conclusion that there was no plea agreement, the trial court in the instant case made a finding of fact in direct contravention of the sentencing court's finding on 5 January 1994.

I believe that we are bound by the maxim that "[t]he power of one judge of the superior court is equal to and coordinate with that of another." *Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). As such, it is well-established that one superior court judge "may not correct another's errors of law." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (citation omitted).

As the trial court was bound by the sentencing court's finding that there was a plea agreement, its conclusion that imposition of a sentence exceeding the presumptive term was incorrect. As this Court has noted previously, "Fair Sentencing . . . required written findings upon deviation from the presumptive sentence. However, Fair Sentencing provided an exception to that requirement if the court 'imposed a prison term pursuant to any plea arrangement as to sentence.' " *State v. Bright*, 135 N.C. App. 381, 382, 520 S.E.2d 138, 139 (1999) (quoting N.C. Gen. Stat. § 15A-1340.4(a), (b) (repealed effective 1 October 1994)).

In interpreting plaintiff's parole eligibility date, the trial court was bound by the sentence as given originally. The trial court was without authority to carve a fifteen-year kidnapping sentence out of plaintiff's forty-year consolidated sentence, thus shortening the period of plaintiff's incarceration.

The concurring opinion questions DOC's characterization of plaintiff's forty-year consolidated sentence as a "unified whole," finding no support in *Stonestreet* and *Brown*. I find DOC's argument compelling.

> Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. Presumably this (the single judgment) was based upon consideration of guilt on both charges. But the rule is otherwise when . . . separate judgments, each complete within itself, are pronounced on separate indictments or counts. In such case, a valid judgment pronounced on a plea of guilty to a valid count in a bill of indictment will be upheld.

State v. Stonestreet, 243 N.C. 28, 31, 89 S.E.2d 734, 737 (1955) (citations omitted). DOC contends, and I agree, that in essence, a consolidated sentence is a unified whole—the individual underlying indictments either stand together or fail together. As such, and because plaintiff failed to attack his sentence directly, the forty-year consolidated sentence stands as a whole, with all forty years attributable to his conviction for second-degree kidnapping, just as all forty years are attributable to his conviction for common law burglary, just as all forty years are attributable to his conviction for conspiracy to commit common law burglary.

I find no support to the contrary in *Hemby* or *Nixon*, cited in the concurring opinion. In *Hemby*, there were eight indictments, each carrying a presumptive term of one year. The consolidated sentences totaled eight years. Upon resentencing after six of the indictments were remanded, the new sentence remained eight years. Our Supreme Court held that this amounted to a sentence greater than that originally imposed—one year for each offense. Similarly in *Nixon*, there originally were three indictments carrying presumptive terms of twelve years each, consolidated for a total term of thirty-six years. When one of the indictments was invalidated, the resulting new thirty-six year sentence was held to be in violation of the Fair Sentencing Act.

These cases are inapplicable to the case before us. Here, the three indictments did not carry equal presumptive terms, but two

terms of fifteen years and one of three years. The consolidated sentence did not total the sum of the three presumptive terms. It could not easily be divided into equal portions for each indictment. While in *Hemby and Nixon* there was a logical basis for apportioning the sentence evenly amongst the valid indictments, there is no such logical basis in the case *sub judice*. We simply cannot tell how the sentencing court apportioned the consolidated sentence among the three charges underlying it. The trial court was without authority to reapportion the sentence allocating only fifteen years of the forty to plaintiff's conviction for second-degree kidnapping.

Furthermore, North Carolina General Statutes, section 15A-1027, specifically prohibits such collateral attacks on convictions pursuant to guilty pleas, by stating that "[n]oncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2007). Within the appeal period, the General Assembly has provided three methods to review a guilty plea a defendant believes is inconsistent with his plea agreement. A defendant so aggrieved may (1) withdraw his plea pursuant to North Carolina General Statutes, section 15A-1024; (2) appeal his conviction pursuant to North Carolina General Statutes, section 15A-1444; or (3) file a petition for writ of *certiorari*, as provided in North Carolina General Statutes, section 15A-1444(e). *See State v. Rush*, 158 N.C. App. 738, 740, 582 S.E.2d 37, 38 (2003); N.C. Gen. Stat. §§ 15A-1024, 15A-1444 (2003). Although the majority distinguishes the facts of *Rush* from the instant case, the methods of review stated therein are correct statements of law.

Plaintiff in the case *sub judice* did not attempt to withdraw his plea pursuant to section 15A-1024. He did not appeal his conviction to this Court pursuant to section 15A-1444. Although plaintiff filed various petitions in this Court, none specifically alleged that the sentence he received upon his plea of guilty was in violation of the Fair Sentencing Act. Neither did his MAR allege such violations.

As explained above, plaintiff challenged his original sentence when he alleged in his complaint for declaratory judgment that his sentence violated the Fair Sentencing Act and sought to have the kidnapping charge separated from the other charges for purposes of determining his parole eligibility date. The alleged violation was based on his plea agreement. Because the appeal period has expired, plaintiff cannot now complain that his sentence was not in accord-

ance with his plea agreement, resulting in his kidnapping conviction being for no more than a term of fifteen years.

In part III of the opinion, the majority contends that DOC's interpretation of the parole statutes is not reasonable. The majority agrees with plaintiff that pursuant to DOC's interpretation, a person convicted of second-degree kidnapping as an habitual felon and sentenced to life imprisonment would be eligible for parole after serving twenty years, while the same person sentenced to forty years would not be eligible for parole until ninety days prior to completion of his forty-year term.

Pursuant to the Fair Sentencing Act, a Class C felon could be sentenced to a term of up to fifty years, or life. N.C. Gen. Stat. § 14-1.1(a)(3) (1994) (repealed effective 1 October 1994). Parole for Class C felons with a life sentence was governed by North Carolina General Statutes, section 15A-1371, which allowed parole after having served twenty years. N.C. Gen. Stat. § 15A-1371(a1) (1994) (repealed effective 1 October 1994). However, parole for Class C felons serving up to fifty years was governed by North Carolina General Statutes, section 15A-1380.2, which allowed parole ninety days prior to the expiration of the sentence. N.C. Gen. Stat. § 15A-1380.2(a) (1994) (repealed effective 1 October 1994).

Both parole statutes incorporated the possibility of community service parole, except when the felon was convicted of, *inter alia*, kidnapping. N.C. Gen. Stat. §§ 15A-1371(h), 15A-1380.2(h) (1994) (repealed effective 1 October 1994). With appropriate findings of aggravating factors, a person could have been convicted solely of second-degree kidnapping as an habitual felon and sentenced to fifty years in prison. As such, he would not have been eligible for parole until he had served ninety days less than fifty years. That same person, if sentenced to life, would have been eligible for parole after serving twenty years. DOC's interpretation is not unreasonable; the statutes themselves provide for the seemingly inconsistent result.

The majority concludes that the trial court properly applied the parole eligibility statutes. I believe the issue may be answered simply by examining North Carolina General Statutes, section 15A-1380.2(h) which states that "no prisoner convicted under . . . G.S. 14-39 . . . shall be eligible for community service parole." N.C. Gen. Stat. § 15A-1380.2(h) (1994) (repealed effective 1 October 1994). As

part of his forty-year consolidated sentence, which I do not believe can be broken down into component parts, plaintiff was convicted pursuant to North Carolina General Statutes, section 14-39. Therefore, he is not eligible for community service parole.

Finally, for the reasons stated above, I believe that we must reverse the decision of the trial court. Although the trial court could review the proper application of the parole eligibility statutes by DOC to plaintiff's sentence, here, the trial court impermissibly engaged in a collateral attack on the underlying sentence. The majority misinterprets my position to mean that plaintiff was not entitled to any relief if DOC erroneously calculated plaintiff's parole eligibility date. However, I believe that plaintiff would be entitled to relief if DOC erroneously calculated his parole eligibility date *based on his original forty year consolidated sentence, as imposed on 5 January 1994*. It is because the trial court impermissibly altered plaintiff's sentence, in essence *un*consolidating it, that the order effected a collateral attack.

Accordingly, I would reverse.

RANDY B. FREEMAN, EMPLOYEE, PLAINTIFF v. J.L. ROTHROCK, EMPLOYER, AND NORTH AMERICAN SPECIALTY, CARRIER, AEQUICAP CLAIMS SERVICES, INC. (FORMERLY CLAIMS CONTROL, INC.) ADMINISTRATOR, DEFENDANTS-APPELLANTS

No. COA07-269

(Filed 4 March 2008)

1. Appeal and Error— preservation of issues—motion to dismiss made in brief

Plaintiff's motion in his brief to dismiss defendants' appeal was not properly before the Court of Appeals because such motions may not be raised in a brief, but instead must be made in accordance with N.C. R. App. P. 37.

2. Appeal and Error— preservation of issues—failure to assign error to findings of fact—findings deemed binding

Defendants failed to assign error to the Full Commission's findings of fact numbers 1 through 9 in a workers' compensation case, and therefore, these findings of fact are deemed binding on appeal.

3. Workers' Compensation— Larson test—misrepresentations barred right to compensation

The trial court erred in a workers' compensation case by concluding that plaintiff employee's misrepresentations did not bar his right to recover compensation, because: (1) the Larson test provides that an employee may be barred from recovering workers' compensation benefits as a result of a false statement at the time of hiring when the employer proves the employee knowingly and willfully made a false representation as to his physical condition, the employer relied upon the false representation and this reliance was a substantial factor in the hiring, and there was a causal connection between the false representation and the injury; (2) although there appears to be no specific statutory basis for the Larson test, it has authority in the common law doctrines of fraud in the inducement and equitable estoppel, numerous state courts have adopted it, a majority of states that have considered this issue have judicially recognized intentional misrepresentation to gain employment as an affirmative defense even in the absence of a specific statute, and intentional misrepresentations during the hiring process as to a prior medical condition is the type of conduct which cannot be rewarded; and (3) applying the Larson test to this case, the full Commission found as fact that plaintiff misrepresented his physical condition at the time of hiring, and plaintiff conceded that the first criterion was satisfied; the evidence presented to the full Commission demonstrated defendant relied upon plaintiff's false representation and that the reliance was a substantial factor in the hiring; and several doctors testified that plaintiff's undisclosed medical condition increased his risk of the back injury at issue, and common sense dictated that a prior injury of the nature suffered by defendant would create a predisposition to further injury considering the nature of the work involved.

Judge WYNN dissenting.

Appeal by defendants from Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 9 November 2006. Heard in the Court of Appeals 18 September 2007.

Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer, for defendants-appellants.

JACKSON, Judge.

J.L. Rothrock ("defendant-employer"), its insurance carrier, North American Specialty, and its insurance administrator, Aequicap Claims Services, Inc. (collectively, "defendants") appeal from an order of the Full Commission of the North Carolina Industrial Commission ("Full Commission") awarding workers' compensation benefits to Randy B. Freeman ("plaintiff"). For the reasons stated below, we reverse.

Plaintiff has a history of lower back problems, having experienced back injuries in 1992 and 1996 and having filed workers' compensation claims with respect to both injuries. As a result of the lower back injury in 1996, plaintiff was assigned a ten percent permanent partial impairment rating to his back and was restricted to performing light- to medium-duty work, including: (1) lifting no more than thirty-five pounds occasionally; (2) lifting no more than fifteen pounds frequently; (3) lifting no more than seven pounds continuously; and (4) limited sitting, bending, driving, and climbing. Plaintiff's work restriction was based upon a general estimate of a truck driver job as opposed to a specific job description. Plaintiff acknowledged in his testimony that, as a result of these restrictions, he was (1) incapable of continuing to drive a truck for B.B. Walker, his employer at the time, and (2) advised to seek another line of employment.

In early 2000, plaintiff applied for employment with defendant-employer, performing substantially the same work "[b]ecause it—quite a time had passed there and it was—it was good. . . . I could do basically pretty much what I wanted to do, up to a certain extent." At the time he applied for the position, plaintiff was aware that he remained restricted to light- to medium-duty work, notwithstanding the fact that the job description form prepared by defendant-employer expressly stated: "This is a strenuous position which requires the ability to sit, stand, bend, stoop, reach, climb, push, pull, and live under adverse conditions . . . ."

On 9 February 2000, plaintiff completed, as part of defendant-employer's application process, a medical history questionnaire. On the questionnaire, plaintiff denied (1) suffering from any prior health conditions, including backache or a "herniated intervertebral disk (slipped disk)"; (2) the existence of "any health-related reason" that may prevent plaintiff from performing the job for which he was applying; (3) having "any physical defects" or "work limitations" that would

have prevented him "from performing certain kinds of work"; (4) having "any disabilities or impairments" that may have affected his performance in the position for which he was applying; and (5) having ever filed a workers' compensation claim. Plaintiff later testified that he made these false representations on the questionnaire because he was concerned that he would not be hired if he told the truth. Specifically, plaintiff stated, "The point was I'd go fill out an application. At that time, they'd ask if you've ever been injured, or you'd ever been hurt on a job, or if you've ever drawn workers' comp and I'd put 'yes,' and nobody ever hired me."

Also on 9 February 2000, plaintiff presented to Dr. Robert Williford ("Dr. Williford") for a Department of Transportation physical examination—a prerequisite for hiring. Dr. Williford testified that as part of such an examination, he interviews the patient and asks for a medical history, in part because there are "conditions that cannot be discovered based purely on a physical exam." At the top of his examination forms is a section entitled "Health History," in which various injuries and illnesses are listed. Next to each injury or illness are two boxes, one for "Yes" and one for "No." Dr. Williford testified that none of the boxes were checked on the examination form for plaintiff's 9 February 2000 examination that Dr. Williford retained in his files.[1] Dr. Williford stated that he always asks if the patient has had any serious injuries and explained that if plaintiff had informed him of a prior injury, he probably would have checked the appropriate box on the examination form.

In June 2000, after plaintiff executed the job description form describing the position as "strenuous," defendant-employer hired plaintiff. Less than two years later, on 11 March 2002, plaintiff sustained an injury by accident to his back while cranking a dolly in the course and scope of his employment with defendant-employer. Plaintiff experienced significant pain in his lower back, and over time, he also developed problems with his legs. Plaintiff reported the incident to defendant-employer within fifteen to twenty minutes after its occurrence. Defendants admitted compensability of the accident, and as of 12 March 2002, plaintiff began receiving ongoing total disability payments of $431.32 per week.

On 23 December 2002, defendants filed a Form 24 Application to Terminate or Suspend Payment of Compensation, contending that

1. All of the "No" boxes, however, are checked on the form contained in the exhibits submitted with the record on appeal.

plaintiff had refused an offer of suitable employment. Defendants' Form 24 was disapproved by order entered 3 February 2003 by Special Deputy Commissioner Chrystina S. Franklin ("Special Deputy Commissioner Franklin"). Defendants filed another Form 24 on 5 March 2003, and by order entered 22 April 2003, Special Deputy Commissioner Franklin indicated that she was unable to reach a decision, noting that "[d]ue to the particular disputed issue, evidence will need to be taken, and the matter should proceed to hearing."

Following a hearing on 25 July 2003, Deputy Commissioner Bradley W. Houser ("Deputy Commissioner Houser") entered an Opinion and Award in favor of plaintiff. Defendants appealed to the Full Commission, and on 9 November 2006, the Full Commission entered an Opinion and Award affirming Deputy Commissioner Houser's Opinion and Award. Chairman Buck Lattimore, dissenting in part from the Full Commission's Opinion and Award, stated that "[t]he majority has erred in finding that plaintiff has established entitlement to ongoing disability payments . . . [because] [t]he competent evidence of record fails to show that plaintiff is completely incapable of performing any work." Defendants filed timely notice of appeal to this Court.

[1] As a preliminary matter, we note that plaintiff has included in his brief a motion to dismiss defendants' appeal. It is well-established, however, that "[s]uch motions may not be raised in a brief, but rather must be made in accordance with [Rule 37 of the North Carolina Rules of Appellate Procedure]." *Warren v. Warren*, 175 N.C. App. 509, 512, 623 S.E.2d 800, 802 (2006). Plaintiff's motion is not properly before this Court, and therefore, we decline to address it.

[2] Our standard of review from a decision of the Full 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. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Ramsey v. S. Indus. Constructors, Inc., 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (internal quotation marks and citations omitted), *disc. rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006). Additionally, in the instant case, defendants have failed to assign error to the Full Commission's findings of fact numbers 1 through 9, and therefore,

these findings of fact are deemed binding on appeal. *See McGhee v. Bank of Am. Corp.*, 173 N.C. App. 422, 427, 618 S.E.2d 833, 837 (2005).

[3] Defendants first argue that the Full Commission erred in concluding that plaintiff's misrepresentations did not bar his right to recover compensation. We agree.

In its Opinion and Award, the Full Commission found "that plaintiff had applied for a job with defendant-employer on June 1, 2000, had been hired conditionally, and had been given a medical questionnaire to complete to ensure he had the physical ability to perform its truck driving job." The Full Commission further found that

> [i]n completing the medical questionnaire, plaintiff made no reference to prior back injuries he had or to workers' compensation claims associated with those injuries. While his responses to most of the questions were either accurate or ambiguous, the negative answers to the direct questions as to whether he had ever had a backache or made a workers' compensation claim were clearly incorrect.

Defendants, therefore, argue that plaintiff should be barred from recovering based upon a three-part test from Professor Larson's treatise on workers' compensation ("the Larson test").

Pursuant to the Larson test, an employee may be barred from recovering workers' compensation benefits as a result of a false statement at the time of hiring when the employer proves:

> (1) The employee must have knowingly and wilfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

3 *Larson's Workers' Compensation Law* § 66.04 (2006) (footnotes omitted).

This Court previously has expressed disapproval for the Larson test, explaining that "neither the Industrial Commission nor this Court has the authority to adopt such a defense, if it is not found in the Workers' Compensation Act." *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 115, 587 S.E.2d 440, 443 (2003), *disc. rev. denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). The Court in *Hooker*, however, expressly did not reach the merits of such an argument, and there-

fore, we are not bound by its discussion of the Larson test. *See Debnam v. N.C. Dep't of Corr.*, 334 N.C. 380, 386, 432 S.E.2d 324, 329 (1993) ("[S]tatements in the nature of *obiter dictum* are not binding authority."). Accordingly, neither this Court nor our Supreme Court has ruled conclusively on the Larson test.[2]

"The Workers' Compensation Act is a compromise arrived at through the concessions of employees and employers alike." *Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 92, 318 S.E.2d 534, 538 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). "The [A]ct should be construed liberally, to the end that rights of parties may be fully protected. On the other hand, it should not be so interpreted or the procedure thereunder be of such a nature as to jeopardize the substantial rights of either party." *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 35, 195 S.E. 34, 36 (1938).

It is well-established that our "[Workers' Compensation] Act applies only where the employer-employee relationship exists." *Hicks v. Guilford County*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966). Pursuant to North Carolina General Statutes, section 97-2,

> [t]he term "employee" means every person engaged in an employment *under any appointment or contract of hire or apprenticeship*, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . .

N.C. Gen. Stat. § 97-2(2) (2005) (emphasis added).

Although "[o]ur Supreme Court 'has warned against any inclination toward judicial legislation' in the construction of the Workers' Compensation Act," *Hooker*, 161 N.C. App. at 115, 587 S.E.2d at 443 (quoting *Johnson v. S. Indus. Constructors*, 347 N.C. 530, 536, 495 S.E.2d 356, 359 (1998)), it is well-settled that "in construing the provisions of this State's Workers' Compensation Act, common law rules . . . remain in full force and continue to apply in North Carolina,

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2. Although this Court rejected the Larson test in an unpublished opinion, *McCollum v. Atlas Van Lines*, No. COA03-897, 2004 N.C. App. LEXIS 1651, at *20 (N.C. Ct. App. Sept. 7, 2004), *disc. rev. denied*, 359 N.C. 190, 607 S.E.2d 276 (2005), it is well-established that unpublished opinions are not binding upon this Court. *See United Servs. Auto. Ass'n. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. rev. denied*, 347 N.C. 141, 492 S.E.2d 37 (1997). Therefore, we are free to reconsider the issue.

unless specifically abrogated or repealed by our General Assembly or Supreme Court." *Tise v. Yates Constr. Co., Inc.*, 122 N.C. App. 582, 587, 471 S.E.2d 102, 106 (1996), *aff'd as modified*, 345 N.C. 456, 480 S.E.2d 677 (1997). Therefore, "[w]hether an employer-employee relationship existed at the time of the injury is to be determined by the application of ordinary common law tests." *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001). The first step in determining "whether an employer-employee relationship exists [is] . . . '*[w]hat are the terms of the agreement—that is, what was the contract between the parties[?]*' " *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 702, 573 S.E.2d 233, 235 (2002) (emphasis in original) (alterations added) (quoting *Askew v. Leonard Tire Co.*, 264 N.C. 168, 172, 141 S.E.2d 280, 283 (1965)).

Although there appears to be no specific statutory basis for the Larson test, we find authority for the test in the common law doctrine of fraud in the inducement, the elements of which closely parallel those suggested by Professor Larson.

> The essential elements of fraud in the inducement are: (i) that defendant made a false representation or concealed a material fact he had a duty to disclose; (ii) that the false representation related to a past or existing fact; (iii) that defendant made the representation knowing it was false or made it recklessly without knowledge of its truth; (iv) that defendant made the representation intending to deceive plaintiff; (v) that plaintiff reasonably relied on the representation and acted upon it; and (vi) plaintiff suffered injury.

Harton v. Harton, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). Fraud in the inducement renders a contract void, *see Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 464, 323 S.E.2d 23, 25 (1984), and it is axiomatic that the employer-employee relationship is one based in principles of contract. *See Edwards v. Seaboard & Roanoke R.R. Co.*, 121 N.C. 490, 28 S.E. 137 (1897) (recognizing the contractual nature of the employment relationship). Therefore, fraud in the inducement of employment would render the employment contract void. In the absence of a valid employment contract, a claimant would fail to meet the statutory definition of an "employee" and therefore would lack standing under the Workers' Compensation Act. As explained by the Supreme Court of Alabama,

> [i]t is not a usurpation of the legislative function for this Court to conclude that misrepresentation on an employment application as to prior physical injuries is a bar to recovery of worker's compensation benefits. . . . [I]t has long been a part of the common law that fraud in the inducement is a good defense to an action on a contract by one of the contracting parties. That worker's compensation bears a contractual relationship is no longer arguable. Thus, we hold that if the evidence supports a finding that an employee, in entering into the employment relationship, intentionally misrepresented the existence of a prior injury, then that material misrepresentation, if relied upon by the employer, will bar a claim for worker's compensation benefits if the employer can establish a causal relationship between the misrepresentation and the injury.

Ex Parte S. Energy Homes, Inc., 603 So. 2d 1036, 1039 (Ala. 1992) (per curiam) (internal citations omitted). *But see Hilt Truck Lines, Inc. v. Jones*, 281 N.W.2d 399, 403 (Neb. 1979) (finding that such misrepresentations render an employment contract voidable, not void).

We also find support for adoption of the Larson test in the common law doctrine of equitable estoppel. *See, e.g.*, *Lamay v. Roswell Indep. Sch. Dist.*, 882 P.2d 559, 564 (N.M. Ct. App. 1994) ("We believe that the Larson rule derives its essential ingredients from the principle of equitable estoppel rather than contract law."). *But see Stovall v. Sally Salmon Seafood*, 757 P.2d 410, 416 (Or. 1988) (noting that most of the cases adopting the Larson test "do not mention estoppel but discuss whether the claimant must be barred from recovery by reason of fraud or misrepresentation"). In fact, some courts have looked to *both* fraud and estoppel in adopting the Larson test. *See Divita v. Hopple Plastics*, 858 S.W.2d 214, 215 (Ky. Ct. App. 1993) ("What seems to be emerging, in place of a conceptual approach relying on purely contractual tests, is a common-sense rule made up of a melange of contract, causation, and estoppel ingredients." (internal quotation marks and citation omitted)).[3] In North Carolina, " '[t]he law of estoppel applies in [workers'] compensation proceedings as in all other cases.' " *Watkins v. Cent. Motor Lines, Inc.*, 279 N.C. 132, 139, 181 S.E.2d 588, 593 (1971) (alterations added) (quoting *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953)); *see also Gore v. Myrtle/Mueller*, 362 N.C. 29, 37, 653 S.E.2d 400, 408 (2007)

3. The Larson test was codified in Kentucky shortly after *Divita* was issued. *See* Ky. Rev. Stat. Ann. § 342.165(2).

(noting "the general permissibility of estoppel under our workers' compensation law"). As our Supreme Court has explained,

> "[t]he doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play."

Watkins, 279 N.C. at 139, 181 S.E.2d at 593 (omission in original) (quoting *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937)); *see also Fed. Copper & Aluminum Co. v. Dickey*, 493 S.W.2d 463, 464 (Tenn. 1973) ("A wrongdoer is precluded from profiteering from his fraud or wilful misrepresentation in an ordinary civil suit.").

Furthermore, we note that the Larson test has been adopted by numerous state courts,[4] and as the Virginia Court of Appeals explained over twenty years ago, the Larson test "constitutes the majority view in this country." *McDaniel v. Colonial Mech. Corp.*, 350 S.E.2d 225, 227 (Va. Ct. App. 1986).[5] Additionally, notwithstanding

4. *See, e.g.*, *Shippers Transp. of Ga. v. Stepp*, 578 S.W.2d 232, 233 (Ark. 1979) (en banc); *Ex Parte S. Energy Homes, Inc.*, 603 So. 2d at 1039; *Air Mod Corp. v. Newton*, 215 A.2d 434, 440 (Del. 1965); *Martin Co. v. Carpenter*, 132 So. 2d 400, 404 (Fla. 1961); *Ga. Elec. Co. v. Rycroft*, 378 S.E.2d 111, 114 (Ga. 1989); *Divita*, 858 S.W.2d at 215; *Shaw's Supermarkets, Inc. v. Delgiacco*, 575 N.E.2d 1115, 1119 (Mass. 1991); *Jewison v. Frerichs Constr.*, 434 N.W.2d 259, 261 (Minn. 1989) (en banc); *Hilt Truck Lines, Inc.*, 281 N.W.2d at 403; *Sanchez v. Mem. Gen. Hosp.*, 798 P.2d 1069, 1071 (N.M. Ct. App.), *cert. denied*, 798 P.2d 1039 (N.M. 1990); *Cooper v. McDevitt & Street Co.*, 196 S.E.2d 833, 835 (S.C. 1973); *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 828 (S.D. 1994); *Fed. Copper & Aluminum Co.*, 493 S.W.2d at 465; *McDaniel v. Colonial Mech. Corp.*, 350 S.E.2d 225, 227 (Va. Ct. App. 1986); *Volunteers of Am. v. Indus. Comm'n*, 141 N.W.2d 890, 895 (Wis. 1966); *Long v. Big Horn Constr. Co.*, 295 P.2d 750, 754 (Wyo. 1956). *See generally* Tracy A. Bateman, *Eligibility for Workers' Compensation as Affected by Claimant's Misrepresentation of Health or Physical Condition at Time of Hiring*, 12 A.L.R. 5th 658 (1993); William J. Collins III, *An Exception for Deception: Why* McKennon *Should not be Extended to Employment Application Misrepresentations of Pre-Existing Injuries*, 37 S. Tex. L. Rev. 779, 809-10 (1996).

5. In referencing Virginia caselaw, we note that "at the time the general assembly adopted the North Carolina Workmen's Compensation Act it had before it the Virginia Workers' Compensation Act. The Virginia act was identical to the bill originally presented to the North Carolina general assembly . . . ." J. Cameron Furr, Jr., Whitley v. Columbia Lumber Manufacturing Co.*: Abolishing the Exclusive Remedy Requirement for the Scheduled Injuries Section of the North Carolina Workers' Compensation Act*, 66 N.C. L. Rev. 1365, 1369 (1988). Our Act's similarity to Virginia's statute has survived the decades since its enactment. *Cf. Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1207 (4th Cir. 1986) ("The Virginia Workers' Compensation Act was modeled after the analogous statute in Indiana."); *Riley v. Debaer*, 149 N.C. App. 520, 528, 562 S.E.2d 69, 73 (2002) (Eagles, C.J., dissenting) ("The Indiana . . . workers' compensation act[] [is] substantially similar to our Act.").

plaintiff's arguments with respect to judicial legislation, "[a] majority of the states that have considered this issue have *judicially* recognized intentional misrepresentation to gain employment as an affirmative defense even in the absence of a specific statute." *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 828 (S.D. 1994) (emphasis added).[6]

For over the last eighteen years, North Carolina has been surrounded by states that have adopted the defense. *See Ga. Elec. Co.*, 378 S.E.2d at 114; *Cooper*, 196 S.E.2d at 835; *Fed. Copper & Aluminum Co.*, 493 S.W.2d at 465; *McDaniel*, 350 S.E.2d at 227.[7] However, we refuse to continue to countenance fraud perpetrated upon employers in our state, and as aptly noted by the South Dakota Supreme Court, intentional misrepresentations during the hiring process as to a prior medical condition "is the type of conduct which cannot be rewarded through any liberal interpretation of the worker's compensation laws." *Oesterreich*, 511 N.W.2d at 828-29; *see also Dressler*, 262 N.W.2d at 684 (Coleman, J., dissenting) ("The intriguing effect of my colleague's opinion is that it now legally pays to lie—and it is the consumer who bears the cost."). Accordingly, we are persuaded that the three-pronged Larson test for misrepresentations made by a prospective employee at the time of hiring with respect to his or her medical condition, with the burden of proving each of the prongs resting with the employer, is suitable for application in the instant case.

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6. Several courts, however, have held—or at least implied—that the Larson test must be adopted legislatively, rather than judicially. *See, e.g.*, *Marriott Corp. v. Indus. Comm'n*, 708 P.2d 1307, 1312 (Ariz. 1985) (en banc); *Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (en banc); *Teixeira v. Kauikeolani Children's Hosp.*, 652 P.2d 635, 636 (Haw. Ct. App. 1982); *Dressler v. Grand Rapids Die Casting Corp.*, 262 N.W.2d 629, 634 (Mich. 1978); *Goldstine v. Jensen Pre-Cast*, 729 P.2d 1355, 1356 (Nev. 1986); *Akef v. BASF Corp.*, 658 A.2d 1252, 1255-56 (N.J. 1995); *Harris v. Syracuse Univ.*, 564 N.Y.S.2d 227, 228 (N.Y. App. Div. 1990); *H.J. Jeffries Truck Line v. Grisham*, 397 P.2d 637, 643 (Okla. 1964); *Stovall*, 757 P.2d at 417; *Blue Bell Printing v. Workmen's Comp. Appeal Bd.*, 539 A.2d 933, 936 (Pa. Commw. Ct. 1988); *see also State Dep't of Highways & Pub. Transp. v. Thrasher*, 805 S.W.2d 798, 800 (Tex. Ct. App. 1990) (declining to extend the misrepresentation defense to all injuries when the legislature only provided for a misrepresentation defense with respect to occupational diseases).

7. The North Carolina's Workers' Compensation Act was enacted contemporaneously with the analogous statutes as originally enacted in these states—Virginia in 1918, Tennessee in 1919, Georgia in 1920, and South Carolina in 1936. It also is notable that South Carolina, which has adopted the Larson test, modeled their worker's compensation statute after North Carolina's statute. *See Pressley v. REA Constr. Co., Inc.*, 648 S.E.2d 301, 304 (S.C. Ct. App. 2007) ("Inasmuch as our Worker's Compensation Act is modeled after the North Carolina Act, we naturally look to North Carolina's decisions in interpreting similar provisions.").

Applying the Larson test to the case *sub judice*, defendants had the burden first to demonstrate that plaintiff knowingly and wilfully made a false representation as to his physical condition at the time he was hired. In finding of fact number 10, the Full Commission found as fact that plaintiff misrepresented his physical condition at the time of hiring:

> In completing the medical questionnaire, plaintiff made no reference to prior back injuries he had had or to workers' compensation claims associated with those injuries. While his responses to most of the questions were either accurate or ambiguous, the negative answers to the direct questions as to whether he had ever had a backache or made a workers' compensation claim were *clearly incorrect*.

(Emphasis added). Although this finding arguably is insufficient for a determination that plaintiff's false representation was knowingly and wilfully made, plaintiff nevertheless concedes in his brief "that the first criterion on [sic] Larson's test was satisfied."

With respect to the second prong of the Larson test, defendants had the burden of demonstrating that defendant-employer relied upon plaintiff's false representation and that its reliance was a substantial factor in the hiring. Here, the Full Commission found that Gerald Robertson ("Robertson"), defendant-employer's safety and recruiting director, "testified that plaintiff would have been hired and given the job, even if he had answered all the questions accurately. Robertson further testified that the question about prior worker's [sic] compensation claims was superfluous."

First, we agree with the Full Commission's characterization of the question concerning prior workers' compensation claims. Robertson testified that as of 25 July 2003, defendant-employer had approximately seventeen employees with prior workers' compensation claims. Robertson further testified: "As far as previously being hired, as long as it doesn't affect their ability to perform positions that we have available, we don't really take that into consideration." Additionally, the following colloquy transpired between plaintiff's attorney and Robertson:

> [PLAINTIFF'S ATTORNEY]: I believe, Mr. Robertson, you said that—that if somebody had answered "yes" to the workers' comp claim question, then you'd go back to some other part of the—of

> the form and look at the physical condition he's talking about with respect to the workers' comp claim. And the question I have is what does the fact that that injury was the result of a workers' comp claim do to change—change his physical condition when you're trying to assess his ability to do the job?
>
> [ROBERTSON]: Probably nothing.
>
> [PLAINTIFF'S ATTORNEY]: So that's sort of a surplus question?
>
> [ROBERTSON]: Well, it could be, I suppose, but we would certainly want to know what he had hurt on his self to make sure that we were not going to place him into some type of a job position that he would get hurt again.
>
> [PLAINTIFF'S ATTORNEY]: But you'd get that information from all the other questions except for [the question on prior workers' compensation claims], is that accurate?
>
> . . . .
>
> [ROBERTSON]: In most cases, yes.

Accordingly, the Full Commission's finding that "the question about prior worker's [sic] compensation claims was superfluous" was supported by competent evidence.

However, we disagree with the Full Commission's finding that defendant-employer did not rely upon the false representations made by plaintiff in hiring plaintiff. Robertson was asked point-blank whether defendant-employer would have hired plaintiff had plaintiff disclosed his work restrictions:

> [DEFENDANTS' ATTORNEY]: Mr. Robertson, assuming that the medical evidence that's admitted in this case shows that [plaintiff] was limited to a light to medium demand level indicating he could lift thirty-five pounds occasionally, fifteen pounds frequently, seven pounds continuously, was limited to occasional sitting . . . which indicates only a third of the day should be spent sitting, if you had known of these prior restrictions, would you have hired [plaintiff] to perform a job as a truck driver?
>
> [ROBERTSON]: No.

Robertson further noted that "[i]t would have been very difficult . . . to make reasonable accommodations for [plaintiff] . . . because of

the driving restrictions for one, and secondly, not knowing when—specifically when and where or if a driver is going to be required to load and/or unload and/or what type of product that that would even involve."

The Full Commission appears to have based its finding on one line of Robertson's testimony, during which he equivocated on the issue:

> [PLAINTIFF'S ATTORNEY]: So is it your testimony that you don't know what you would have done, or is it your testimony that you would not have hired him to drive for Rothrock, or is it your testimony that you would have allowed him to drive for Rothrock?
>
> [ROBERTSON]: It's very—I feel this is very a [sic] hypothetical. I suppose I would have hired him. I don't know.
>
> [PLAINTIFF'S ATTORNEY]: Okay, thank you.

However, Robertson immediately thereafter clarified his answer:

> [ROBERTSON]: I did hire him. Based upon no information, I hired him.
>
> [PLAINTIFF'S ATTORNEY]: But I asked you the question concerning if you had had the information that you think is full information and I believe your answer was that you probably would have hired him anyway, is that correct?
>
> [ROBERTSON]: Again, it's a hypothetical question. I don't know what I would have done.
>
> [PLAINTIFF'S ATTORNEY]: Well, it's not hypothetical because you now have the information. *If you had the information then that you have now concerning his prior back problems as you perceive them, would he have been hired or not?*
>
> [ROBERTSON]: *Probably not.*
>
> [PLAINTIFF'S ATTORNEY]: Probably not?
>
> [ROBERTSON]: Probably not.

(Emphases added). Later in his testimony, Robertson elaborated on defendant-employer's reliance on plaintiff's honesty with respect to plaintiff's physical condition, stating, "We hired him based on—from what he told us in his application and on these forms that he filled out about his limitations . . . . That's what we hired him on." Finally,

Robertson stated unequivocally at the end of his testimony that defendant-employer would not have hired plaintiff but for plaintiff's false representations as to his prior medical condition:

> [DEFENDANT'S ATTORNEY]: [I]f [plaintiff] had indicated to you he was physically able to perform the job but those medical restrictions were in place, what would your decision have been regarding [plaintiff]'s employment?
>
> [ROBERTSON]: I would not have hired him.

The evidence presented to the Full Commission demonstrates that defendant-employer relied upon plaintiff's false representation and that defendant-employer's reliance was a substantial factor in the hiring. The Full Commission, therefore, erred in finding that defendant-employer did not rely upon plaintiff's misrepresentations.

Finally, defendants had the burden under the third prong of the Larson test to demonstrate the existence of a causal connection between the false representation and the injury. The Full Commission stated in finding of fact number 12 that "Doctors Ramos, Aluiso, and Rogers all testified, and the Full Commission finds as fact, that plaintiff's prior back problems did not increase his risk of sustaining the type of injury he sustained on March 11, 2002." This finding, however, is not supported by competent evidence.

First, Dr. Richard D. Ramos ("Dr. Ramos") testified that he could not state with any certainty whether plaintiff's 11 March 2002 injury was an aggravation of a prior injury or a new injury. Regardless, Dr. Ramos testified that plaintiff was "definitely at risk for reinjury in his lower back" as a result of his prior injuries. Dr. Ramos explained that plaintiff probably should have stayed away from a truck driving job, noting that such a job would be "a more strenuous job than the light-medium level" work restrictions to which plaintiff was assigned and that working outside assigned restrictions may place an employee "at an increased risk for additional injury or aggravation." Dr. Ramos further explained that "somebody with [plaintiff]'s condition who performs a heavy-duty job such as this for a 19-month period . . . can [absolutely] make them [sic] more susceptible to another injury." Finally, Dr. Ramos testified that the type of activity in which plaintiff was engaging for defendant-employer "certainly could" aggravate plaintiff's condition.

Next, Dr. Frank V. Aluiso ("Dr. Aluiso") was asked during his deposition why work restrictions are assigned to persons with a

back condition, such as that experienced by plaintiff. Dr. Aluiso explained that

> [p]art of it is that there's, with a degenerative disk or bulging disk, there would be a higher risk for recurrent back injuries if they're on a job that has no restrictions with respect to the amount they lift or how frequently they're lifting. They're just more prone to getting a recurrent back injury.

Dr. Aluiso then noted that by returning to a truck-driving job, plaintiff was working outside his work restrictions. He further explained that by returning to a "heavy-duty truck-driving job" after the 1996 incident, plaintiff placed himself "at high risk for reinjuring himself." Dr. Aluiso noted that the fact that plaintiff worked for nearly two years without incident was not dispositive with respect to the likelihood of injury. Specifically, he explained that plaintiff "had documented evidence of degenerative disk as well as bulging disk, so he could reinjure himself at any time. It doesn't matter if it's a year or five years. It could be anytime." Dr. Aluiso opined that any number of activities, including pushing, pulling, lifting, cranking, and driving, could aggravate plaintiff's back condition.[8] Ultimately, contrary to the Full Commission's finding, Dr. Aluiso testified that plaintiff "was at increased risk of having problems in his back" and that it was "likely with [plaintiff's] condition that an exacerbation would have occurred at some point."

Testimony by Dr. Tate Rogers ("Dr. Rogers") also demonstrates that plaintiff's prior back injury increased his risk of sustaining the 11 March 2002 injury or aggravation, thereby contradicting the Full Commission's finding of fact. Although plaintiff quotes Dr. Rogers as explaining that it would be speculative to say that the heaviness of plaintiff's other work activities increased the risk of injury while cranking the dolly, the issue is not whether other aspects of the job increased his risk of injury, but whether his undisclosed medical condition increased his risk of injury. *See* 3 *Larson's Workers' Compensation Law* § 66.04 (2006) ("There must have been a causal connection *between the false representation and the injury*."

8. Plaintiff contends that Dr. Aluiso only testified that plaintiff had an increased risk of injury due to lifting, as opposed to cranking a dolly, and that Dr. Aluiso acknowledged that plaintiff's work restrictions did not mention turning a hand crank. Dr. Aluiso, however, responded to a question concerning the risk posed by a cranking motion by saying that "if there's a lot of pushing and pulling, that's an activity that could also aggravate the back." Later in his deposition, Dr. Aluiso stated that "lifting up to 70 pounds, a lot of bending and stooping, [and] *the operating of the crank* . . . most likely" would have exacerbated plaintiff's condition at some point. (Emphasis added).

(emphasis added)). Dr. Rogers clearly provided his opinion on this issue:

> [DR. ROGERS]: . . . But I would tend to agree that, given his back condition, truck driving would not be the best type of work for him to be doing.
>
> [DEFENSE COUNSEL]: And so assuming that an orthopedist in 1996 made that recommendation, you would be inclined to concur with that?
>
> [DR. ROGERS]: I would, yes.
>
> [DEFENSE COUNSEL]: And would, in your opinion, a recommendation such as that back in 1996, does that reflect the fact that if he were to return to a truck-driving position, he was at a higher risk of reinjury?
>
> [DR. ROGERS]: In my opinion, yes.
>
> [DEFENSE COUNSEL]: And if after the—[plaintiff] has actually had two prior work injuries in '92 and '96. And if after the 1996 incident, [plaintiff] was to return to a heavy duty or strenuous truck-driving position and suffered an injury, would that be something you would see as foreseeable based upon his condition?
>
> [DR. ROGERS]: I don't know if you can say it's "foreseeable." *You can certainly say he was at increased risk for it. He would definitely be at increased risk, and then I wouldn't be surprised if he did suffer a back injury*; but I couldn't predict a back injury.

(Emphasis added). Dr. Rogers also agreed with Dr. Aluiso's assessment that plaintiff's injury or aggravation could have happened at any time and that the nearly two years of injury-free work did not alter the fact that plaintiff was at an increased risk for injury. Specifically, Dr. Rogers stated that "[a] person can have a ruptured lumbar disk for 30 years and work for 30 years and never have any trouble out of it, but that doesn't change the fact that they're still—they're in a high-risk group. They just happen to luck out."

Although the Full Commission found that plaintiff's prior back problems did not increase his risk of the 11 March 2002 injury, this finding was not supported by competent evidence. Dr. Ramos, Dr. Aluiso, and Dr. Rogers all testified to the effect that plaintiff's undisclosed medical condition increased his risk of the back injury at issue. Additionally, we note, as did the Tennessee Supreme Court,

that "[c]ommon sense dictates that a prior injury of the nature suffered by defendant would create a predisposition to further injury considering the nature of the work involved." *U.S. Fid. & Guar. Co. v. Edwards*, 764 S.W.2d 533, 536 (Tenn. 1989). Defendants, therefore, satisfied the third and final prong of the Larson test.

Because defendants satisfied their burden of proof under the Larson test, plaintiff is barred from workers' compensation benefits for his injury sustained on 11 March 2002. Accordingly, the Full Commission erred in awarding workers' compensation benefits to plaintiff. Additionally, because we reverse the Opinion and Award of the Full Commission, we need not reach defendants' remaining assignments of error. *See Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 267, 545 S.E.2d 485, 491, *aff'd*, 354 N.C. 355, 554 S.E.2d 337 (2001) (per curiam).

Reversed and Remanded.

Judge Hunter concurs.

Judge Wynn dissents in a separate opinion.

WYNN, Judge, dissenting.

In this case, the majority adopted the *Larson* test and in applying the test, concluded that Mr. Freeman is barred from receiving workers' compensation benefits for his injury because of his misrepresentations at the time of his hiring. Because I disagree with the adoption of the *Larson* test, I respectfully dissent.

In published and unpublished opinions, this Court has rejected the *Larson* test. In *Hooker*, the defendants argued that this Court should adopt a misrepresentation defense in workers' compensation cases. *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 115, 587 S.E.2d 440, 443 (2003), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). In response, this Court stated that "neither the Industrial Commission nor this Court has the authority to adopt such a defense, if it is not found in the Worker's Compensation Act. Our Supreme Court 'has warned against any inclination toward judicial legislation' in the construction of the Worker's Compensation Act." *Id.* (citation omitted).

Additionally, as the majority concedes, this Court has rejected the *Larson* test in an unpublished opinion. In *McCollum v. Atlas Van*

Lines, the defendants urged this Court to adopt the three-part *Larson* test to bar workers' compensation recovery where an employee made misrepresentations about his physical condition. *McCollum v. Atlas Van Lines*, 166 N.C. App. 280, 603 S.E.2d 167 (unpublished, Sept. 7, 2004), *disc. review denied*, 359 N.C. 190, 607 S.E.2d 276 (2004). This court cited *Hooker* as the basis for the rejection of the *Larson* test, and concluded that "defendants' . . . argument is without merit." *Id.*

Not only have we previously rejected the *Larson* test, there is no legislative authority for this Court to adopt such a test. Our Supreme Court has stated:

> With respect to interpreting the Workers' Compensation Act, this Court has warned against any inclination toward judicial legislation . . . . This Court has long distinguished between liberal construction of statutes and impermissible judicial legislation or the act of a court in "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced."

Johnson v. Southern Indus. Constructors, Inc., 347 N.C. 530, 536, 495 S.E.2d 356, 359-60 (1998) (citations omitted). Because the *Larson* test is not included in our Workers' Compensation Act, the adoption of the test by this Court is impermissible judicial legislation. Accordingly, I must dissent.

STATE OF NORTH CAROLINA v. HAROLD RAY HARRIS

No. COA07-383

(Filed 4 March 2008)

1. Constitutional Law— right of confrontation—victim's statements—victim subject to cross-examination

There was no error in the admission of testimony from police officers about statements made by a sexual offense and assault victim where defendant argued a violation of the Confrontation Clause, but had objected at trial only on evidentiary grounds and did not request plain error review at trial. Even so, the victim was subject to cross-examination at trial, and defendant cited no evidence that defense counsel ever attempted to recall the victim to cross-examine her further, or that she would have been unavailable.

2. Evidence— victim's out-of-court statements—corroborative—slight variances with trial testimony

A sexual offense and assault victim's out-of-court statements to officers were admissible even though defendant contended that the statements went beyond corroboration of trial testimony. Slight variances do not render the testimony inadmissible; moreover, there was a limiting instruction and the result would not have been different without this evidence.

3. Criminal Law— identify of attacker—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where defendant argued that there was insufficient evidence that he had assaulted the victim. Although the victim testified that she did not see her attacker, the evidence in the light most favorable to the State gives rise to a reasonable inference that defendant was the assailant.

4. Assault— deadly weapon—hands and feet

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where defendant argued that there was insufficient evidence that the victim had been assaulted with a deadly weapon. *State v. Hinton*, 361 N.C. 207, does not control this case: the jury was properly allowed to determine whether defendant's hands and feet constituted deadly weapons given the evidence of the disparity in size between defendant and the victim, the marks on her body, and her injuries.

5. Sexual Offenses— first-degree—sufficiency of evidence—sexual act

There was sufficient evidence of a first-degree sexual offense where defendant contended that there was not sufficient evidence of a sexual act, but a doctor testified that the hole in the victim's colon could have come from disease, of which there was no evidence, or the insertion of a foreign body, and there was evidence of extensive damage to the victim's outer genital and rectal areas.

6. Appeal and Error— preservation of issues—failure to provide argument or authority

Defendant abandoned his argument concerning the admissibility of an assault victim's failure to pay child support by not providing a reason, argument, or authority to support his claim.

7. Evidence— prior conduct by victim—rape shield exceptions inapplicable

The trial court did not err by excluding evidence of the victim's prior sexual history and motel stays by defendant and the victim of a sexual offense and assault. Although defendant contended that the evidence implied a prior course of sexual behavior between the two, these exceptions to the rape shield statute were not applicable.

8. Evidence— victim's prior drug rehabilitation—not admissible

The trial court did not err by excluding defendant's testimony regarding a sexual offense and assault victim's prior experience in a drug rehabilitation program. While the victim's drug use on the evening of the assault may have been relevant in assessing her credibility, evidence of prior rehabilitation had no bearing on the issue. Furthermore, there was no prejudice because the victim herself had admitted her prior drug use and addiction on cross-examination.

Appeal by Defendant from judgments entered 3 November 2006 by Judge B. Craig Ellis in Superior Court, Columbus County. Heard in the Court of Appeals 17 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Kevin Anderson, for the State.

Irving Joyner for Defendant-Appellant.

McGEE, Judge.

A jury found Harold Ray Harris (Defendant) guilty of one count of first-degree sexual offense and one count of assault with a deadly weapon inflicting serious injuries on 3 November 2006. The trial court sentenced Defendant to a term of 240 months to 297 months in prison on the first-degree sexual offense charge, and to a consecutive term of twenty-five months to thirty months in prison on the assault charge. Defendant appeals.

The evidence presented at trial tended to show the following: Defendant and K.L. went to a motel together on the evening of 6 November 2005. According to K.L., Defendant had told K.L. that they were going to the motel to attend a birthday party for one of Defendant's coworkers. K.L. testified that when she walked into the motel room, she picked up a remote control to turn on the television

and felt a blow to the back of her head. K.L. was thrown onto the tile bathroom floor, and she remembered "fists coming at me at my face." The next thing K.L. remembered was sitting in a restaurant with Defendant the following day. K.L. also remembered speaking with a police officer a short time later and telling the officer the name "Harold."

Jamesie Gentry (Ms. Gentry) was the owner of the restaurant where K.L. and Defendant ate on 7 November 2005. Ms. Gentry testified that Defendant and K.L. came into her restaurant around 11:00 a.m., and K.L. was having difficulty walking. K.L.'s hair was matted, her shirt was dirty and bloody, and her face was badly swollen. Ms. Gentry also observed a shoe print on K.L.'s back. Ms. Gentry called police and told them that K.L. needed immediate assistance.

Officer Franklin Blake Potter (Officer Potter) with the Chadbourn Police Department testified that on the morning of 7 November 2005, he responded to a call at a restaurant near the police department. When Officer Potter entered the restaurant, he immediately noticed K.L. sitting with Defendant. According to Officer Potter, K.L. "had very swollen lips. Her eyes were swollen shut. She was bent over, holding her abdominal area, taking slow, faint breaths, and unable to move." Defendant informed Officer Potter that K.L. had recently had tooth surgery and could not talk, and Defendant would answer any questions Officer Potter had. Officer Potter took K.L. outside the restaurant to speak with her privately, and Defendant instructed K.L., "[d]on't tell him anything." Once outside, Officer Potter asked K.L. who had hurt her. K.L. responded, "Harold," and identified "Harold" as Defendant. Officer Potter called an ambulance for K.L. and took Defendant into custody.

Dr. Andrew John Hutchinson (Dr. Hutchinson) treated K.L. when she arrived at the emergency room on 7 November 2005. Dr. Hutchinson testified that K.L. had handprints on her arms, thighs, buttocks, and neck. K.L.'s face was scratched, bruised, and swollen. Dr. Hutchinson ordered a CAT scan of K.L.'s head, which revealed massive soft tissue swelling of K.L.'s head, face, and neck. Dr. Hutchinson testified that K.L.'s injuries could have been caused by blunt trauma to her head and face, such as being hit with fists. Dr. Hutchinson also ordered a CAT scan of K.L.'s abdomen, which revealed that K.L. had air in her abdomen caused by a hole in one of her organs. Doctors immediately prepared K.L. for surgery. Once in the operating room, Dr. Hutchinson noticed that K.L. had sustained bruises and cuts to her genital area, and was bleeding from her rec-

tum. Dr. Hutchinson also saw more bruising and handprints on the backs of K.L.'s thighs and buttocks. During surgery, doctors found a large hole in K.L.'s colon and repaired the damage. Dr. Hutchinson testified that K.L.'s colon injury was consistent with a foreign body being inserted into K.L.'s rectum.

Floyd Ray Watts (Mr. Watts) had been acquainted with Defendant for a number of years. Mr. Watts testified at trial that Defendant visited him at his house around 7:00 a.m. or 8:00 a.m. on 7 November 2005. According to Mr. Watts, Defendant stated that "he had blackened [K.L.]'s eye and busted her lip" because K.L. "had been sleeping with a Black man." Defendant then left Mr. Watts' house.

Defendant also testified at trial. According to Defendant, K.L. had been taking Xanax, Valium, and Soma pills the night of the assault. Defendant testified that he and K.L. arrived at the motel around 8:00 p.m. Two hours later, K.L. asked Defendant to go purchase some cigarettes. Defendant left the motel, bought cigarettes, went to see a friend, and returned to the motel shortly after midnight. When Defendant entered the motel room, he saw K.L. lying on the bed. Her underwear was next to her on the bed and was stained with blood. Defendant asked K.L. what had happened, and K.L. responded, "I left some people in the room. It's my body, I'll do what I want to with it." Defendant claimed that he attempted to call paramedics for K.L., but K.L. refused assistance. Defendant did not notice that K.L.'s face was bruised and swollen until the following morning. That morning, K.L. dressed herself and insisted that Defendant take her to eat at a restaurant. Defendant and K.L. left the motel around 11:00 a.m. and went to a diner, where they were approached by police. Defendant denied having visited Mr. Watts early that morning before leaving the motel with K.L.

A jury convicted Defendant of one count of first degree sexual offense and one count of assault with a deadly weapon inflicting serious injuries. Defendant appeals and argues that the trial court erred by: allowing witnesses to testify as to K.L.'s out-of-court statements; refusing to dismiss the charges against Defendant due to insufficiency of the evidence; and refusing to allow Defendant to question K.L. regarding certain topics on cross-examination.

I.

Defendant first argues that the trial court erred by allowing police officers to testify at trial to allegedly inadmissible out-of-court statements K.L. made to police following her assault and surgery.

Defendant argues that this evidence was inadmissible under both federal and state law.

A.

[1] Officer Potter testified at Defendant's trial regarding the conversation he had with K.L. after he first saw her at the restaurant on 7 November 2005. In addition, Lieutenant Harold Dion Hayes (Lieutenant Hayes) of the Chadbourn Police Department testified about K.L.'s responses to both written and oral questions he asked of K.L. while K.L. was hospitalized. Defendant contends that the trial court should have excluded the officers' testimony pursuant to *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). In *Crawford*, the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the admission of an out-of-court testimonial statement made by an unavailable declarant who did not testify at trial and who was not previously available for cross-examination by the defendant. According to Defendant, K.L.'s out-of-court statements were inadmissible because (a) her statements were testimonial, and (b) although K.L. testified at trial, there was no indication that she was available for the remainder of the trial to be examined again by defense counsel.

We find that Defendant has not preserved this argument for appellate review. Defendant objected to the officers' testimony at trial on state evidentiary grounds alone and did not raise a federal constitutional objection. Our Courts have consistently held that constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *See, e.g.*, *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Further, Defendant is not entitled to plain error review because he has not asked this Court to review the admission of K.L.'s out-of-court statements for plain error. *See, e.g.*, *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); N.C.R. App. P. 10(c)(4).

Even were this Court to review Defendant's constitutional challenge, Defendant's *Crawford* argument is without merit. The Supreme Court in *Crawford* clearly stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places *no constraints* at all on the use of [the declarant's] prior testimonial statements." *Crawford*, 541 U.S. at 59, 158 L. Ed. 2d at 197-98 n.9 (emphasis added). The rule in *Crawford* therefore does not apply when the declarant is subject to cross-examination at trial. *See State v.*

Burgess, 181 N.C. App. 27, 34, 639 S.E.2d 68, 74 (2007) (holding that admission of the declarants' prior out-of-court statements did not violate *Crawford* because the declarants testified at trial and were available for cross-examination). K.L. was subject to cross-examination at trial, and therefore *Crawford* is inapplicable here. In addition, Defendant's argument that K.L. was unavailable to be recalled for further examination by defense counsel is likewise without merit. Defendant cites no evidence in the record that defense counsel ever attempted to recall K.L. and cross-examine her further regarding her out-of-court statements, or that K.L. would have been unavailable for further cross-examination.

B.

[2] Defendant also argues that K.L.'s out-of-court statements were inadmissible because they went beyond mere corroboration of K.L.'s own trial testimony. In *State v. Swindler*, 129 N.C. App. 1, 497 S.E.2d 318, *disc. review denied*, 348 N.C. 508, 510 S.E.2d 670, *aff'd per curiam*, 349 N.C. 347, 507 S.E.2d 284 (1998), our Court held that "[p]rior consistent statements of a witness are admissible for purposes of corroboration," and "[w]hen so offered, evidence of a prior consistent statement must in fact corroborate a witness's later testimony." *Id.* at 4-5, 497 S.E.2d at 320. Defendant argues that K.L.'s out-of-court statements introduced by Officer Potter and Lieutenant Hayes included new and different hearsay testimony that went beyond merely corroborating K.L.'s trial testimony. We disagree.

As noted above, K.L. testified at trial that she and Defendant were alone in a motel room when she was assaulted. K.L. also remembered being at a restaurant with Defendant the following day and giving Defendant's name to a police officer. Officer Potter testified that once outside the restaurant, he asked K.L. who had assaulted her, and K.L. responded, "Harold." K.L. then identified Defendant as "Harold," and told police that she had been assaulted the previous night at a motel. We find nothing in Officer Potter's testimony regarding K.L.'s out-of-court statement that does not corroborate K.L.'s trial testimony or that introduces new hearsay on a different subject. While K.L.'s testimony and out-of-court statements are not completely identical, our Courts have held that " '[s]light variances in the corroborative testimony do not render it inadmissible.' " *Id.* at 5, 497 S.E.2d at 321 (quoting *State v. Covington*, 290 N.C. 313, 337, 226 S.E.2d 629, 646 (1976)).

Lieutenant Hayes testified that he gave K.L. a series of written questions while K.L. was in the hospital on 10 November 2005.

According to Lieutenant Hayes, K.L. wrote that her name was "[K.N.]," that her birth date was "3/6/74," and that the day of the week was "Thursday." K.L. also wrote that "Harold Harris" had assaulted her. Defendant argues that these statements differed significantly from K.L.'s trial testimony and were not corroborative. We disagree. K.L. testified at trial that her maiden name was "[K.F.N.]" and that she was thirty-two years old. These slight variances in K.L.'s in-court and out-of-court statements do not render her out-of-court statements inadmissible. Further, K.L.'s statement that Defendant had assaulted her was generally corroborative of her in-court testimony that she was assaulted while alone in the motel room with Defendant. *See State v. Love*, 152 N.C. App. 608, 616, 568 S.E.2d 320, 325-26 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003) (stating that "[c]orroborative testimony may contain additional information when it strengthens or adds credibility to the testimony in which it corroborates but it may not contradict trial testimony"). Even if K.L.'s out-of-court statement identifying Defendant as her attacker went beyond merely corroborating her in-court testimony that she was attacked while alone with Defendant, the trial court later explicitly instructed the jury:

> Ladies and gentlemen, the testimony of [Lieutenant Hayes] about what [K.L.] wrote down on the piece of paper when he asked her questions was received for the purpose of corroborating [K.L.]'s testimony. Whether or not it does, again, is for you, the jury, to determine. We will receive it for that purpose only.

Because the trial court's instruction ensured that the jury considered K.L.'s out-of-court statement only for its proper corroborative purpose, and not as substantive evidence, there was no error. *See State v. Daniels*, 59 N.C. App. 63, 67, 295 S.E.2d 508, 511 (1982) (holding that where the trial court instructed the jury that a witness's prior consistent statements were to be considered "solely as corroborative evidence, there was no error").

Lieutenant Hayes also testified that he spoke with K.L. in the hospital on 15 November 2005. According to Lieutenant Hayes, K.L. said during that interview that: Defendant had a crush on her; she and Defendant were friends who took drugs together; she and Defendant had not been drinking and did not have sex on 6 November 2005 prior to the assault; she did not remember Defendant giving her any medication; she went to the motel with Defendant of her own free will; Defendant had lied about where they were going that night; she

remembered being hit on the head with something similar to a tire iron, and remembered being thrown on the bathroom floor and being hit in the face; she was attacked and sodomized by Defendant, although she did not remember it; Defendant threatened to harm her if she told anyone what happened; and Defendant helped her to get into a car and into the restaurant. Defendant contends that K.L.'s out-of-court statements to Lieutenant Hayes differed greatly from K.L.'s trial testimony. We disagree. K.L. testified at trial that: she and Defendant were friends, but Defendant wanted to be romantically involved; she had abused prescription drugs in the past; she had agreed to go with Defendant to the motel; Defendant had told her they were going to the motel for a birthday party; and she remembered feeling a blow to the back of her head, being thrown to the bathroom floor, and being punched in the face. Admittedly, portions of K.L.'s out-of-court statements to Lieutenant Hayes contained information that K.L. did not include in her in-court testimony. However, the differences between K.L.'s in-court and out-of-court statements are not contradictory. Rather, K.L.'s trial testimony was simply a less-complete statement of the events than her out-of-court statement to Lieutenant Hayes. *See State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986) (holding that although "[t]he victim's prior oral and written statements . . . includ[ed] additional facts not referred to in his testimony," the victim's prior statements "tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence."). Further, the trial court explicitly instructed the jury to consider K.L.'s out-of-court statements for corroboration purposes only, which ensured that Defendant would not be prejudiced by the variations in K.L.'s statements. *See Daniels*, 59 N.C. App. at 67, 295 S.E.2d at 511.

Finally, we find that even if the trial court erred by admitting certain portions of Officer Potter's and Lieutenant Hayes's testimony, Defendant was not prejudiced by such error. *See State v. Hinnant*, 351 N.C. 277, 291, 523 S.E.2d 663, 672 (2000) (stating that "[t]he erroneous admission of hearsay 'is not always so prejudicial as to require a new trial.' Rather, [the] defendant must show 'a reasonable possibility that, had the error in question not been committed, a different result would have been reached at . . . trial[.]' " (quoting *Ramey*, 318 N.C. at 470, 349 S.E.2d at 574; N.C. Gen. Stat. § 15A-1443(a) (1999)). Defendant does not argue in his brief that the result at trial would have been different if the trial court had not admitted the contested portions of the officers' testimony. Further, as discussed below, we

find that even excluding the contested portions of K.L.'s out-of-court statements, the State introduced sufficient evidence to support a finding of Defendant's guilt on both charges. Therefore, Defendant's assignment of error is overruled.

II.

Defendant next argues that the trial court erred by denying his motion to dismiss the charges against him due to the insufficiency of the State's evidence. To survive a motion to dismiss based on insufficient evidence, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence exists if, considered in the light most favorable to the State, the evidence "gives rise to a reasonable inference of guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). However, a defendant's motion to dismiss must be granted "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it[.]" *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

A.

[3] Defendant first argues that the State failed to introduce sufficient evidence on the charge of assault with a deadly weapon inflicting serious injuries. Defendant contends that the State did not introduce substantial evidence that Defendant was the perpetrator of the crime committed. Defendant claims that the only evidence presented by the State regarding the identity of K.L.'s attacker was K.L.'s testimony that she was struck in the back of the head, but never actually saw her attacker. According to Defendant, this evidence only raises conjecture and speculation regarding Defendant's role in the assault. We disagree with Defendant's characterization of the State's evidence. K.L. testified that she and Defendant went alone to a motel room. She was assaulted immediately after entering the room, and by the following morning, had sustained serious physical injuries. K.L.'s statements to police corroborated her testimony that she had been alone with Defendant when she was assaulted. Defendant testified that he knew K.L. was bleeding and had been injured, but he never sought medical assistance for her. In fact, Defendant attempted to keep Officer Potter from asking K.L. how she had been hurt. Officer Potter testified that Defendant explicitly instructed K.L. not to say anything to police. Further, Mr. Watts testified that Defendant stated that he

had assaulted K.L. Although K.L. testified that she did not see her attacker, and although Defendant denied any involvement in the assault, we find that the evidence, when taken in the light most favorable to the State, gives rise to a reasonable inference that Defendant was K.L.'s assailant.

[4] Defendant also contends that the State did not introduce substantial evidence that he assaulted K.L. with a deadly weapon. We disagree. Our Courts have previously held that under certain conditions, an assailant's hands and feet may be considered "deadly weapons" for the purpose of the crime of assault with a deadly weapon. *See*, *e.g.*, *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003) (where the defendant was charged with assault with a deadly weapon with intent to kill inflicting serous injury, the Court held that "hands and fists may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved"); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430, *disc. review denied*, 309 N.C. 463, 307 S.E.2d 429 (1983) (holding that where the thirty-nine-year-old, 210-pound male defendant hit the sixty-year-old female victim in her head and stomach with his fists, "[t]he defendant's fists could have been a deadly weapon given the manner in which they were used and the relative size and condition of the parties").[1] Whether an assailant's hands and feet are used as deadly weapons is a question of fact to be determined

1. Our Courts have recently held that hands cannot be considered "dangerous weapons" for the purposes of certain other crimes containing a "dangerous weapon" element. In *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007), our Supreme Court held that hands are not "dangerous weapons" for the purposes of the crime of robbery with a dangerous weapon. Under N.C. Gen. Stat. § 14-87(a) (2007), "[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" is guilty of a class D felony. Our Supreme Court found that "the purpose of N.C.G.S. § 14-87 is to provide for more severe punishment when the robbery is committed with the 'use or threatened use of firearms or other dangerous weapons,' " and concluded that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon[.]" *Id.* at 211-12, 639 S.E.2d at 440 (quoting *State v. Jones*, 227 N.C. 402, 405, 42 S.E.2d 465, 467 (1947)). In addition, our own Court has relied on *Hinton* to reach a similar conclusion regarding the crimes of first-degree rape and first-degree sexual offense, each of which contain the element of "[e]mploy[ing] or display[ing] a dangerous or deadly weapon or an article which the [victim] reasonably believes to be a dangerous or deadly weapon[.]" N.C. Gen. Stat. § 14-27.2(a)(2) (2007) (defining the crime of first-degree rape); N.C. Gen. Stat. § 14-27.4(a)(2) (2007) (defining the crime of first-degree sexual offense). *See State v. Adams*, 187 N.C. App. ——, 654 S.E.2d 711 (2007).

by the jury. *State v. Hunt*, 153 N.C. App. 316, 318-19, 569 S.E.2d 709, 710-11 (2002).

In the current case, the evidence tended to show that Defendant weighed 175 pounds and K.L. weighed 110 pounds. Ms. Gentry testified that when Defendant and K.L. came into her restaurant, K.L. had a shoe print on her back. Dr. Hutchinson testified that K.L. had handprint bruises on her arms, thighs, and buttocks. In addition, K.L. had handprints on her neck, which Dr. Hutchinson noted were consistent with a choke hold. Dr. Hutchinson also testified that the handprints on K.L.'s neck could have been responsible for swelling in K.L.'s mouth, tongue, and throat. Under these circumstances, the jury was properly allowed to determine whether Defendant's hands and feet constituted deadly weapons. *Compare State v. Grumbles*, 104 N.C. App. 766, 411 S.E.2d 407 (1991) (where the evidence showed that the 175-pound male defendant hit and choked the 107-pound female victim, leaving marks on her neck and causing her facial swelling and a broken jaw, the Court held that the trial court properly submitted to the jury the issue of whether the defendant's hands were deadly weapons, given the size and strength disparity between the defendant and the victim, as well as the "devastating physical effect" of the assault).

We find that the State introduced substantial evidence that Defendant assaulted K.L., and that Defendant assaulted K.L. using a deadly weapon. Any weakness in the State's evidence or discrepancy between the State's evidence and Defendant's testimony was for the jury to consider. The trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injuries.

Our Supreme Court in *Hinton*, however, expressly declined to read N.C.G.S. § 14-87 *in pari materia* with N.C. Gen. Stat. § 14-33(c)(1), which criminalizes misdemeanor assault with a deadly weapon. *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440. The Court distinguished N.C.G.S. § 14-87, in part, because unlike the assault statute, it referred specifically to "firearm[s]" or other "implement[s]" in describing the "types of weapons that suffice under the statute to increase a defendant's sentence[.]" *Id.* at 212, 639 S.E.2d at 440. According to the Court, this language "indicates that a defendant must use an external weapon to be convicted under N.C.G.S. § 14-87." *Id.* The Court did not address or distinguish the felony assault with a deadly weapon statute under which Defendant here was convicted. *See* N.C. Gen. Stat. § 14-32(b) (2007) (punishing as a felon "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury"). However, given that the Court did not apply its new rule to the misdemeanor assault statute, and likewise did not overrule cases such as *Rogers* or *Jacobs* that allowed the hands-as-deadly-weapons question to go to the jury in felony assault cases, we find that *Hinton* does not control our decision in the current case.

B.

[5] Defendant next argues that the State failed to introduce sufficient evidence on the charge of first-degree sexual offense. Defendant contends that the State did not introduce substantial evidence that Defendant was the perpetrator of the crime committed. We disagree. As noted above, we have found that the State introduced substantial evidence identifying Defendant as the person responsible for K.L.'s injuries.

Defendant also contends that the State did not introduce substantial evidence that Defendant committed a "sexual act" on K.L. *See* N.C.G.S. § 14-27.4(a)(2) (defining first-degree sexual offense as "engag[ing] in a sexual act . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflict[ing] serious personal injury upon the victim"). "The term 'sexual act' as used in this statute means cunnilingus, fellatio, analingus, or anal intercourse. It also means the penetration, however slight, by any object into the genital or anal opening of another person's body." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986).

Defendant notes that rape kits prepared while K.L. was at the hospital showed no evidence of Defendant's pubic hair, semen, saliva, or other bodily fluids. Defendant argues that the State's only evidence of a sexual act was Dr. Hutchinson's speculation that the intrusion of an object into K.L.'s rectum could have resulted in the injury to her colon. Defendant contends that this does not amount to substantial evidence that Defendant committed a sexual act on K.L. We disagree. Dr. Hutchinson testified that a hole in a person's colon could be caused in two different ways. First, a hole could be caused by a certain type of disease, and Dr. Hutchinson found no evidence that K.L. was suffering from that disease. Second, the hole could have been caused by the insertion of a body part or other foreign object into K.L.'s rectum. When considered with the evidence that K.L. also suffered extensive damage to her outer genital and rectal areas, the State's evidence gives rise to a reasonable inference that K.L.'s colon injury was the result of the penetration of an object into her rectum. We find that the State introduced substantial evidence on the charge of first-degree sexual offense, and therefore hold that the trial court did not err in denying Defendant's motion to dismiss.

III.

Defendant next argues that the trial court erred by excluding certain evidence related to K.L.'s delinquent child support payments,

prior drug abuse, and prior sexual activity with Defendant and with other people. "A trial court's rulings on relevancy . . . are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Further, the decision whether to exclude relevant evidence as unfairly prejudicial under N.C. Gen. Stat. § 8C-1, Rule 403 "is a matter left to the sound discretion of the trial court and will only be reversed upon a showing that the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719, *reh'g denied*, 520 U.S. 1111, 137 L. Ed. 2d 322 (1997).

[6] Defendant first asserts that the trial court erred by excluding evidence of K.L.'s allegedly delinquent child support payments. However, Defendant only references this argument in the heading for section III of his brief. Defendant never provides a reason, argument, or authority to support his claim. Defendant has therefore abandoned his argument under N.C.R. App. P. 28(b)(6).

[7] Defendant next argues that the trial court erred by excluding certain evidence regarding K.L.'s prior sexual history. Defendant testified on *voir dire* that on multiple occasions, he had seen K.L. offer to have sex with other people in exchange for drugs. The State objected to Defendant's testimony, and the trial court sustained the State's objection. The trial court did not state the basis of its decision, but it appears that the trial court believed the evidence was irrelevant and therefore inadmissible under our rape shield statute. Defendant contends that this evidence was admissible under an exception to the rape shield:

> [T]he sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior . . . [i]s evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented[.]

N.C. Gen. Stat. § 8C-1, Rule 412(b)(3) (2007). Defendant contends that the contested evidence demonstrated a distinctive pattern in K.L.'s behavior that resembles Defendant's version of the assault: that

K.L. was assaulted when she attempted to trade sex for drugs with another person while Defendant was absent from the motel room. We disagree with Defendant's contention. Rule 412(b)(3) provides that such evidence is only relevant on the issue of consent between a complainant and a defendant. Defendant has never argued that he had a consensual sexual encounter with K.L. on 6 November 2005; to the contrary, he has repeatedly denied having such an encounter, consensual or otherwise. Thus, this exception to the rape shield does not apply, rendering the contested evidence irrelevant under Rule 412(b). The trial court therefore did not err in excluding evidence of K.L.'s prior sexual behavior with persons other than Defendant.

Defendant next argues that the trial court erred by excluding certain evidence regarding his own sexual history with K.L. Defendant testified on *voir dire* that K.L. had offered to have sex with him on "a couple of hundred" occasions in exchange for drugs. The State objected to Defendant's testimony, and the trial court sustained the State's objection. Again, the basis of the trial court's ruling was not entirely clear, but it appears that the trial court believed the testimony was irrelevant. Defendant contends that this evidence was admissible under another exception to the rape shield: "[T]he sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior . . . [w]as between the complainant and the defendant[.]" N.C.G.S. § 8C-1, Rule 412(b)(1). We disagree with Defendant's contention. Rule 412(b)(1) does not exclude evidence of prior sexual behavior between a complainant and a defendant because "prior consent from a complainant to the defendant on trial is relevant to the complainant's subsequent consent to that defendant[.]" *State v. Ginyard*, 122 N.C. App. 25, 31-32, 468 S.E.2d 525, 530 (1996). As noted above, Defendant denied having a sexual encounter with K.L. on 6 November 2005, and has not raised K.L.'s consent as a defense. Thus, this exception to the rape shield does not apply, rendering Defendant's testimony irrelevant under Rule 412(b) and therefore inadmissible. The trial court did not err in excluding evidence of K.L.'s prior sexual behavior with Defendant.

Defendant next argues that the trial court erred by excluding certain evidence regarding K.L. and Defendant's prior motel stays. During Defendant's cross-examination of K.L., K.L. testified during *voir dire* that she and Defendant had rented motel rooms together on a number of previous occasions. The State objected to this testimony, and the trial court sustained the State's objection under N.C. Gen. Stat. § 8C-1, Rule 403, on the basis that the prejudicial effect of the

testimony outweighed its probative benefit. Defendant contends that this evidence was relevant and admissible under Rule 412(b)(1) because it implied a prior course of sexual behavior between Defendant and K.L. We disagree. Again, as Defendant has not raised K.L.'s consent as a defense, this exception to the rape shield is inapplicable. Further, the trial court excluded this evidence not because it was inadmissible under the rape shield, but rather because it was unfairly prejudicial. Given the questionable relevance of this evidence and its likely prejudicial effect on the remainder of K.L.'s testimony, we cannot say that the trial court's Rule 403 ruling "was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Womble*, 343 N.C. at 690, 473 S.E.2d at 304. Therefore, the trial court did not err by excluding evidence of K.L. and Defendant's prior motel stays.

[8] Finally, Defendant argues that the trial court erred by excluding certain evidence regarding K.L.'s prior drug use. Early in the trial, the trial court ruled that Defendant could question K.L. regarding her drug use on the day of the assault, as well as her ongoing addiction to prescription drugs. Defendant did in fact elicit testimony from K.L. on these topics, and K.L. admitted that she had drug addiction problems, and could not recall whether she had taken drugs the day of the assault. Later at trial, Defendant testified that when he returned to the motel room to find K.L. injured, K.L. asked Defendant not to call the police because "the first thing they will do whenever they take me to the hospital is take me to Lumberton, because they'll try to dry me out." Defendant then added, "[s]he had been two times before." The State objected to Defendant's last statement. The trial court sustained the State's objection and instructed the jury not to consider Defendant's answer. The State did not offer the grounds for its objection, and the trial court did not state the basis of its ruling.

Defendant argues that the trial court erred by excluding this evidence because K.L.'s drug addiction and possible drug use the night of the assault was relevant to the jury's assessment of K.L.'s credibility. We disagree. "When a general objection is sustained it will generally be upheld if there is any reason to exclude the evidence." *Chapman v. Pollock*, 69 N.C. App. 588, 592, 317 S.E.2d 726, 730 (1984). We find that Defendant's testimony could have been excluded under N.C. Gen. Stat. § 8C-1, Rule 608(b), because the fact of K.L.'s prior placement in a drug rehabilitation program was not probative of her character for truthfulness or untruthfulness. *See*, *e.g.*, *State v. Rowland*, 89 N.C. App. 372, 382, 366 S.E.2d 550, 555, *disc. review*

improvidently allowed, 323 N.C. 619, 374 S.E.2d 116 (1988) (concluding that testimony regarding "[the] defendant's drug addiction was improper under Rule 608(b) because extrinsic evidence of drug addiction, standing alone, is not probative of [a] defendant's character for truthfulness or untruthfulness"). While Defendant is correct that K.L.'s drug use on the evening of 6 November 2005 may have been relevant in assessing the credibility of K.L.'s version of the assault, evidence of K.L.'s prior drug rehabilitation had no bearing on this issue. Further, Defendant could not have been prejudiced by the trial court's exclusion of his testimony, because K.L. had previously admitted her prior drug use and drug addiction problems when cross-examined by Defendant. We find that the trial court did not err by excluding Defendant's testimony regarding K.L.'s prior experience in a drug rehabilitation program.

No error.

Judges HUNTER and BRYANT concur.

DARREN RAY HARTSELL, PLAINTIFF v. RACHEL KATHERINE HARTSELL, DEFENDANT

No. COA07-884

(Filed 4 March 2008)

1. Appeal and Error— preservation of issues—failure to assign error to sufficiency of evidence

The trial court's order in an alimony, child support, and equitable distribution case is reviewed for abuse of discretion taking its findings of fact as conclusively established, because plaintiff failed to assign error to the sufficiency of the evidence to support any specific finding of fact.

2. Divorce— alimony—sufficiency of findings—additional findings required for amount and duration

The trial court did not err by awarding alimony to defendant even though plaintiff contends there was insufficient findings of fact because: (1) findings of fact 3, 4, and 5 address the duration of the marriage, the status of their minor children, and the parties' ages and education levels; (2) findings 8 through 15 and 19 discuss the parties' relative incomes and earning capacities; (3)

findings 16 through 18, 20, 26, and 29 address the parties' expenses, debts, financial obligations, and plaintiff's payments to defendant; (4) finding 21 addresses the parties' standard of living; (5) finding 22 addresses marital misconduct; (6) contrary to plaintiff's contention, findings 16 through 18 articulate the trial court's reasoning in calculating plaintiff's expenses, and the trial court is not required to make findings about the weight and credibility it assigns to the evidence before it; (7) contrary to plaintiff's claim, finding 21 included detailed references to features of the parties' lifestyle; and (8) plaintiff failed to identify any specific pertinent assets, liabilities, or debts that the court erred by failing to discuss. However, the case is remanded for further findings of fact regarding the amount and duration of alimony since the trial court provided no explanation as to why it had concluded that defendant was entitled to $650 per month, nor did it provide any explanation as to its rational for the duration of the award to be until the death or remarriage of defendant.

3. Child Support, Custody, and Visitation— support—imputing income

The trial court did not improperly impute income to plaintiff in a child support order without the required findings of fact because: (1) the court's findings of fact expressly calculated plaintiff's income on the basis of his present earnings and not by imputing hypothetical earnings to an unemployed or underemployed parent; (2) the trial court's determination that plaintiff could continue to earn at least $2,500 a month from the grading business was reasonably based on its findings of fact regarding plaintiff's actual earnings during the year prior to the hearing; (3) findings of fact 12 through 14 specifically address the amount plaintiff earned working alone while also teaching, and discussed the availability of work; and (4) contrary to plaintiff's assertion that in finding 14 the trial court stated the testimony about the income from the grading business would be highly speculative, the only potential income source the trial court found speculative was the income plaintiff might earn by renting a truck, which the court did not include in its calculation of plaintiff's income.

4. Divorce— equitable distribution—distributional factor—conflicting evidence of tax liability

The trial court did not err by entering an equitable distribution order that distributed the parties' marital property unequally, because: (1) plaintiff identified only one distributional factor that

he contended was mishandled by the trial court, which was the specific dollar amount of the 2004 tax liability that the court distributed to plaintiff; and (2) the trial court addressed this issue in detail in finding of fact 27 and explained that the court was unable to assign an exact dollar amount to the liability since plaintiff had presented conflicting evidence on this issue.

Appeal by Plaintiff from judgments entered 25 April 2007 by Judge Michael G. Knox in Cabarrus County District Court. Heard in Court of Appeals 16 January 2008.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for Plaintiff-Appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, and Tobias S. Hampson, for Defendant-Appellee.

ARROWOOD, Judge.

Darren Hartsell (Plaintiff) appeals from the trial court's orders awarding alimony in favor of Rachel Hartsell (Defendant), ordering Plaintiff to pay child support, and ordering equitable distribution of marital and divisible property. We affirm in part and remand in part.

Plaintiff and Defendant were married in 1988 and separated on 23 July 2005. Two children were born of the marriage, sons born in 1991 and 1994. On 17 August 2005 Plaintiff filed a complaint seeking equitable distribution of marital property, and orders determining child custody and child support. September 2005 Defendant filed an answer and counterclaims for child custody and support, alimony and post-separation support, counsel fees, and equitable distribution. In October 2005 Plaintiff filed a reply to Defendant's counterclaims.

Hearings were conducted on the parties' claims on 26 and 27 July 2006, and on 25 August 2006. The trial court entered its first orders for child support, alimony, and equitable distribution on 23 January 2007. Following motions by the parties for relief from judgment and amendment of judgment, the trial court on 25 April 2007 entered amended orders for child support, alimony, and equitable distribution. From these orders Plaintiff appeals.

Standard of Review

[1] Preliminarily, we note that Plaintiff failed to assign error to the sufficiency of the evidence to support any specific finding of fact.

"Because plaintiff has failed to assign error to any of the trial court's findings of fact, they are binding on appeal." *Langdon v. Langdon*, 183 N.C. App. 471, 475, 644 S.E.2d 600, 603 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Accordingly, we review the trial court's orders for abuse of discretion, taking its findings of fact as conclusively established.

Regarding alimony, we observe that Plaintiff does not dispute Defendant's entitlement to alimony. "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)). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (internal quotation marks omitted).

Regarding the trial court's order for child support, we note that in determining issues of child support, the "trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts." *Maney v. Maney*, 126 N.C. App. 429, 431, 485 S.E.2d 351, 352 (1997) (citations omitted). " 'Trial court orders regarding the obligation to pay child support are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.' " *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 352, 620 S.E.2d 899, 903 (2005) (quoting *Moore Cty. ex rel. Evans v. Brown*, 142 N.C. App. 692, 694-95, 543 S.E.2d 529, 531 (2001) (internal quotation marks and citations omitted)).

Our review of orders for equitable distribution is similarly limited. "In *White v. White*, our Supreme Court set forth 'the proper standard of review of equitable distribution awards' as follows:

> Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. The legislature also clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. [§] 50-20[.] . . . It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.

Stone v. Stone, 181 N.C. App. 688, 690, 640 S.E.2d 826, 827-28 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal quotation marks and citations omitted)).

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[2] Plaintiff first argues that the trial court erred in its order awarding Defendant alimony, on the grounds that the court made "insufficient findings of fact" to support the award.

A trial court's award of alimony is addressed in N.C. Gen. Stat. § 50-16.3A (2007), which provides in pertinent part that in "determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors" including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

In finding of fact twenty-four (24) the trial court states that it considered the statutory factors, including those listed above. However, Plaintiff argues that the court's other findings of fact are insufficient to demonstrate the court's attention to these factors. We disagree, and note that the findings of fact include, in pertinent part, the following:

> (3) The parties hereto were married . . . October 8, 1988, . . . and separated on July 23, 2005.
>
> (4) Two (2) children were born of the marriage of the parties . . . [in] 1991, and . . . 1994.
>
> (5) The named minor children . . . have been in the primary physical custody of the defendant since the separation of the parties. The plaintiff is 39 years old and the defendant is 36 years old. The plaintiff has a high school education and the defendant has a college degree.
>
> . . . .
>
> (8) The plaintiff is presently employed as a teacher with the Cabarrus County Schools, having commenced that employ-

ment after the separation of the parties. The plaintiff earned a gross monthly income from teaching during the 2005-2006 school year of $3,890.00 per month . . . for ten months of the year[, and] . . . an annual teacher's supplement of $972.00 for the 2005-2006 school year. In the 2006-2007 school year, the plaintiff will earn a gross monthly income of $4,174.00 per month for ten months.

(9) Prior to August 2005, the plaintiff had been self-employed as a masonry and grading contractor. The plaintiff sold the masonry business in 2004, but continued to operate the grading business. For several years prior to 2005, the parties had contemplated the plaintiff pursuing a career in teaching. In 2005, prior to the separation, . . . [the parties] discussed, planned and agreed . . . [that] plaintiff would teach while continuing to operate his grading business[.] . . . [P]laintiff represented to Defendant . . . that he could earn $30,000.00 to $50,000.00 per year in addition to his teaching income. . . .

(10) The plaintiff testified he "did not have a clue how much money he made from the grading business in 2004." The income tax return of the parties for 2003 showed wages for the plaintiff from his business of approximately $32,150.00 (see Defendant's 1 from ED trial) and other profit income of $43,073.00. The profit income was reduced from approximately $66,000.00 by the election of '179 expenses' (depreciation) of $23,500.00. The masonry business was closed in 2004. It is unclear what percentage was from the masonry business and what percentage was from the grading business.

(11) Neither the business nor the personal income tax returns for 2004 or 2005 were proffered to the Court. The bank account records of the masonry business from January 2004 through August 2005 show total deposits of $403,718.58 (see Defendant's 10). Payments to or for the benefit of the plaintiff from the masonry business account for the period from April 2004 through August 2005 were $71,727.82. The plaintiff also paid many personal expenses from the business account including health, airplane and car insurance, cell phones, gasoline for the parties, automobile repairs, and property taxes. Both parties benefitted from these payments.

(12) The plaintiff had income from the grading business from the date of separation through December 31, 2005 of $39,389.33 (Defendant's 7). The business income included the sale of a truck for $12,000.00. The remaining income of $27,389.33 came from the operation of the grading business by the plaintiff while he was employed full-time as a teacher. The average monthly income for this period of five months and eight days was $5,217.02. From this income the plaintiff paid living expenses, some finances to defendant, and reduced the monthly debt of the parties. The expenses that the Court attributes to the business during this period are $13,241.63 or $2,522.22 per month. The net monthly income of the grading business during this period, after expenses, was $2,694.80.

(13) Through July 2006 the plaintiff earned $13,847.00 in income from the grading business. Despite the availability of the plaintiff during the summer months when school is closed, the plaintiff has earned only $4,210.00 in June and July of 2006.

(14) Sammy Flowe of S.J. Flowe Grading Company who has worked with Plaintiff in the past, testified that grading work is available and that the 643 Caterpillar loader owned by the plaintiff has a rental value of $5,000.00 to $6,000.00 per month. He also testified that the loader could be operated by an employee and earn a net monthly income after expenses of $3,000.00 per month. The truck owned by the plaintiff would also have rental and income value. However, income from this source would be highly speculative.

(15) The plaintiff is capable of earning income with the grading business and has demonstrated that ability. The income of $2,694.80 per month earned by the grading business in the last five months of 2005 is representative of the earning capacity of the plaintiff in that business while continuing his employment as a teacher. The Court finds that Plaintiff has the present ability and capacity to earn at least $2500.00 per month from the grading business based upon his past income. The total monthly gross income of the plaintiff from his employment as a teacher for twelve months and from the operation of the grading business was $5741.00 prior to August 2005 and $5978.00 after August 2005.

(16) The plaintiff filed a financial affidavit with the Court at the time of the filing of the Complaint. The plaintiff, however, . . . presently does not have any expense for rent or electricity. Plaintiff has made efforts to reduce his living expenses in order to pay on the parties' marital debt and has been paying one-half of the mortgage payment since February 2006. It is reasonable to find that Plaintiff will have some expense for housing. The income and expense records indicate the plaintiff is paying approximately $300.00 per month for credit card accounts. The gasoline, insurance and repairs for his vehicle have been paid through the business. The plaintiff offered no other evidence as to his expenses at the hearing of this matter. From the affidavit of the plaintiff and the evidence presented by the plaintiff, the Court finds the plaintiff's reasonable monthly expenses, to be as follows:

Food: $250.00; Clothing: 100.00; Telephone 50.00; Medical: 25.00; Education: 75.00; Grooming: 20.00; Recreation and Entertainment: 100.00; Laundry: 25.00; Life Insurance: 175.00; Credit Cards: 300.00; Rent: 500.00; Gifts: 25.00; Electricity: 100.00; Total: $1,745.00

The Plaintiff testified that he had always paid many living expenses through the grading business and the records reflect such, thus the Court will not consider expenses already paid through the business.

(17) That from the date of separation through January 2006 the plaintiff paid the following sums to the defendant: . . . Total $ 13,151.03

(18) Beginning in February 2006 the plaintiff paid to the defendant the sum of $450.00 per month as support for the minor children and $1,163.00 per month representing one-half of the mortgage payment and escrows for the former marital residence.

(19) The defendant is employed as a teacher[,and has] . . . national teacher certification for which she receives additional income[.] . . . The gross monthly income of the defendant for ten months in 2005-2006 was $4,214.00. The net income of the defendant is $2,784.82 for ten months

which for twelve months is $3,511.66 gross and $2,321.00 net. Defendant's gross pay for 2006-2007 will be $4,425.00 per month for ten months.

(20) The defendant has filed an affidavit with the Court and testified as to the expenses contained in the affidavit. The reasonabl[e] monthly expenses for the defendant to maintain the lifestyle to which she had become accustomed are as follows:

House payment: 2,326.00; Electricity: 300.00; Heat: 25.00; Water: 40.00; Cable TV: 100.00; Telephone: 100.00; House Maintenance: 100.00; Gasoline: 300.00; Car repairs: 50.00; Car insurance: 84.00; Groceries: 150.00; Religious contributions: 200.00; Medical expenses: 25.00; Clothing: 75.00; Grooming: 40.00; Laundry: 20.00; Entertainment: 100.00; Christmas Gifts: 100.00; Subscriptions: 10.00; Life Insurance: 45.00; Car registration/other: 10.00; Vacations: 100.00; Pets: 30.00; Alarm system: 20.00;

Total: $ 4,350.00

(21) During the marriage of the parties, the parties enjoyed a comfortable lifestyle, but lived beyond their means. The parties frequently traveled to the beach. The defendant resided in a large home with the plaintiff and the children. The home was located near the defendant's parents. The minor children participated in many activities, in school, the community, and the church. The parties kept a standard of living much higher than they could afford.

(22) The plaintiff committed acts of marital misconduct, including illicit sexual behavior during the marriage and prior to the separation of the parties.

(23) The defendant is a dependent spouse in that she is substantially in need of maintenance and support from the other spouse.

. . . .

(25) Considering the factors listed above, the plaintiff is the supporting spouse, and has the means and ability to contribute the amount of $650.00 to the maintenance and support of the defendant.

(26) The minor children are covered by health insurance provided by the plaintiff through his employment at a monthly cost of $240.22.

(27) The child support obligation for the plaintiff to the defendant based upon the 2002 Child Support Guidelines, the guidelines in place at the time of the hearing, would be $773.00 per month.

(28) The plaintiff has the means and ability to pay child support in accordance with the North Carolina Child Support Guidelines.

(29) That from August 2005 to February 2006 the plaintiff paid to the defendant the sum of $2,000.00 each month, designated as 'mortgage/child support', except during August 2005, when $2,300.00 was paid. The Court is unable to determine any arrearage in child support during this period. From February 2006 to present the plaintiff paid the defendant child support of $450.00 per month. The plaintiff has accrued an arrearage from February 1, 2006 through January, 2007 of $323.00 per month for a total of $3,876.00.

As discussed above, the trial court's findings of fact are conclusively established on appeal. Findings of fact three (3), four (4), and five (5) address the duration of the marriage, the status of their minor children, and the parties' ages and education levels. The parties' relative incomes and earning capacities are set out in findings of fact eight (8) through fifteen (15), and in finding of fact nineteen (19). Their expenses, debts, financial obligations, and Plaintiff's payments to Defendant are discussed in findings of fact sixteen (16) through eighteen (18) and in findings of fact twenty (20), twenty-six (26), and twenty-nine (29). Their standard of living is detailed in finding of fact twenty-one (21). Marital misconduct is addressed in finding of fact twenty-two (22). We conclude that the trial court's findings of fact were more than sufficient to demonstrate the court's consideration of the statutory factors.

We have considered and rejected Plaintiff's arguments to the contrary. For example, Plaintiff argues that the trial court erred in its calculation of the parties' expenses, on the grounds that the court improperly adopted "wholesale" the expenses Defendant listed in her affidavit, but made changes to the expenses in Plaintiff's affidavit

"without explanation, justification or reason." Findings of fact sixteen (16) through eighteen (18) do articulate the trial court's reasoning in its calculation of Plaintiff's expenses. Moreover, the trial court is not required to make findings about the weight and credibility it assigns to the evidence before it. "Where trial is by judge and not by jury, . . . [the] trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected. . . . The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties throughout trial and to discern the sincerity of their responses to difficult questions." *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991) (citation omitted).

Similarly unavailing is Plaintiff's claim that the trial court "made no specific findings" about the parties' standard of living. Finding of fact twenty-one (21) includes detailed references to features of the parties' lifestyle. Plaintiff also asserts that the court's findings fail to consider any reduction of Defendant's expenses in order to "keep the parties living within their means." In finding of fact twenty (20) the court enumerates Defendant's living expenses in detail. We conclude that the listed expenses represent a modest lifestyle, and that the court did not abuse its discretion in calculating Defendant's living expenses. The Plaintiff also makes a generalized assertion that the trial court inadequately addresses the assets, liabilities, or required contributions to debt distributed in the Amended Order for equitable distribution. However, Plaintiff fails to identify any specific pertinent assets, liabilities, or debts that the court erred by failing to discuss.

The Plaintiff next contends that the court erred by failing to justify its decisions about the amount and duration of its award of alimony. N.C. Gen. Stat. § 50-16.3A(b) (2007) directs that the court "shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." Decisions about the amount and duration of alimony are made in the trial court's discretion, and the court is not required to make findings about the weight and credibility it assigned to evidence before it. *See Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979). However, based upon this Court's decisions in *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000), *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d

517 (2003), and *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006), we must remand to the trial court for further findings of fact regarding the amount and duration of alimony.

In *Williamson*, the Court first pointed out that "N.C. Gen. Stat. § 50-16.3A(c) (1995) requires the trial court, in making an alimony award, to set forth 'the reasons for its amount, duration, and manner of payment.' "[1] *Id.* at 365, 536 S.E.2d at 339. The Court remanded to the trial court for further findings because its alimony order "failed to provide any reasoning for the $1,500.00 monthly amount, why the award was permanent, or why it would be paid directly to the Union County Clerk of Court." *Id.*

In *Fitzgerald*, this Court specifically held: "[T]he trial court is also required to set forth the reasons for the amount of the alimony award, its duration, and manner of payment." 161 N.C. App. at 421, 588 S.E.2d at 522. The Court then pointed out that "[t]he trial court, however, did not make required findings as to the reasons for making the duration of the alimony continuous until defendant dies, remarries, or cohabits, and why it is to be paid directly to the Clerk of Superior Court." *Id.* As a result, the Court held, citing *Williamson* as controlling precedent, that it was bound "to remand the alimony portion of the order to the trial court to make further findings of fact explaining its reasoning for the duration of the alimony award and its manner of payment." *Id.* at 422, 588 S.E.2d at 523.

Similarly, in *Squires*, the trial court had ordered alimony to "continue until the death of one of the parties, or plaintiff's remarriage or cohabitation, but failed to make any finding about the reasons for this duration." 178 N.C. App. at 264, 631 S.E.2d at 163. This Court "remand[ed] for further findings of fact concerning the duration of the alimony award." *Id.*

Here, the trial court in almost identical fashion ordered the payment of alimony in the amount of $650.00 per month "until the death or remarriage of the defendant." With respect to the $650.00, the trial court made only a finding that plaintiff had the ability to pay that amount, but provided no explanation as to why it had concluded that defendant was entitled to that specific amount. Further, the trial court included no findings of fact at all to explain its rationale for the duration of the award. Accordingly, *Williamson*, *Fitzgerald*, and *Squires* mandate that we remand for

1. The current version of the statute is identical.

further findings of fact regarding the basis for the amount and duration of the alimony award.

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[3] Plaintiff next argues that the trial court's order for child support improperly "imputed income to the Plaintiff" without the required findings of fact. We disagree.

Under N.C. Gen. Stat. § 50-13.4(c) (2007), the trial court "shall determine the amount of child support payments by applying the presumptive guidelines" in the North Carolina Child Support Guidelines (the guidelines), which define income as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment[.]" "Ordinarily, gross income for self-employed individuals is determined under the North Carolina Child Support Guidelines, AOC-A-162, Rev. 10/02, as 'gross receipts minus ordinary and necessary expenses required for self-employment[.]' " *Ford v. Wright*, 170 N.C. App. 89, 99, 611 S.E.2d 456, 462 (2005).

"It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (citation omitted). "Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children." *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976). Thus, "a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent." *Sharpe v. Nobles*, 127 N.C. App. 705, 706, 493 S.E.2d 288, 289 (1997).

In the instant case, the unchallenged findings of fact establish the following regarding Plaintiff's income:

1. Prior to the parties' separation, Plaintiff earned income as a self-employed masonry and grading contractor. In 2004 Plaintiff closed the masonry part of his business. After the parties separated, Plaintiff continued to earn income as a self-employed grading contractor.

2. For several years before their separation, the parties planned for Plaintiff to take a second job as a high school teacher, while continuing to operate the grading business part time.

3. After the parties separated Plaintiff began working as a high school teacher.

4. After Plaintiff started teaching school, he continued to operate his grading business. At the time of the hearing, he was employed as a teacher, and also earning income from the grading business. Plaintiff paid many personal expenses from his business account.

5. Employment was available in the grading business at the time of the hearing.

6. Plaintiff failed to provide income tax returns for 2004 or 2005.

In addition, the court's findings state the dollar amounts of the following: Plaintiff's teaching salary for the pertinent calendar years; the amount Plaintiff represented that he could earn as a full time teacher and part-time grading contractor; the amount deposited into Plaintiff's business account before and after the parties' separation; and the amount of Plaintiff's income from the grading business during the twelve months after the parties separated, while Plaintiff was also teaching school full time. These figures show that during the first year after the parties separated, Plaintiff's income from the grading business was approximately $39,400 including the sale of a truck for $12,000, or $27,400 excluding the truck sale, yielding an average monthly income of $3,280 including the truck sale or $2,280 if it is excluded.

Regarding income earned by Plaintiff from the sale of a truck from his grading business, Plaintiff does not argue that this should be excluded from his income, and case law suggests that the trial court could properly consider it. In *Burnett v. Wheeler*, 128 N.C. App. 174, 493 S.E.2d 804 (1997), the appellant argued that the trial court had improperly imputed income to him. This Court held:

> Judge Foster did not 'impute' an income of $77,000 to defendant. . . . When setting child support and determining the defendant's gross income, it is appropriate to consider all sources of income along with the defendant's earning capacity. *See* North Carolina Child Support Guidelines. The trial court found . . . defendant had retirement accounts which totaled $722,384 and . . . stocks and land valued at $60,000 and $74,000, respectively. . . . [T]he trial court did not abuse its discretion in considering all of defendant's available sources of income in

> arriving at his gross income. We find that the trial court did not impute an income to defendant[.]

Burnett, 128 N.C. App. at 177, 493 S.E.2d at 806.

Nor does the trial court's mere use of the phrases "earning capacity" or "past income" automatically transform the order into one that "imputes" income to Plaintiff. In the instant case, the court's findings of fact expressly calculate Plaintiff's income on the basis of his present earnings, and not by imputing hypothetical earnings to an unemployed or underemployed parent. Finding of fact fifteen (15) might best be read as stating that "Plaintiff has the present ability and capacity to [continue to] earn at least $2,500.00 per month from the grading business[.]" *See*, *e.g.*, *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (trial court did not "impute" income to appellant when it averaged his 2001 and 2002 to determine his 2003 income).

We conclude that the trial court's determination that Plaintiff could continue to earn at least $2,500 a month from the grading business, was reasonably based on its findings of fact regarding Plaintiff's actual earnings during the year prior to the hearing. We have considered and rejected Plaintiff's arguments to the contrary.

Plaintiff asserts that the court's findings about Plaintiff's income from the grading business "failed to include the fact that plaintiff's full-time job responsibilities had changed, that plaintiff's previous income was based upon his having a crew of full-time workers in addition to himself, and that there may be periods when work was unavailable to him." We disagree, and note that findings of fact twelve (12) through fourteen (14) specifically address the amount Plaintiff earned working alone while also teaching, and discuss the availability of work.

Plaintiff also argues that "in finding of fact #14 [the court] stated that the testimony about the income from the grading business 'would be highly speculative.' " This contention, that the court found that income "from the grading business" to be "highly speculative" mischaracterizes the trial court's finding. The only potential income source that the trial court found speculative was the income Plaintiff might earn by renting a truck, which the court did not include in its calculation of Plaintiff's income.

Glass v. Glass, 131 N.C. App. 784, 509 S.E.2d 236 (1998) cited by Plaintiff, is easily distinguished from the instant case. In *Glass*, the Defendant produced evidence of a decrease in income caused by cir-

cumstances beyond his control. Notwithstanding this evidence, and without any factual basis, the trial court found that Defendant would have increased income in the future. In contrast, the trial court herein based its conclusions on detailed findings of fact on Defendant's actual income. This assignment of error is overruled.

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[4] The Plaintiff also argues that the trial court erred by entering an order for equitable distribution that distributed the parties' marital property unequally, on the grounds that the order was "not supported by adequate findings of fact or appropriate consideration of the statutory distributional factors." We disagree.

Plaintiff identifies only one distributional factor that he contends was handled improperly by the trial court—the specific dollar amount of the 2004 tax liability that the court distributed to Plaintiff. However, in finding of fact twenty-seven (27) the court addressed this issue in detail, and explained that because Plaintiff had presented conflicting evidence on this issue, the court was unable to assign an exact dollar amount to the liability. This assignment of error is overruled.

We have considered Plaintiff's other arguments and conclude they are without merit. For the reasons discussed above, the trial court's orders for alimony, child support, and equitable distribution are

Affirmed in part and Remanded in part.

Judges ELMORE and GEER concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. MARK A. KEY, ATTORNEY, DEFENDANT

No. COA06-1666-2

(Filed 4 March 2008)

1. Attorneys— abandonment of client—findings supported by evidence

There was adequate and substantial evidence to support each of the challenged findings in a disciplinary hearing against an attorney for failure to complete his representation of a client after she did not pay the attorney fee.

2. Attorneys— withdrawing representation without court's permission—intent

An order of the Disciplinary Hearing Commission of the State Bar expressed findings of fact that adequately supported the conclusion that an attorney violated Rule 1.16(c) of the Rules of Professional Conduct by failing to seek the court's permission before effectively concluding his representation of the client. Rule 1.16 does not mention an intent requirement.

On rehearing of appeal from an Order of Discipline entered 8 June 2006 by the Disciplinary Hearing Commission of the North Carolina State Bar. Originally heard in the Court of Appeals 30 August 2007.

On 22 January 2008, defendant filed a Petition for Rehearing of this case, which was decided with a published opinion filed 18 December 2007. On 13 February 2008, we allowed that petition for the limited purpose of considering defendant's challenge to finding of fact 26 of the Order of Discipline. The following opinion supersedes and replaces the opinion filed on 18 December 2007.

The North Carolina State Bar, by Deputy Counsel David R. Johnson, for plaintiff-appellee.

Mark A. Key, pro se.

STEELMAN, Judge.

Because there was substantial evidence from which the Disciplinary Hearing Commission of the North Carolina State Bar could conclude that defendant violated N.C. Rev. R. Prof. Conduct 1.16, 1.3, and 8.4 in violation of the terms of a 2003 Consent Order of Discipline, we affirm the Disciplinary Hearing Commission.

I: Procedural History

On 9 December 2005, the North Carolina State Bar ("Bar") filed a motion for Order to Show Cause against defendant Mark Anthony Key ("Key"), alleging that Key had failed to comply with a 2003 Consent Order of Discipline by violating the North Carolina Revised Rules of Professional Conduct. Key is an attorney whose license to practice law in the State of North Carolina was suspended for two years in 2003. That suspension had been stayed for three years. The facts upon which the Show Cause order was based arose from Key's

representation of Tammy Faircloth on a series of probation violation matters in the Superior Court of Wake County in 2005.

This matter was heard by the Disciplinary Hearing Commission ("DHC" or "Commission") of the State Bar on 5 May 2006. On 26 June 2006, the DHC entered an Order of Discipline, lifting the stay of the suspension of Key's license for a period of ninety days. Key appealed.

A panel of this Court heard the matter on 30 August 2007. In an opinion filed 18 December 2007, the panel affirmed the Order of Discipline. Key filed a petition for re-hearing on 22 January 2008. His petition was allowed for the limited purpose of reviewing Key's challenge to finding of fact 26 of the Order of Discipline.

II: Factual Background

On 8 August 2005, Key appeared in the Superior Court of Wake County, representing Faircloth on two probation violations. At the time of the hearing, Faircloth was served with a third probation violation, for absconding supervision ("the absconder violation"). Key requested that Judge Abraham Penn Jones "consider disposing of [all] charges in one order." Although Key thought that all three charges had been resolved, Judge Jones' written order did not include a disposition of the absconder violation. In late August, Faircloth's probation officer told her that a hearing had been scheduled for 12 September 2005. Faircloth relayed this information to Key, who agreed to appear on Faircloth's behalf.

Faircloth and Key appeared before Judge Stafford G. Bullock on 12 September 2005, where Key admitted the absconder violation on her behalf. Key did not in any manner limit his representation. When the court refused to provide assurances that it would follow a recommendation of the probation officer, Key moved to continue Faircloth's case. The motion was granted, and the hearing was rescheduled for 10 October 2005. Following the continuance, Faircloth agreed to pay Key an additional $200 fee to represent her on the absconder violation.

In preparation for the 10 October 2005 hearing, Key issued a subpoena for a probation officer from Cumberland County to be present at the hearing. On 10 October 2005, Faircloth and her probation officer were present in the courtroom for calendar call. In the common area outside the courtrooms, Faircloth told Key that she did not have the $200 for his fee. Key then released the Cumberland County probation officer from the subpoena, advising the officer that he had not

been "fully retained" and would not be representing Faircloth. Shortly thereafter, Key left the Wake County Courthouse to attend a conference at his daughter's school.

When Faircloth's case was called for hearing, Key was not present. Judge Thomas D. Haigwood instructed the courtroom clerk, Sonya Clodfelter, to call Key and tell him that his presence was required in court to resolve Faircloth's absconder violation. After a series of phone calls between Clodfelter and Key, in which Key adamantly stated that he did not represent Faircloth, Judge Haigwood agreed to continue the matter until 9:30 a.m. on 11 October 2005. When Clodfelter called Key back to inform him of the continuance, he became angry and, when told that the judge may issue a show cause order or a bench warrant, stated that "he didn't give a s___" what the judge did.

On 11 October 2005, Key appeared before Judge Haigwood. Both Faircloth and her probation officer also returned to court that morning for the rescheduled hearing. Judge Haigwood continued the matter and issued an order directing Key to show cause why he should not be held in contempt of court. A second show cause order was subsequently issued on 31 October 2005 directing Key to show cause why he should not be subject to attorney discipline by the court for violating provisions of the Revised Rules of Professional Conduct.

On 15 November 2005, following a two-day hearing, Judge Donald W. Stephens entered two orders, one of criminal contempt and one of attorney discipline. Key appealed these matters to this Court. *See State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444 (affirming the trial court's contempt judgment), *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 398 (2007); *In re Key*, 182 N.C. App. 714, 643 S.E.2d 452 (affirming the trial court's order of discipline and sanctions), *disc. rev. denied*, 361 N.C. 428, 648 S.E.2d 506 (2007).

III: Standard of Review

By statute, judicial review of a disciplinary order is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h) (2005). In examining the record, the reviewing court applies a "whole record" test, which requires this Court to consider the evidence which supports the Commission's findings and "also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn." *N.C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 98 (1982) (citation omitted).

> Under the whole record test there must be substantial evidence to support the findings, conclusions and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion.

Id., 286 S.E.2d at 98-99 (internal citations omitted). However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee. *See N.C. State Bar v. Leonard*, 178 N.C. App. 432, 439, 632 S.E.2d 183, 187 (2006), *disc. rev. denied*, 361 N.C. 220, 641 S.E.2d 695 (2007); *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

In *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003), the Supreme Court set forth a three-step process to determine "if the lower body's decision has a 'rational basis in the evidence.' " *Id.*, 356 N.C. at 634, 576 S.E.2d at 311.

> (1) Is there adequate evidence to support the order's expressed finding(s) of fact?
>
> (2) Do the order's expressed findings(s) of fact adequately support the order's subsequent conclusion(s) of law? and
>
> (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?

Id. Talford also requires that the evidence used by the DHC in making its findings "rise to the standard of clear, cogent, and convincing." *Talford*, 356 N.C. at 632, 576 S.E.2d at 310 (quotations and citations omitted).

Since the third prong of *Talford* is not at issue in the case *sub judice*, we limit our review to whether adequate and substantial evidence, rising to the level of clear, cogent, and convincing, supports the order's expressed findings of fact, and, if so, whether those findings adequately support the order's conclusions of law. *Talford*, 356 N.C. at 632, 634, 576 S.E.2d at 310-11.

IV. Duty of Attorney in Criminal Cases

An attorney's duty to a client in a criminal case is set forth in N.C.G.S. § 15A-143:

> An attorney who enters a criminal proceeding without limiting the extent of his representation pursuant to G.S. 15A-141(3)

> undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment, at the trial stage.

Id. (2005).

It is well-settled that an attorney's responsibilities extend not only to his client but also to the court. *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965).

> An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation. To the client who refuses to pay a fee the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel and so that he may be heard if he disputes the charge of nonpayment. To the court, which cannot cope with the ever-increasing volume of litigation unless lawyers are as concerned as is a conscientious judge to utilize completely the time of the term, the lawyer owes the duty to perfect his withdrawal in time to prevent the necessity of a continuance of the case.

Id. (internal citations omitted). *See also State v. Crump*, 277 N.C. 573, 591, 178 S.E.2d 366, 377 (1971) (attorney has an independent obligation to the court to continue to represent a client until the court grants permission to withdraw).

V. Findings of Fact

[1] In his first argument, Key contends that findings of fact 26, 28, 29, and 35 were not supported by the evidence, and that findings of fact 28 and 35 are actually conclusions of law. We disagree.

The challenged findings of fact are as follows:

> 26. Shortly before court was to commence on Oct. 10, Faircloth told Key that she did not have the additional $200 fee. Key left the courtroom area, and told Faircloth that he was not going to return to court because she had not paid his fee.
>
> . . .
>
> 28. Key did not seek or obtain the Court's permission to withdraw as Faircloth's attorney, nor did he take any steps to protect Faircloth's interests before he effectively concluded his involvement in the case.

> 29. As a result of Key's refusal to complete his representation, Faircloth was left without representation at the Oct. 10, 2005 hearing on the absconder violation.
>
> . . . .
>
> 35. Faircloth was adversely affected by Key's refusal to appear on her behalf in that she was required to return to court on Oct. 11 and by the fact that she was also subpoenaed to testify at a disciplinary hearing regarding Key conducted by the Court on Nov. 14 and 15, 2005.

Key argues that there was "absolutely no evidence" that he refused to appear in court or that Faircloth was "adversely impacted." Key contends that he never refused to appear and "made a number of efforts to protect [his client's] interest." We review the whole record, taking into account any contradictory evidence, to determine whether there is adequate and substantial evidence to support these findings, and whether the evidence considered by the DHC is clear, cogent, and convincing. *Talford*, 356 N.C. at 632, 634, 576 S.E.2d at 309-11.

Before analyzing each of the challenged findings of fact, we note that there are a number of findings of fact contained in the Order of Discipline, which are unchallenged on appeal by Key, and deal with facts that are the same or similar to those contained in the challenged findings of fact. These are:

> 21. Key did not limit the scope of his representation of Faircloth during the hearing before Judge Bullock on Sept. 12.
>
> 22. The hearing on the absconder violation was rescheduled for Oct. 10, 2005.
>
> . . .
>
> 24. On Oct. 5, 2005, Key issued a subpoena to [probation officer] Porter to appear at the Oct. 10 hearing.
>
> 25. Before court began on the afternoon of Oct. 10, 2005, Key knew that the matter on the calendar was the absconder violation charge.
>
> . . .
>
> 27. Thereafter, Key told Porter than he (Key) had not been "fully retained" by Faircloth and released Porter from the subpoena.
>
> . . .

32. Judge Haigwood ordered Key to return to court on Oct. 11 to handle Faircloth's case.

. . .

34. Because Key failed to handle Faircloth's case on Oct. 10, and did not return to court that day, Faircloth's case was continued until the following day.

These unchallenged findings of facts are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

A. Finding of Fact 26

We have reviewed the record in this case and conclude that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Key left the Wake County Courthouse on 10 October 2005, knowing that the probation matter was scheduled for hearing. In addition, findings of fact 22, 24, 25, 27, and 34, uncontested on appeal, are evidentiary facts that support finding of fact 26.

Key's testimony before the DHC included the following:

Q: And you didn't tell Ms. Faircloth that you would not be returning to the courtroom?

A: I did tell her that.

. . .

Q: But you didn't tell [Ms. Faircloth] that you weren't coming back in the courtroom?

A: No. I told her I wasn't—wouldn't be able to represent her. I didn't tell her I wasn't going to come back into the courtroom.

. . .

THE CHAIRMAN: . . . you told her you weren't representing her because you hadn't gotten paid, right?

THE WITNESS: Right. I did tell her that, . . .

Key's own testimony constitutes substantial evidence supporting finding of fact 26.

B. Finding of Fact 28

We have reviewed the record in this case and conclude that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Key never sought or obtained

permission from the court to withdraw as Faircloth's attorney. It is further uncontroverted that he left the Wake County Courthouse on 10 October 2005, knowing that the probation matter was scheduled for hearing. In addition, findings of fact 22, 24, 25, 27, and 34, uncontested on appeal, are evidentiary facts that support finding of fact 28.

Key also contends that finding of fact 28 is really a conclusion of law.

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, see *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, see *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)).

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.

Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (internal citations omitted). Moreover, classification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review. *See Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (classifying the trial court's neglect, reasonable efforts, and best interest determinations as conclusions of law).

We conclude that the DHC properly classified finding of fact 28 as a finding of fact, although since it is based upon other evidentiary facts, it is more in the nature of an ultimate finding of fact, and that the finding is supported by substantial evidence.

C. Finding of Fact 29

We have reviewed the record in this case and conclude that there is adequate and substantial evidence contained therein to support

this finding. It is uncontroverted that Key left the Wake County Courthouse on 10 October 2005, knowing that the probation matter was scheduled for hearing. In addition, findings of fact 22, 24, 25, 27, and 34, uncontested on appeal, are evidentiary facts that support finding of fact 29, and finding of fact 26, which we have concluded is supported by adequate and substantial evidence, also supports this finding.

D. Finding of Fact 35

We have reviewed the record in this case and conclude that there is adequate and substantial evidence contained therein to support this finding. It is uncontroverted that Faircloth was required to make three additional court appearances to resolve her absconder violation and was required to appear at the disciplinary hearing before Judge Stephens. The portion of finding of fact 35 stating that "Faircloth was adversely affected by Key's refusal to appear on her behalf" is an ultimate finding of fact, based upon the balance of finding of fact 35. *See Woodard v. Mordecai*, 234 N.C. at 470, 67 S.E.2d at 644.

E. Evidentiary Conclusions

Having reviewed the record in this case, and finding adequate and substantial evidence to support each of the challenged findings, we hold that there is adequate evidence to support the order's expressed findings of fact. *Talford*, 356 N.C. at 634, 576 S.E.2d at 311. We further hold that the evidence considered by the DHC rises to the standard of clear, cogent, and convincing. *Talford*, 356 N.C. at 632, 576 S.E.2d at 310.

Key assigned error to findings of fact twelve and fifteen, "in support of which no reason or argument is stated or authority cited." Pursuant to N.C.R. App. P. 28(b)(6) (2007), we deem these assignments of error to be abandoned.

For all of the reasons stated above, this argument is without merit.

VI: Rules of Professional Conduct

[2] In his second argument, defendant contends that he did not violate Rules 1.16, 1.3, and 8.4(d) of the Revised Rules of Professional Conduct, that the evidence supports his position that no violation of the rules occurred, and that the DHC erred in concluding that such violations occurred. We disagree.

With respect to Rules 1.3 and 8.4, Key contends that: (1) this case presents a matter of first impression before this Court; (2) the comments following Rule 1.3 suggest that a violation of diligence occurs when there is a *pattern* of negligent conduct and his refusal to appear on October 10 fails to establish such a violation; (3) the sole basis for the Rule 8.4 charge is "the unsupported allegation that he 'refused to appear' in court on October 10, 2005[;]" and (4) rather than a "refusal to appear," the evidence demonstrates his diligence on Faircloth's behalf. Finally, he argues that mere refusal to appear does not constitute a violation of Rule 8.4 for three reasons: (1) these circumstances are insufficiently egregious, (2) Key had a "good faith" belief that no legal obligation existed, and (3) DHC failed to adduce evidence of harm to Faircloth or of a reasonable likelihood of prejudice to the administration of justice.

The Order of Discipline contained the following conclusions of law:

> 2. Key entered a general appearance regarding the absconder violation pending against Faircloth on Sept. 12, 2005. Consequently, he could not properly refuse to appear at the Oct. 10, 2005 hearing on the grounds that she had not paid his fee, without first seeking permission to withdraw from the court.
>
> 3. Key's conduct as set out herein violated the Revised Rules of Professional Conduct in the following respects:
>
> > a. By refusing to appear on Faircloth's behalf at the Oct. 10, 2005 hearing, Key neglected a client matter in violation of Rule 1.3, and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d).
> >
> > b. By failing to seek Court permission before effectively concluding his representation of Faircloth, Key violated Rule 1.16(c).

The North Carolina Revised Rules of Professional Conduct govern proper terms of an attorney's representation of clients.

> Rule 1.16. Declining or terminating representation.
>
> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> > (1) withdrawal can be accomplished without material adverse effect on the interests of the client, or:
> >
> > . . . .

> (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled[.]
>
> . . . .
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client[.] . . . .

N.C. Rev. R. Prof. Conduct 1.16 (2005).

Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." N.C. Rev. R. Prof. Conduct 1.3 (2005). Rule 8.4 proscribes a lawyer from engaging "in conduct that is prejudicial to the administration of justice." N.C. Rev. R. Prof. Conduct 8.4(d) (2005). Comment 4 to the rule states:

> **[4]** A showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. . . . The phrase "conduct prejudicial to the administration of justice" in Paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

Id, Cmt. 4.

Under the second prong of *Talford*, we must determine whether the order's expressed findings of fact adequately support its subsequent conclusions of law. 356 N.C. at 634, 576 S.E.2d at 311.

Having considered the evidence supporting the DHC's findings, as well as any evidence from which conflicting inferences could be drawn, we hold that the order's expressed findings of fact adequately support the DHC's conclusion that Key violated Rules 1.3 and 8.4 by refusing to appear on Faircloth's behalf at the 10 Octo-

ber 2005 hearing. *Id.* Willful refusal to appear in contravention of N.C.G.S. § 15A-143 violates the Rule of Diligence to the client and amounts to conduct that has a "reasonable likelihood of prejudicing the administration of justice." *See* N.C. Rev. R. Prof. Conduct 8.4, Cmt. 4.

Regarding conclusion of law 3(b), we note that the plain language of Rule 1.16(c) states: "A lawyer *must* comply with applicable law requiring notice to or permission of a tribunal when terminating representation." N.C. Rev. R. Prof. Conduct 1.16(c) (2005) (emphasis added). Unlike other rules, Rule 1.16 makes no mention of a "scienter" or "intent" requirement, either in its text or its comments. *Cf.* N.C. Rev. R. Prof. Conduct 1.3, cmt. 7 (suggesting an "element of intent or scienter"). Key undertook Faircloth's representation when he appeared and entered admissions on her behalf at the 12 September 2005 hearing, and did not seek or obtain the court's permission to withdraw. Consequently, even after considering any evidence from which conflicting inferences could be drawn, we hold that the order's expressed findings of fact adequately support the DHC's conclusion that Key violated Rule 1.16(c) by failing to seek the court's permission before effectively concluding his representation of Faircloth. *Talford*, 356 N.C. at 634, 576 S.E.2d at 311.

For the reasons stated above, this argument is without merit.

Defendant's brief addresses only ten of twenty-two assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2007), the remaining assignments of error are deemed to be abandoned.

AFFIRMED.

Judges ELMORE and GEER concur.

FULMORE v. HOWELL

[189 N.C. App. 93 (2008)]

MARY E. FULMORE, ADMINISTRATOR OF THE ESTATE OF PRISCILLA ANN MAULTSBY, PLAINTIFF v. GREGORY HOWELL AND PFS DISTRIBUTION COMPANY, INC., DEFENDANTS/THIRD PARTY PLAINTIFFS v. INA LOFTIN HARPER, THIRD PARTY DEFENDANT

No. COA07-984

(Filed 4 March 2008)

1. Appeal and Error— appealability—interlocutory order—attorney-client privilege or disclosure—substantial right

Although defendants' appeal in a wrongful death case from an order allowing plaintiff's motion to compel disclosure was an appeal from an interlocutory order, the trial court's determination of the applicability of the attorney-client privilege or disclosure affects a substantial right and is therefore immediately appealable.

2. Discovery— social security number—exemption for court orders

The trial court did not abuse its discretion in a wrongful death case by issuing an order compelling discovery of defendant individual's social security number because: (1) both N.C.G.S. § 132-1.10 and the Federal Privacy Act of 1974 provide exemptions to the general guidelines proscribing an agency or political subdivision's disclosure of an individual's social security number for court orders; and (2) the trial court took measures to minimize the potential loss of privacy resulting from the disclosure by requiring that all records be purged upon the completion of the lawsuit under N.C.G.S. § 1A-1, Rule 26(c).

3. Discovery— non-privileged documents reviewed in anticipation of deposition—attorney-client privilege—work product doctrine

The trial court did not abuse its discretion in a wrongful death case by issuing an order compelling discovery of the non-privileged documents defendant individual reviewed with his attorney in preparation for his deposition even though defendant contends they were protected by the attorney-client privilege and work product doctrine, because: (1) the trial court did not compel discovery of the communications between defendant and his attorneys, but rather the non-privileged documents that defendant reviewed; and (2) defendants failed to meet their burden of showing that the documents were protected by the work product

doctrine or attorney-client privilege, and defendants failed to explicitly state what documents they argue are protected.

4. Discovery— accident report—safety purpose—ordinary course of business

The trial court did not abuse its discretion in a wrongful death case by requiring defendant company to produce its internal investigation/accident report even though defendant contends it was protected by the attorney-client privilege and work product doctrine because: (1) the attorney did not contact the pertinent individuals until they had already begun the accident report, and the company's safety manual directed that the preparation of the accident report was for safety purposes, instead of for seeking legal advice as required for the attachment of the attorney-client privilege; and (2) the accident report was created in the ordinary course of business pursuant to the safety manual.

Appeal by Defendants from orders entered 7 April 2007 by Judge Thomas D. Haigwood in Wayne County Superior Court. Heard in the Court of Appeals 6 February 2008.

Joretta Durant, for Plaintiff-Appellee.

Wharton, Aldhizer & Weaver, P.L.C., by Charles F. Hilton and Thomas E. Ullrich, pro hac vice, and Teague, Rotenstreich & Stanaland, by Paul A. Daniels, for Defendants-Appellants.

The Cochran Firm, by Hezakiah Sistrunk and Shean Williams, for Plaintiff.

Wallace, Morris, Barwick, Landis & Stroud, by Stuart L. Stroud, for Third-Party Defendant.

ARROWOOD, Judge.

Gregory A. Howell (Howell) and PFS Distribution Company, Inc. (PFS) (together, Defendants), appeal from orders entered 5 April 2007 allowing the motions of Mary E. Fulmore, administrator of the estate of Priscilla Ann Maultsby (Plaintiff), to compel Howell to disclose (1) his social security number; (2) all non-privileged documents that Howell reviewed with his attorney in preparation for his deposition; and (3) the accident report generated by Howell and PFS's former Safety Director, Tommy Lawrimore (Lawrimore), on 6 August 2004. We conclude the trial court did not abuse its discretion in issuing the orders.

Pilgrim's Pride, a corporation employing drivers of tractor-trailers to carry freight, merged with PFS on 29 September 2004, and owned a tractor-trailer operated by Howell, an employee of Pilgrim's Pride and PFS. On 5 August 2004, Howell approached a curve in the road while driving the tractor-trailer, and saw a car driven by Ina Harper approaching the tractor-trailer in the wrong lane of traffic. Howell made an effort to avoid colliding with Harper and, according to the allegations in Plaintiff's complaint, crossed the center line. Thereafter, the tractor-trailer driven by Howell collided with Priscilla Maultsby's vehicle. As a result of the collision, Maultsby died. Plaintiff alleged that Maultsby's death was caused by the negligence of Howell and Defendants.

On 5 August 2004, Lawrimore began his investigation of the accident, and on 6 August 2004, Howell completed, on a pre-printed form, an accident report as required by Pilgrim's Pride Fleet Safety Manual, Sections 13.1-13.6 and 16.13-16.14. Lawrimore also signed the report, and stated in his deposition that the accident report was made in the normal course of business, pursuant to the Pilgrim's Pride Fleet Safety Manual.

On 6 August 2004, Pilgrim's Pride contacted legal counsel, Mr. Thomas E. Ullrich (Ullrich), and requested that Ullrich direct the investigation of the collision for Pilgrim's Pride. The same day, Ullrich contacted Lawrimore, and assumed responsibility for the investigation. Prior to Ullrich's contact, Lawrimore and Howell had begun preparing the accident report pursuant to company policy.

On 2 February 2007, Plaintiff filed a motion to compel discovery seeking disclosure of the accident report prepared by Howell and Lawrimore after the collision. Plaintiff also sought discovery of Howell's social security number, and the non-privileged documents which Howell reviewed with his attorney in preparation for his deposition. On 10 April 2007, the trial court entered orders requiring that Defendants disclose the foregoing documents and social security number. From these orders, Defendants appeal.

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[1] As an initial matter, we note that Defendants' appeal is interlocutory. Our Supreme Court has held, however, that "[t]he trial court's determination of the applicability of the [attorney-client] privilege or disclosure affects a substantial right and is therefore immediately appealable." *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003); *see also Sharpe v. Worland*, 351 N.C.

159, 522 S.E.2d 577 (1999). Accordingly, this appeal is properly before the Court.

Our Standard of review "of a trial court's discovery order is . . . deferential: the order will only be upset on appeal by a showing that the trial court abused its discretion." *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 44 (2005).

Federal Privacy Act of 1974

[2] In their first argument, Defendants contend that the trial court abused its discretion by requiring Howell to produce his social security number, because such compelled disclosure violated the Federal Privacy Act of 1974. We disagree.

The purpose of the Federal Privacy Act of 1974 (the Act) was to regulate the "collection, maintenance, use, and dissemination of personal information by Federal agencies[,]" such that individuals were "provide[d] certain safeguards . . . against an invasion of personal privacy[.]" Section 7 of the Act extends specifically to the protection of the disclosure of an individual's social security number. Section 7 of the Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909, included in the History, Ancillary Laws and Directives of 5 U.S.C. § 552a, states the following:

> (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to—
>
> (A) any disclosure which is required by Federal statute, or
>
> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

The Act also provided exemptions to the general guidelines proscrib-

ing disclosure, specifically stating, in pertinent part, that individual records collected under the Act "shall [not be] disclosed" to "any person, or to another agency" unless disclosure would be "to an instrumentality of any governmental jurisdiction . . . for a civil or criminal law enforcement activity" or "pursuant to the order of a court of competent jurisdiction." Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909; 5 U.S.C. § 552a(b)(11) (1974).

N.C. Gen. Stat. § 132-1.10 (2007), also recognizes the importance of regulating the disclosure of an individual's social security number by agencies or political subdivisions of the State, stating that the "social security number can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual." N.C. Gen. Stat. § 132-1.10(a)(1) (2007). This notwithstanding, the statute also recognizes "legitimate reasons for State and local government agencies to collect social security numbers and other personal identifying information from individuals[.]" N.C. Gen. Stat. § 132-1.10(a)(2) (2007). Agencies and political subdivisions must "minimize the instances this information is disseminated either internally within government or externally with the general public." N.C. Gen. Stat. § 132-1.10(a)(3). To protect an individual's social security number, N.C. Gen. Stat. § 132-1.10, requires the following:

> (b) Except as provided in subsections (c) and (d) of this section, no agency of the State or its political subdivisions, or any agent or employee of a government agency, shall do any of the following:
>
> (1) Collect a social security number from an individual unless authorized by law to do so or unless the collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities as prescribed by law. Social security numbers collected by an agency must be relevant to the purpose for which collected and shall not be collected until and unless the need for social security numbers has been clearly documented.
>
> . . . .
>
> (c) Subsection (b) of this section does not apply in the following circumstances:
>
> . . . .

(2) To social security numbers or other identifying information disclosed pursuant to a court order, warrant, or subpoena.

Citing the Supremacy Clause of the United States Constitution, Article VI, Clause 2, Defendants specifically argue that the court's order requiring Howell to disclose his social security number violated section 7 of the Federal Privacy Act, and that the exemption for court orders in N.C. Gen. Stat. § 132-1.10, is preempted by the Act. Defendants, however, fail to recognize that the Act also provided an exemption for court orders. *See* Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909; 5 U.S.C. § 552a(b)(11) (1974) (stating that individual records collected under the Act "shall [not be] disclosed" to "any person, or to another agency" unless disclosure would be "to an instrumentality of any governmental jurisdiction . . . for a civil or criminal law enforcement activity" or "pursuant to the order of a court of competent jurisdiction"). Notably, and contrary to Defendants' assertions on appeal, both N.C. Gen. Stat. § 132-1.10, and the Federal Privacy Act of 1974 contain exceptions to the general guidelines proscribing an agency or political subdivision's disclosure of an individual's social security number for court orders.

Because the trial court's order compelling discovery of Howell's social security number falls squarely within the exemption for court orders in both N.C. Gen. Stat. § 132-1.10, and the original Federal Privacy Act of 1974, which Defendants submit as authority for their argument, we conclude that the trial court did not abuse its discretion. We further note that the trial court here took measures to minimize the potential loss of privacy resulting from Howell's disclosure of his social security number, requiring that all records be purged upon the completion of the lawsuit pursuant to N.C.R. Civ. P. 26(c). This assignment of error is overruled.

Attorney-Client Privilege & Work-Product

[3] Defendants next argue that the trial court abused its discretion by compelling Howell to disclose all non-privileged documents that Howell reviewed with his attorney in preparation for his deposition, because the documents were protected by the attorney-client privilege and the doctrine of work product. We disagree.

Our Supreme Court has held that, in deciding whether the attorney-client privilege attaches to a particular communication, the trial court must consider whether:

> "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege."

In Re Miller, 357 N.C. at 335, 584 S.E.2d at 786 (quoting *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994)). "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Id.* The party who claims the privilege bears the burden of demonstrating that the communication at issue meets all the requirements of the privilege. *Id.* at 336, 584 S.E.2d at 787.

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means.' " *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)). Pursuant to the rules of discovery, N.C. Gen. Stat. § 1A-1, Rule 26(b)(3), "documents prepared in anticipation of litigation are afforded a qualified immunity from discovery by the party seeking those documents." *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997) (holding that an accident report prepared by a hospital regarding a doctor's slip and fall did not constitute work product).

Defendants first contend that the trial court erred by requiring Howell to identify the documents he reviewed with his attorney to prepare for his deposition, because the information was protected by attorney-client privilege and the doctrine of work-product.

N.C. Gen. Stat. § 8C-1, Rule 612(b) (2007), regulates the disclosure of such non-privileged documents to an adverse party:

> If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if prac-

> ticable, at the trial, hearing, or deposition in which the witness is testifying.

Notably, the rule explicitly includes "deposition" testimony. Moreover, the official Commentary of Rule 612 state that "[i]f the writing is used before testifying for the purpose of testifying, disclosure is in the discretion of the court." Rule 612(c) addresses the proper procedure when the writing allegedly contains privileged material:

> If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial.

At the hearing on the motions to compel discovery, the attorney for the Plaintiff explained, "I don't want to know documents . . . [the Defendants' attorney] prepared" for his client." Rather, the attorney for Plaintiff requested discovery of nonprivileged documents Howell reviewed in preparation for his deposition, documents such as the "police report[,]" "anybody's deposition[,]" or "anybody's statements[.]" The attorney for Defendants argued, "I don't think [P]laintiff's lawyer gets to learn what Mr. Howell and I looked at together," to which the court replied, "I'm not asking you to do that. I'm asking him to respond to the question as to what documents [which were not protected by attorney-client privilege or the doctrine of work product] [did Howell review] in preparation of the deposition."

Defendants admit in their brief to this Court that "the documents themselves may not individually be privileged[,]" but posit that the communications between Howell and his attorneys are privileged. However, the trial court did not compel discovery of the communications between Howell and his attorneys, but rather, the non-privileged documents that Howell reviewed.

Furthermore, Defendants, the party asserting the protection, failed to meet their burden of showing that the documents were pro-

tected by the doctrine of work product or attorney-client privilege. *See Isom*, 177 N.C. App. at 410, 628 S.E.2d at 461; *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 786. In fact, Defendants failed to explicitly state what documents they argue are protected. Because Defendants generally argue that the documents reviewed by Howell are either protected by the attorney-client privilege or the doctrine of work product, without submitting the allegedly privileged documents to either the trial court, *in camera*, or to this Court, offering a specific explanation as to why the documents are protected, we conclude that the trial court did not abuse its discretion in compelling, in accordance with N.C. Gen. Stat. § 8C-1, Rule 612, the discovery of non-privileged documents Howell reviewed in anticipation of his deposition. This assignment of error is overruled.

[4] Defendants next contend that the trial court erred by requiring PFS to produce its internal investigation/accident report, generated by Howell and Lawrimore, because the document was protected by attorney-client privilege and the doctrine of work-product.

"In general, documents created in anticipation of litigation are considered 'work product,' or 'trial preparation' materials, and are protected because '[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.' " *Cook*, 125 N.C. App. at 623, 482 S.E.2d at 550 (quoting *Willis v. Duke Power*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976)). However, "[m]aterials prepared in the ordinary course of business are not protected," and are thus, not considered materials "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Documents prepared " 'in anticipation of litigation' include 'not only materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation.' " *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 310, 628 S.E.2d 851, 864 (2006) (quoting *Willis*, 291 N.C. at 35, 229 S.E.2d at 201).

Willis, 291 N.C. at 35, 229 S.E.2d at 201, and *Cook*, 125 N.C. App. at 623-24, 482 S.E.2d at 550, cite 8 Wright, Miller and Marcus, *Federal Practice and Procedure*: *Civil*, § 2024 at 343 (1994), offering the following guidance:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual sit-

> uation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Id. In *Cook*, this Court stated the following with regard to a hospital accident report: "In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital." 125 N.C. App. at 625, 482 S.E.2d at 551-52.

Here, the facts tend to show that the attorney, Ullrich, did not contact Lawrimore and Howell until they had already begun the accident report, and the procedural manual directs that the preparation of the accident report was for safety purposes, not for the purpose of seeking legal advice, as required for the attachment of attorney-client privilege. Moreover, the accident report was created in the ordinary course of the business of Pilgrim's Pride, pursuant to their safety manual, which negates the possibility of the protection of the report under the doctrine of work product.

With regard to the accident report in question Lawrimore stated the following in his deposition:

> Q: . . . [Y]ou collected information regarding this accident and you talked to Mr. Howell based upon your normal practice as safety director of the . . . facility.
>
> A: Yes, sir. . . .
>
> A: We were doing an accident report; trying to get his statement.
>
> Q: . . . An accident report, what is that?
>
> A: Okay. It tells the vehicles involved. Now, this is something we do on our own. Tells the vehicles involved; who the drivers were; what they—their reason for the accident. I go through, you know, put all their drivers license information; get all that together.
>
> Q: And you do this every time there is an accident?
>
> A: I do this every time there is a DOT recordable accident.
>
> Q: And that's something you do as safety director for all accidents, DOT recordable accidents, involving your drivers.

A: Oh, yes.

Q: And you do that as a normal course of business as part of PFS?

A: Yes, sir.

Q: And you do that—and that's actually part of your policies and procedures at PFS to do that?

A: Yes, sir.

Q: And on this accident report that you called that is [an] official document for PFS?

A: Yes, sir.

Q: It's a business document.

A: Yes, sir.

Q: And that document is generated by you in the normal course of business whenever there is an accident?

A: Yes, sir.

Q: Did you get Mr. Howell to fill out this accident report?

A: Yes, sir. . . .

Q: So, before you got the call, you [were] already starting a process of filling out this accident report?

A: Yes, sir.

Q: And regardless of the call you would have still completed that accident report?

A: Yes, sir.

We further note that Pilgrim's Pride Corporation's Statement of Safety Policy contained the following "accident-control program":

> All accidents involving a Company vehicle will be reviewed by the Accident Review Board. Responsibilities of the Accident Review Board will be as follows:
>
> 13.1 Identify the cause or causes of the accident. . . .
>
> 13.4 Make recommendations for corrective action to prevent reoccurrence of similar accidents in the future. . . .

> 16.13 Completely and accurately fill out the Company Accident Report at the accident scene. An accident package should be in the glove compartment of each tractor. If not, contact your supervisor.
>
> 16.14 Accident Report Forms must be completed and submitted to the Corporate Fleet Safety Office within 24 hours after the accident, or no later than the next scheduled shift. . . .

Based on the foregoing evidence, we cannot say that the trial court abused its discretion in concluding that the accident report was not work product, nor was it protected by attorney client privilege. The report was "prepared in the ordinary course of business[.]" *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. As in *Cook*, the accident report here "would have been compiled, pursuant to the [company] policy, regardless of whether . . . litigation was ever anticipated[.]" *Cook*, 125 N.C. App. at 625, 482 S.E.2d at 551-52. We conclude the trial court did not abuse its discretion in compelling the discovery of the accident report.

We conclude the trial court did not abuse its discretion in issuing the orders compelling the discovery of Howell's social security number, the non-privileged documents Howell reviewed in preparation for his deposition, and the accident report.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

JOSEPHINE BURRELL, Plaintiff v. SPARKKLES RECONSTRUCTION COMPANY, BRIDGEWATER GROUP, INC., and PIEDMONT MUTUAL INSURANCE COMPANY, Defendants

No. COA07-494

(Filed 4 March 2008)

1. Judgments— consent and directed verdict—technical error—outcome unchanged

Entry of a consent judgment for plaintiff on damages was affirmed, despite the court's technical error in granting directed verdict for defendants, because the court's error did not affect the outcome.

2. Damages and Remedies— breach of insurance contract— mold and water damage

The correct amount was awarded for damages for breach of an insurance contract arising from damage to a residence from water and mold where defendant insurer stipulated to an amount for water damage repairs without contradiction from plaintiff, and the court allowed the policy limit for mold damage, less an amount already paid for hotel expenses.

3. Insurance— mold damage—alleged slow settlement—not proximate cause

Any slow response to mold damage by an insurance company was not the proximate cause of the damages, and the trial court did not err by granting summary judgment for defendant insurance company.

4. Witnesses— expert—insurance adjustor—no additional information

The refusal to allow an insurance adjustor to testify as an expert was not an abuse of discretion by the trial court. The witness was not planning to give any additional information or facts that would assist the trier of fact; rather, he essentially would have substituted his judgment about the meaning of the facts for that of the jury and the court.

Appeal by plaintiff from order and judgment entered 13 October 2006 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 13 November 2007.

Lewis & Roberts, PLLC, by Daniel K. Bryson and Geoffrey S. Proud, for plaintiff-appellant.

Hunton & Williams LLP, by Steven B. Epstein and Edward Avery Wyatt, for defendants-appellees.

WYNN, Judge.

Plaintiff Josephine Burrell appeals from an order granting a directed verdict to Defendants Piedmont Insurance and Bridgewater Group on her claims for breach of contract and unfair and deceptive trade practices, as well as the amount of a monetary judgment entered in her favor. After a careful review of the record and the issues before us, we conclude that the trial court technically erred by entering a directed verdict against Ms. Burrell on her claim for breach

of contract; however, we affirm the ultimate disposition of the trial court to award her damages for that breach.

Upon returning to her home on the evening of 5 July 2003, Ms. Burrell found it flooded by hundreds of gallons of water due to a ruptured toilet valve on the second floor. Ms. Burrell called the fire department for assistance and contacted Sparkkles Restoration Services, an emergency water remediation company, to extract the water and dehumidify the house.

On 7 July 2003, Ms. Burrell reported the damage and loss to her homeowner's insurer, Piedmont Insurance Company. Piedmont assigned the claim to an independent adjusting company, Bridgewater Group, Inc. On 8 July 2003, Bridgewater's adjuster, David Barber, investigated the claim along with Randy Baker, President of Sparkkles. Ms. Burrell received a scope of work prepared by Mr. Barber on 21 July 2003, estimating the cost of repairs as $10,448.03, not including mold remediation.

On 10 July 2003, Sparkkles abandoned its incomplete work, leaving ceilings, floors, and walls in Ms. Burrell's house open and unfinished. A week later, Ms. Burrell hired Elliot Tatum of Insight Inspection Services to inspect her home, at which point he discovered mold in the HVAC system. Concerned about her health, Ms. Burrell went to a doctor and checked into a hotel. The next day, she informed Mr. Barber of Bridgewater that mold had been discovered and that she moved out of her home because she had become ill. Mr. Barber informed her that Piedmont would begin paying for her additional living expenses, and he then retained Cary Reconstruction Company (CRC) to inspect the house for mold; that inspection took place on 21 July 2003.

Thereafter, Ms. Burrell discovered that Sparkkles and CRC were respectively owned by two brothers. Concerned as to their impartiality, Ms. Burrell refused to allow CRC personnel to enter her home when Mr. Barber sent them back to the house for a reinspection on 31 July 2003. Nevertheless, CRC provided Ms. Burrell with a copy of its initial 21 July report indicating the presence of mold in her home. Upon Piedmont's request, CRC also prepared a mold remediation estimate in the amount of $3,081.52, which was received by Mr. Barber on 15 August 2003, but never sent to Ms. Burrell.

In the meantime, on 28 July 2003, Ms. Burrell hired AfterDisaster, another remediation company, to inspect her home and continue the

drying process. Mr. Barber agreed to work with AfterDisaster. On 5 August 2003, AfterDisaster submitted a drying and restoration estimate in the amount of $10,149.84 to Mr. Barber, who rejected the estimate and directed AfterDisaster to refer to Ms. Burrell for payment of work already completed.

Mr. Barber sent letters to Ms. Burrell on 31 July 2003 and 7 August 2003, asking her to contact him so further mold inspection could take place. When Ms. Burrell had not responded to either letter by 3 September 2003, Piedmont claims adjuster Jeff Stepp sent her a letter stating that her file would be closed and a payment would be issued for all undisputed claims if she did not reply within ten days. On 6 October 2003, Piedmont sent Ms. Burrell a check in the amount of $1,012.37, for her hotel stay immediately following the flooding of her house. On 26 October 2003, CRC reinspected Ms. Burrell's home with an independent Certified Industrial Hygienist, finding elevated mold levels and thus recommending extensive mold remediation. Piedmont offered Ms. Burrell approximately $13,000 in February 2004 to resolve her claim; she rejected the offer, stating that it was insufficient to cover the damages she had incurred.

On 16 July 2004, Ms. Burrell brought an action asserting eight claims against Sparkkles, Bridgewater, and Piedmont. Before the jury trial, Ms. Burrell voluntarily dismissed all her claims, except for a breach of contract claim against Piedmont and an unfair and deceptive trade practices claim against Piedmont and Bridgewater. At the close of Ms. Burrell's evidence, Piedmont and Bridgewater moved for a directed verdict. On 13 October 2006, the trial court entered an order granting a directed verdict to Piedmont and Bridgewater on Ms. Burrell's remaining claims, and entering a consent judgment in favor of Ms. Burrell in the amount of $14,435.66 against Piedmont.

Ms. Burrell now appeals, arguing that the trial court erred by: (I) granting a directed verdict on the breach of contract claim; (II) granting a directed verdict on the unfair and deceptive trade practices claim; and (III) excluding the testimony of Donald L. Dinsmore.[1]

1. We note in passing that Ms. Burrell's brief to this Court states that she filed a notice of arrangement for the transcript on 26 October 2006, pursuant to Rule 7 of our appellate rules, but the record does not contain a copy of this notice. Moreover, according to Defendants' brief, the transcript was not delivered until 28 February 2007. Nevertheless, Defendants have not argued that any prejudice resulted from this omission or delay; moreover, both parties received extensions of time to prepare their briefs to this Court, which would have mitigated any problems resulting from the delayed transcript. We see no reason these technical rules violations would impede our understanding of the issues on appeal.

I.

[1] First, Ms. Burrell argues that the trial court erred by granting directed verdict on the breach of contract claim and entering judgment in her favor for $14,435.66. We agree in part and disagree in part.

At the outset, we note that Piedmont and Bridgewater conceded at oral arguments before this Court that there was, in fact, a breach of contract in Piedmont's failure to pay Ms. Burrell's claim following the flooding of her house. Specifically, appellate counsel for Piedmont and Bridgewater stated, "We have no problem . . . accepting that there was a breach of contract [and restricting our argument to] what were the damages." When asked if he was telling the Court that his clients stipulated to a breach of contract, "so the only issue now is the question of the Chapter 58 damages," appellate counsel responded, "That's fine, your Honor." Thus, the parties agree that the trial court erred by entering a directed verdict in favor of Piedmont and Bridgewater on Ms. Burrell's breach of contract claim.

However, we conclude that this technical error did not affect the outcome of the trial because the trial court also entered judgment ordering Piedmont to pay $14,435.66 in damages to Ms. Burrell for a breach of contract. Thus, the error does not require reversal or a new trial. *See Phillips v. Phillips*, 185 N.C. App. 238, 244, 647 S.E.2d 481, 486 (2007) ("Thus, the court's finding of a stipulation is a technical error which does not affect the outcome of the order and, therefore, does not require reversal."), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008); *see also Home Ins. Co. v. Ingold Tire Co.*, 286 N.C. 282, 290, 210 S.E.2d 414, 420 (1974) ("[W]e decline to hold a technical oversight constitutes reversible error when its correction would not produce a different result."); *Lewis v. Carolina Squire, Inc.*, 91 N.C. App. 588, 595-96, 372 S.E.2d 882, 887 (1988) ("The harmless error rule stems from a notion of judicial economy: a judgment should not be reversed because of a technical error which did not affect the outcome at trial." (citation omitted)). Here, regardless of the entry of a directed verdict against her for breach of contract, the outcome of the trial was ultimately the same for Ms. Burrell: namely, damages from that breach of contract. As such, we will consider Ms. Burrell's challenge to the adequacy of the amount of the damages awarded by the trial court.

[2] In general, damages in a breach of contract action attempt to place the injured party, insofar as possible, in the position she would

have been in had the contract been performed. *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 571-72, 500 S.E.2d 752, 757, *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). Thus, when an insurance company breaches its policy with an insured party, the damages owed to the insured are the amount of coverage due under the express terms of the policy itself. Moreover, as established by our Supreme Court, "the language of the [insurance] policy controls" its interpretation. *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). "The various terms of an insurance policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 690, 443 S.E.2d 357, 361 (1994), *disc. review improvidently allowed*, 340 N.C. 353, 457 S.E.2d 300 (1995). Furthermore,

> Where the language of a contract is plain and unambiguous, 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 light of the undisputed evidence as to the custom, usage and meaning of its terms.

Id. (emphasis, quotation, and citation omitted).

Here, although Ms. Burrell's actual insurance policy with Piedmont was never entered into evidence at trial, there was extensive testimony as to the provisions and coverage under the policy, including the mold endorsement included in the policy. The mold endorsement specifically stated that it applied "even if the wet rot, dry rot, bacterium or fungus results from or is aggravated by a loss that may be covered by this policy," including "the accidental discharge of liquids." Most importantly, the endorsement provided a limit of five thousand dollars in payment for the total of all losses and costs from incidental wet rot, dry rot, bacteria, and fungi damage, regardless of the number of locations or number of claims made.

The sole evidence offered at trial as to the water damage repairs fixed that amount at a maximum of $10,448.03, per the initial estimate and scope of work prepared by Mr. Barber. Piedmont stipulated to that amount, and Ms. Burrell did not contradict that amount nor suggest that her direct damages from the water leak were greater than that amount. Rather, Ms. Burrell's evidence focused exclusively on the damages she attributed to the spread of mold in her house, caused by the water leak. She testified that she wanted compensation for the

complete mold remediation of her home, estimated at $42,900, as well as for new ceilings, walls, interior trim, cabinets, HVAC system, ductwork, carpeting, hardwood floors, two Craftmatic beds, and over $88,000 worth of personal property in her home, including furniture and clothing. She further stated that she sought reimbursement for alternate living arrangements in the amount of almost $23,000, hotel expenses totaling nearly three thousand dollars, and $60,000 in medical bills related to mold-related injuries, pain, suffering, and emotional distress. Ms. Burrell also admitted that Piedmont had previously paid her $1,012.37 for hotel expenses incurred when she moved out of her house due to the mold.

Under the clear and express terms of the mold endorsement in Ms. Burrell's policy, Piedmont's liability for the mold damages was capped at five thousand dollars. Notwithstanding Ms. Burrell's assertions that Piedmont did not explain the provisions of the endorsement to her or mention it in any of the correspondence that followed the water leak, neither did Piedmont misrepresent the terms of the coverage or attempt to deny she had some mold coverage. As the insured party, Ms. Burrell had a responsibility to read her own policy; moreover, she was bound by the terms of the contract just as Piedmont was. We see no reason—nor did Ms. Burrell present evidence at trial—why the language of the mold endorsement should not control here. *See Mabe*, 115 N.C. App. at 198, 444 S.E.2d at 667. Thus, even were we to accept all of Ms. Burrell's evidence as to mold-related damage, her recovery under the insurance policy would be capped at five thousand dollars.

The trial court ordered monetary damages for Ms. Burrell in the amount of $14,435.66, which included the uncontradicted $10,448.03 in water damages and the entire five thousand dollars allowed under the policy for mold damage, less the $1,012.37 Piedmont had already paid to Ms. Burrell for her hotel expenses. Again, Piedmont consented at trial to the amount of this judgment, declining to challenge Ms. Burrell's recovery of the full five thousand dollars allowed. As such, we find the trial court entered damages in an amount sufficient to fully compensate Ms. Burrell as if the insurance policy had not been breached, the correct amount as a matter of law. *Strader*, 129 N.C. App. at 571-72, 500 S.E.2d at 757. We further conclude that the nature and amount of the evidence were such that the trial court was not required to make findings of fact as to the amount of damages. Accordingly, we affirm the trial court's entry of judgment in favor of Ms. Burrell in the amount of $14,435.66.

II.

[3] Ms. Burrell next argues that the trial court erred by granting directed verdict on her unfair and deceptive trade practices claim because there was sufficient evidence for submission to the jury. We disagree.

Although claims of unfair or deceptive trade practices are generally brought under N.C. Gen. Stat. § 75-1.1, if such practices occur in the insurance industry, they are instead governed by N.C. Gen. Stat. § 58-63-15 and, if proven, deemed to be violations of Chapter 75 as a matter of law. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 302, 435 S.E.2d 537, 542 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994); *see also Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996) ("N.C. Gen. Stat. 58-63-15(11) enumerates a list of practices which are, as a matter of law, instances of unfair and deceptive conduct." (citation omitted)), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997).

Moreover, "[t]o prevail on a claim for unfair and deceptive trade practices, one must show: (1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." *Miller*, 112 N.C. App. at 301, 435 S.E.2d at 542 (citation omitted). However, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (citation omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). Substantial aggravating circumstances must attend a breach of contract to permit recovery as an unfair or deceptive trade practice. *Id.*

In the instant case, Ms. Burrell contends that Piedmont and Bridgewater committed six unfair settlement practices, causing damage to her by allowing the mold problem in her home to go unremediated and become more severe. We find this argument to be unpersuasive. Even assuming *arguendo* that Piedmont and Bridgewater did, in fact, engage in these alleged unfair settlement practices, prior precedent of this Court prevents Ms. Burrell from proving that those violations caused her injury.

In *Nelson v. Hartford Underwriters Insurance Company*, this Court considered a case in which insured plaintiffs argued that their insurance company had exacerbated their mold problems from water

leaks by misrepresenting their coverage and delaying investigation and payment of their claim. 177 N.C. App. 595, 608, 630 S.E.2d 221, 230-31 (2006). Like here, the plaintiffs in *Nelson* claimed the insurance company had committed unfair settlement practices that "slowed their remediation" of the mold damage in their home. *Id.*, 630 S.E.2d at 231. Although the time period at issue in *Nelson* was five years, much longer than what is implicated here, we find that difference to be irrelevant to the question of causation. Specifically, as we noted in *Nelson*:

> Keeping in mind the ongoing injury from mold contamination, [the insurance company's] actions are related to the *response* by the parties to the injury. A response to an injury is, by its nature, not the cause of the injury itself; the injury happens first, and the response to the injury follows. The response is thus not the cause of the injury, but rather a reaction to it. . . . Furthermore, plaintiffs suffered no new injury from [the insurance company's] actions. Instead, plaintiffs' ongoing mold contamination simply proceeded unabated, as a continuation of the already-existing injury.

Id. at 613, 630 S.E.2d at 234. Even more significantly:

> Plaintiffs also contend that [the insurance company's] actions harmed them by slowing their remediation of the home. This argument similarly fails, however, because remediation is the response to the injury. Even if [the insurance company's] actions slowed the remediation, those actions slowed only the response to the injury, and did not cause the injury itself. *A lack of abatement of an injury is not equivalent to causing the injury itself.* In any case, none of [the insurance company's] actions prevented plaintiffs from eliminating the mold from their home, regardless of the type of mold.

Id. at 613-14, 630 S.E.2d at 234 (emphasis added).

This holding—that an insurance company's slow response to mold damage is not the proximate cause of the damage itself—is squarely on point and is therefore binding on other panels of this Court. *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."). Ms. Burrell offered no evidence at trial to

suggest that Piedmont and Bridgewater were the "but for" cause of the mold damage to her home. Indeed, she stated on cross-examination that the mold was caused by the water leak, and its spread and severity were due in part to the "botched job" done by Sparkkles in the days immediately following the leak. Accordingly, even considering the evidence in the light most favorable to Ms. Burrell, we find that she failed to prove an element of her unfair and deceptive trade practices claim as a matter of law. *See Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (stating the standard of review of a directed verdict), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006). This assignment of error is therefore overruled.

III.

[4] In her final assignment of error, Ms. Burrell argues that the trial court erred by excluding the testimony of Donald L. Dinsmore, Jr., tendered by Ms. Burrell as an expert witness at trial. We disagree.

Rule 702 of our Rules of Evidence provides, in pertinent part: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005). Our Supreme Court has further adopted a three-part test for trial courts evaluating the admissibility of expert testimony under Rule 702: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). We review a trial court's ruling as to the admissibility of an expert witness's testimony for an abuse of discretion. *Id.*

In the instant case, there was an extended *voir dire* examination at trial of Donald Dinsmore, Jr., to establish him as an expert in the field of insurance claims and the proper adjustment of water damage and mold claims. Mr. Dinsmore repeatedly stated his opinion that, based on his review of the file, relevant documents, and interviews with Ms. Burrell, Piedmont and Bridgewater had engaged in conduct that violated statutory law, particularly in the way they responded to and handled her claim. Counsel for both Ms. Burrell and Piedmont provided case law and argument to the trial court as to why Mr. Dunsmore's testimony should be allowed or excluded, respectively;

however, Ms. Burrell's attorney did not offer any case that directly stood for the proposition that insurance adjusters could testify as experts. Moreover, the *voir dire* testimony by Mr. Dunsmore suggests that he would have offered legal conclusions based on the same facts and documents that had been put into evidence and would be reviewed by the trial court and jury. As noted by both defense counsel and the trial court, Mr. Dinsmore was not planning to give any additional information or facts that would "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a). Rather, he would essentially have been substituting his judgment of the meaning of the facts of the case for that of the jury and trial court.

At the conclusion of *voir dire*, the trial court stated:

> The Court finds and concludes, in the Court's discretion, that those opinions will not assist the triers of fact in understanding the evidence or determining a fact in issue, and that those opinions would invade the province of the Court in determining whether legal standards have or have not been met.
>
> Further, the Court determines that the opinions of the witness are not relevant, and if the opinions are irrelevant, the probative value of said opinions are [sic] substantially outweighed by the danger of confusing of the issues in this case and of misleading the jury.
>
> The Court finds and concludes that the objection of the defendant to the testimony of Mr. Dinsmore should be sustained, and it is hereby sustained.

Based on the substance of Mr. Dinsmore's *voir dire* testimony, and the trial court's thoughtful consideration of the arguments presented by counsel for both parties, we see no abuse of discretion in this ruling. This assignment of error is accordingly overruled.

Affirmed.

Judges STEELMAN and GEER concur.

IN RE: ADVANCE AMERICA, CASH ADVANCE CENTERS OF NORTH CAROLINA, INC.

No. COA06-1576

(Filed 4 March 2008)

Banks and Banking— appeal from Bank Commission— requirements

Timely appeal from a Bank Commission final decision to the superior court required only written notice of appeal to the Commissioner of Banks within 20 days of the Commission's final decision. There is no dispute that Advance America did so here, and its appeal was timely.

Appeal by Advance America, Cash Advance Centers of North Carolina, Inc. from order entered 24 August 2006 by Judge J. B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 August 2007.

Womble Carlyle Sandridge & Rice, PLLC, by Johnny M. Loper, Donald C. Lampe, and Christopher W. Jones, for Advance America, Cash Advance Centers of North Carolina, Inc., Appellant.

Attorney General Roy Cooper, by L. McNeil Chestnut, Special Deputy Attorney General, and Philip A. Lehman, Assistant Attorney General, for the North Carolina State Banking Commission, Appellee.

GEER, Judge.

Advance America, Cash Advance Centers of North Carolina, Inc. ("Advance America") appeals from the superior court's dismissal of its appeal from a final decision of the Banking Commission. Advance America argues that it fully complied with the statutory requirement for appeals from the Commission by submitting a notice of appeal to the Commissioner of Banks within 20 days of the order. The Banking Commission, however, asserts that Advance America was required to file a petition for judicial review in superior court within the 20-day deadline. Because the plain language of the statute does not include the requirements that the Commission seeks to impose, we agree with Advance America and reverse the order dismissing its appeal.

Facts

On 1 February 2005, the Consumer Finance Division of the Office of the Commissioner of Banks commenced a contested case against Advance America, alleging that the company was unlawfully engaging in the business of payday lending in violation of the Consumer Finance Act, N.C. Gen. Stat. § 53-164 *et seq.* (2005). After the parties conducted discovery, they submitted to the Commissioner stipulations of fact, written expert testimony, and documentary evidence. By agreement, no evidentiary hearing was held.

On 19 December 2005, the Commissioner first issued an order addressing the admissibility and confidentiality of certain evidence. Then, in an order dated 22 December 2005, the Commissioner addressed the merits of the case, concluding (1) federal law did not preempt the Consumer Finance Act, (2) Advance America was not exempt from the Consumer Finance Act, (3) Advance America had violated the Consumer Finance Act, and (4) the Attorney General and Commissioner of Banks were not estopped from enforcing the Consumer Finance Act against Advance America. The Commissioner ordered Advance America to "cease and desist from the further operation of its payday advance centers in North Carolina, to the extent that they make payday loans . . . ." This order also specified the procedure for appealing the order to the State Banking Commission pursuant to N.C. Gen. Stat. § 53-92(d) (2005).

On 27 December 2005, Advance America timely appealed the 19 and 22 December 2005 orders to the Banking Commission by submitting a written notice of appeal to the Commissioner. On 24 May 2006, the Commission issued a final agency decision affirming both orders. The decision contained no reference to the procedure for appealing the decision to superior court.

On 13 June 2006, Advance America delivered a notice of appeal to the Banking Commission stating that it was appealing the Commission's final agency decision pursuant to N.C. Gen. Stat. § 53-92(d). Advance America also filed a petition for judicial review with the Wake County Superior Court on 23 June 2006, explaining that although the company believed N.C. Gen. Stat. § 53-92(d) set forth the proper procedure for appealing an order of the Banking Commission, "out of an abundance of caution in ensuring its right to judicial review, [Advance America] files this Petition seeking judicial review of the Final Agency Decision pursuant to N.C. Gen. Stat. §§ 150B-45 and 150B-46."

On 28 June 2006, the Banking Commission moved to dismiss the petition for judicial review as being untimely filed. The trial court entered an order dismissing Advance America's appeal and petition for judicial review on 24 August 2006. The court stated:

> 1. The Banking Commission rendered a Final Agency Decision in this cause on 24 May 2006.
>
> 2. G.S. § 53-92(d) requires a party seeking to appeal from a final decision of the Banking Commission to appeal to Wake County Superior Court within 20 days.
>
> 3. [Advance America] did not file or otherwise notice an appeal with this Court until it filed a Petition for Judicial Review on 23 June 2006.
>
> 4. [Advance America's] appeal was not timely filed, and the Banking Commission's motion should be allowed.

Advance America timely appealed to this Court from that order.

Discussion

Advance America contends that its appeal to superior court was timely because it complied with N.C. Gen. Stat. § 53-92(d) (2007), which provides:

> (d) The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State. Upon an appeal to the Banking Commission by any party from an order entered by the Commissioner of Banks following an administrative hearing pursuant to Article 3A of Chapter 150B of the General Statutes, the Administrative Procedure Act, the chairman of the Commission may appoint an appellate review panel of not less than five members to review the record on appeal, hear oral arguments, and make a recommended decision to the Commission. Unless another time period for appeals is provided by this Chapter, any party to an order by the Commissioner of Banks may, within 20 days after the order and upon written notice to the Commissioner, appeal the Commissioner's order to the Banking Commission for review. Upon notice of an appeal, the Commissioner of Banks shall, within 30 days of the notice, certify to the Commission the record on appeal. *Any party to a proceeding before the*

> *Banking Commission may, within 20 days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved.* The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the Clerk of Superior Court of Wake County within 15 days thereafter.

(Emphasis added.) Advance America argues that the plain language of this statute requires a party, in order to appeal to superior court, only to give written notice to the Commissioner of Banks within 20 days of the final order of the Commission. We agree.

As our Supreme Court has emphasized, when construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In performing this function, "[l]egislative purpose is first ascertained from the plain words of the statute." *Id. See also O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) ("The first consideration in determining legislative intent is the words chosen by the legislature."). When the words are unambiguous, "they are to be given their plain and ordinary meanings." *Id.* at 268, 624 S.E.2d at 348.

The statute specifically sets forth the procedure for a party to follow when appealing an order of the Banking Commission. It provides that a party may appeal to the Wake County Superior Court "by written notice to the Commissioner of Banks" within 20 days of the final order. Once the party has appealed, the Commissioner must, within 15 days, certify the record to the clerk of court. The statute further specifies the caption to be used in the superior court and mandates that the appeal shall have precedence over all other civil cases on the court's docket.

There is no dispute that Advance America filed a written notice of appeal with the Commissioner of Banks within the 20-day limit. The Commission, however, argues that this action was not sufficient and that Advance America was required to file a petition for judicial review with the superior court within 20 days. According to the Commission, "[t]he statute requires a party to 'appeal to the Superior

Court of Wake County' *and* to provide written notice to the Commissioner within 20 days of the final order of the Commission." (Emphasis original; quoting N.C. Gen. Stat. § 53-92(d).) In other words, the Commission argues that the statute requires two filings: (1) an "appeal to Superior Court," with (2) separate written notice to the Commissioner.

Nothing in the statute, however, can be read as imposing a two-step filing requirement. The statute specifies: "Any party to a proceeding before the Banking Commission may, within 20 days after final order of said Commission *and by written notice to the Commissioner of Banks*, appeal to the Superior Court of Wake County . . . ." N.C. Gen. Stat. § 53-92(d) (emphasis added). The statute thus refers to only one filing by the appealing party and directs that this filing be made with the Commissioner of Banks.

The Commission glosses over the emphasized language, which states that the appeal shall be "by" written notice to the Commissioner rather than, as the Commission urges, "with" written notice. The ordinary meaning of the word "by" in this type of context is "through the means or instrumentality of." *Webster's Third New Int'l Dictionary* 307 (1968). Thus, using the plain and ordinary meaning of the words in § 53-92(d), the appeal to Wake County Superior Court shall be through the means or instrumentality of written notice to the Commissioner of Banks. *See State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 511 (2004) (holding that "[t]he plain meaning of words" in a statute may be construed by reference to standard, non-legal dictionaries).

Moreover, the Commission is asking this Court to read the word "appeal" as referring to a document constituting an appeal. The Commission has, however, cited to no authority suggesting that the word "appeal" is ordinarily understood to be some type of document. Indeed, *Black's Law Dictionary* 105 (8th ed. 2004) (emphasis added) explains that the customary meaning of "appeal" is "[a] *proceeding* undertaken to have a decision reconsidered by a higher authority . . . ." *See Webb*, 358 N.C. at 97, 591 S.E.2d at 511 (holding that, in construing statute, "[w]here appropriate, including earlier in this opinion, this Court has consulted *Black's Law Dictionary*").

The procedure established by the plain language of N.C. Gen. Stat. § 53-92(d) is hardly unusual. All appeals to this Court are commenced by the filing of a notice of appeal in the forum rendering the decision being appealed. *See* N.C.R. App. P. 3(a) ("Any party entitled

by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule."); N.C.R. App. P. 4(a) (providing that in criminal actions, any party entitled to appeal may do so by giving oral notice of appeal at trial or "filing notice of appeal with the clerk of superior court"); N.C.R. App. P. 18(a) (providing that appeals of right from administrative agencies, boards, or commissions to appellate division "shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions"). While other procedures exist for pursuing appellate review in other contexts, we cannot dismiss § 53-92(d)'s plain language as contrary to the General Assembly's intent when it comports with one form of established appellate procedure.

The Commission, however, argues that the statute should be construed *in pari materia* with the Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1 *et seq.* (2007) ("APA"). More specifically, the Commission asserts that § 53-92(d) should be read jointly with the APA to require the filing of a petition for judicial review in superior court (pursuant to N.C. Gen. Stat. § 150B-45) within 20 days of the order (pursuant to N.C. Gen. Stat. § 53-92(d)).[1]

While "[i]t is true . . . that when statutes deal with the same subject matter, they must be construed *in pari materia* and harmonized to give effect to each, . . . [w]hen, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction." *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (internal quotation marks omitted). As our Supreme Court has stressed, "[i]n such case, the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain." *Id.*, 166 S.E.2d at 670-71 (internal quotation marks omitted). Since N.C. Gen. Stat. § 53-92(d) is unambiguous, we cannot, under *Lumbee River Elec. Membership Corp.*, add conditions—such as the filing of a petition for judicial review—not contained in § 53-92(d) itself.

Even if the statute were ambiguous, the Commission is not asking that we *construe* the statute *in pari materia* with the APA,

1. The APA requires that the petition for judicial review be filed *within 30 days* of service of a written copy of the decision for which review is sought. N.C. Gen. Stat. § 150B-45(a).

but rather is urging that we apply both the APA and N.C. Gen. Stat. § 53-92(d) to appeals from the Banking Commission. Such an approach cannot be reconciled with the APA itself.

N.C. Gen. Stat. § 150B-43 provides: "Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.*" (Emphasis added.) If the procedure in N.C. Gen. Stat. § 53-92(d) is adequate within the meaning of § 150B-43, then review shall be under § 53-92(d), and the provisions of the APA are immaterial. On the other hand, if the procedure under § 53-92(d) is deemed inadequate, then Advance America would be "entitled to judicial review of the decision under [the APA]." N.C. Gen. Stat. § 150B-43. Because of the terms of § 150B-43, we cannot accept the Commission's suggestion that we incorporate the procedures and requirements of the APA into § 53-92(d).

We further note that the Commission asserts, citing *Young v. Roberts*, 252 N.C. 9, 17, 112 S.E.2d 758, 765 (1960), that our Supreme Court has already concluded that N.C. Gen. Stat. § 53-92 provides an adequate procedure for judicial review of the Commission's decisions and, therefore, in the Commission's own words, "provide[s] the mandatory process for review of the Commissioner's decision." Since the procedure under N.C. Gen. Stat. § 53-92(d) is adequate, its provisions—and not the provisions of the APA—control this appeal. N.C. Gen. Stat. § 53-92(d) contains no requirement of the filing of a petition for judicial review within 20 days with the superior court, and we are not free to borrow such a requirement from the APA.[2]

The Commission, however, also claims that it has been the practice customarily followed by parties to Commission proceedings to file a petition for judicial review in superior court within 20 days together with written notice to the Commission. It urges that this practice should control. As this Court recently stressed, however, the plain meaning of a statute " 'may not be evaded by an administrative body or a court under the guise of construction.' " *Navistar Fin.*

2. We observe that, if the APA permitted it, it would be more reasonable to read the two statutes in conjunction to require a notice of appeal within 20 days and a petition for judicial review within 30 days rather than selectively importing provisions from the APA into § 53-92(d). Significantly, if we were to adopt such an approach, Advance America's appeal also would be timely.

Corp. v. Tolson, 176 N.C. App. 217, 221, 625 S.E.2d 852, 855 (quoting *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977)), *appeal dismissed and disc. review denied*, 360 N.C. 482, 632 S.E.2d 176 (2006). We cannot look at custom or practice when the statute is unambiguous and clear.

Finally, the Commission argues hyperbolically that this approach would require "the Commissioner to perfect [Advance America's] appeal by carrying [Advance America's] notice of appeal to the courthouse, drafting and filing a petition for judicial review of his own order, and paying the filing fee for [Advance America's] benefit." To the contrary, no one is required to file a petition for judicial review.

Based on the language of § 53-92(d), once the Commissioner receives the notice of appeal from the appealing party, he or she has 15 days to certify the record to the Clerk of Superior Court of Wake County. Once that certification is received, the matter "shall be placed on the civil issue docket of such court and shall have precedence over other civil actions." N.C. Gen. Stat. § 53-92(d). With respect to the filing fee, that amount can be assessed and collected from Advance America by the Wake County Clerk of Superior Court. *Compare Porter v. Cahill*, 1 N.C. App. 579, 581, 162 S.E.2d 128, 130 (1968) (holding that when plaintiff gave notice of appeal in open court, as required by statute, it was duty of clerk to place action on civil issue docket regardless of payment of filing fees; if filing fees not subsequently paid by plaintiff, defendant-appellee could make motion for notice to appellant to pay fees or suffer dismissal of appeal) *with Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc.*, 114 N.C. App. 494, 496, 442 S.E.2d 85, 86 (1994) (holding that appeal was properly dismissed when plaintiff failed to pay costs to appeal within 20 days of judgment as required by N.C. Gen. Stat. § 7A-228(b)).

In any event, even if the statute's plain language—added in 1953, 1953 N.C. Sess. Laws ch. 1209, sec. 5—gives rise to some procedural problems, we do not have authority to rewrite that statute. As our Supreme Court has emphasized: "The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary." *Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979); *see also Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950) (holding that when statute is clear, "[w]e have no power to add to or subtract from the language of the statute").

Therefore, based on the plain language of N.C. Gen. Stat. § 53-92(d), we hold that in order to timely appeal the Commission's final agency decision, Advance America was required to give written notice of appeal to the Commissioner of Banks within 20 days of the Commission's final decision. Since there is no dispute that Advance America did so, its appeal was timely, and we must reverse the trial court's order dismissing Advance America's appeal.

In conclusion, we observe that it may be time for the General Assembly to review this 50-year-old language. The legislature may conclude that additional provisions are necessary in light of current court practices. *See, e.g.*, N.C. Gen. Stat. §§ 90-14.8, -14.9 (2007) (providing that physician may appeal from Medical Board decision to revoke or suspend license by filing notice of appeal with secretary of Board within 20 days, but further providing that "person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of two hundred dollars ($200.00) at the same time the notice of appeal is filed with the Board"). Until any amendment, however, the statute must be enforced as written.

Reversed.

Judges CALABRIA and JACKSON concur.

JUAN RUIZ v. MECKLENBURG UTILITIES, INC.

No. COA07-804

(Filed 4 March 2008)

1. Judgments— default—no entry of default

There was no abuse of discretion in denying defendant's motion to set aside a default judgment where plaintiff had not filed a motion for entry of default. The order granting the default judgment found that defendant had been properly served and had not answered or otherwise responded, which was tantamount to entry of default. Although the motion to set aside was then considered under the stricter Rule 60 standard, there was no prejudice because the trial court found that there were no grounds for relief under the Rule 55(d) standard.

2. Process and Service— service on registered agent—signed by someone else

An employee can be an agent for the addressee, and plaintiff in this case properly established service of process and obtained jurisdiction.

Judge GEER concurring in the result only.

Appeal by defendant from order entered 21 February 2007 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 9 January 2008.

The Law Office of Mark T. Atkinson, PLLC, by Mark T. Atkinson, for plaintiff appellee.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham and Bradley G. Inman, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from an order denying motion to set aside a default judgment entered against defendant.

FACTS

On 30 December 2005, Juan Ruiz ("plaintiff"), an employee of Virginia-Carolina Paving and Grading Company, filed a complaint against Mecklenburg Utilities, Inc. ("defendant"). According to the complaint, defendant's negligence caused plaintiff to be injured while working on a water line. On 13 November 2006, plaintiff filed a motion for default judgment against defendant pursuant to Rule 55(b) of the North Carolina Rules of Civil Procedure and simultaneously sent notice of this motion to defendant, although he was not required to do so. N.C. R. Civ. P. 55(b). On 2 January 2007, plaintiff's motion for a default judgment was heard in Forsyth County Superior Court. The trial judge allowed plaintiff's motion and entered a default judgment against defendant on 2 January 2007. Defendant filed a motion in Forsyth County Superior Court to set aside the default judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure on 1 February 2007. On 21 February 2007, the Honorable Catherine C. Eagles denied defendant's motion to set aside the entry of default or the default judgment. Defendant filed notice of appeal on 22 March 2007.

I.

[1] Defendant argues the trial court erred by entering a default judgment against defendant. Specifically, defendant contends the trial court erred by entering a default judgment without a prior entry of default. We disagree.

Normally, "[d]efault under Rule 55 of the North Carolina Rules of Civil Procedure is a two-step process requiring (1) the entry of default and (2) the subsequent entry of a default judgment." *McIlwaine v. Williams*, 155 N.C. App. 426, 428, 573 S.E.2d 262, 264 (2002); N.C. Gen. Stat. § 1A-1, Rule 55 (2007).[1] If a plaintiff seeks a default judgment under Rule 55, he must abide by these procedural requirements. *McIlwaine*, 155 N.C. App. at 430, 573 S.E.2d at 264. "While entry of default may be set aside pursuant to Rule 55(d) and a showing of good cause, after judgment of default has been entered, the motion to vacate is governed by Rule 60(b)[.]" *Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) (citations omitted). Rule 60(b) of the North Carolina Rules of Civil Procedure allows a party to seek relief from a final judgment of the trial court in cases of, *inter alia*, mistake, inadvertence, surprise, or excusable neglect. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). On appeal, the trial court's findings of fact are conclusive if supported by any competent evidence. *Estate of Teel*, 129 N.C. App. at 607, 500 S.E.2d at 762. However, the trial court's conclusions of law are subject to appellate review. *Id.*

Upon review of the case *sub judice*, the record indicates that plaintiff failed to file a motion for entry of default pursuant to North Carolina Rule of Civil Procedure 55(a), and neither the trial court nor the clerk made an explicit entry of default prior to the entry of the default judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 55(a). As we noted in *Strauss v. Hunt*, 140 N.C. App. 345, 348, 536 S.E.2d 636, 638 (2000), before a trial court rules on a motion for judgment by default, a plaintiff should file a motion for entry of default, and receive a ruling on that motion from either the clerk or trial court. Although the defendant in *Strauss* failed to raise this issue for appeal, we emphasized the

1. In *McIlwaine* the default judgment rested solely on a premature entry of default, and this Court found that such a judgment could not be enforced. For reasons discussed later, the holding in *McIlwaine* does not control the outcome here.

importance of following the correct procedure to obtain a default judgment. *Id.* at 348, 536 S.E.2d at 638-39.

Rule 55(a) states:

> (a) *Entry.*—When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

Although the Rule provides that entry is to be made by the clerk, the judge has concurrent jurisdiction and can order entry of default. *Hasty v. Carpenter*, 51 N.C. App. 333, 336-37, 276 S.E.2d 513, 516-17 (1981); *Highfill v. Williamson*, 19 N.C. App. 523, 532, 199 S.E.2d 469, 474 (1973).

Entry of default has often been described as an interlocutory or ministerial act, *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E.2d 735 (1970), and looks toward subsequent entry of a final judgment. *Id.*

While entry of default and default judgment are normally accomplished by separate motions and orders, nothing in the Rule prohibits both steps from being addressed in the same pleading.

In *Highfill*, the defendant objected to the fact that an entry of default was entered by the trial judge rather than the clerk. In holding that the judge had concurrent authority with the clerk, this Court noted that plaintiff had moved for "judgment against defendant by default." *Highfill*, 19 N.C. App. at 532, 199 S.E.2d at 474.

In the case at bar, plaintiff's motion uses virtually identical language in the prayer for relief. The order granting default judgment found that defendant had been properly served and had not answered or otherwise responded to the complaint. This finding is tantamount to entry of default. While the Court in *Highfill*, *Hasty* and the other cases discussed herein considered damages in a subsequent hearing, Rule 55 does not prohibit the trial judge from immediately determining the amount of damages. Here, plaintiff filed an affidavit along with supporting documents which the trial court found to be adequate to allow the court to compute damages. We find no abuse of discretion in this instance.

In his brief, defendant argues that the failure to have a separate entry of default prejudiced defendant by prohibiting the trial court

from setting aside the default under the more lenient standard of "for good cause shown" pursuant to Rule 55(d).

This argument ignores the fact that the judge denying the defendant's motion to set aside the default judgment determined that there were no grounds under Rule 55(d) warranting relief. In its order the court stated: "IT FURTHER APPEARING THAT there has been no showing of good cause for setting aside default pursuant to Rule 55(d)[.]"

In summary, while obtaining a default judgment is normally a two-step process with entry of default before the clerk preceding the judgment, Rule 55 does not prohibit both motions from being made in the same pleading.

While it is the better practice to follow the normal procedure, under the facts of this case, we find no prejudice to defendant, as the trial court considered setting aside the default judgment under the more lenient standard of Rule 55(d) but found that relief was not warranted. We perceive no abuse of discretion in that finding.

[2] Defendant further argues that plaintiff failed to obtain personal jurisdiction over defendant. We find defendant's arguments unpersuasive.

Plaintiff sent the summons and complaint to Douglas Jones, defendant's registered agent, and received back the delivery receipt signed by Jennie Jones.

N.C. R. Civ. P. Rule 4(j2)(2) provides:

> (2) Registered or Certified Mail, Signature Confirmation, or Designated Delivery Service.—Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(4), 1-75.10(5), or 1-75.10(6), as appropriate. This affidavit together with the return or delivery receipt or copy of the proof of delivery provided by the United States Postal Service signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was

> an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address.

As an employee can be an agent for the addressee, *Fender v. Deaton*, 130 N.C. App. 657, 662-63, 503 S.E.2d 707, 710 (1998), *disc. review denied*, 350 N.C. 94, 527 S.E.2d 666 (1999), plaintiff obtained jurisdiction as service was properly established. Nothing in the affidavit filed by defendant overcomes the presumption created by the Rule.

For the reasons set forth in this opinion, the trial court's ruling is affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge GEER concurs in the result only with separate opinion.

GEER, Judge, concurring in the result only.

I agree with the majority opinion that plaintiff properly served defendant. I cannot, however, agree with the majority opinion's conclusion that no procedural error occurred in this case. I believe that Rule 55 of the Rules of Civil Procedure requires that a plaintiff obtain an entry of default prior to seeking a default judgment.

It is undisputed that plaintiff never expressly moved for entry of default pursuant to Rule 55(a). Instead, plaintiff filed a motion for default judgment pursuant to Rule 55(b). The trial court allowed that motion and entered a default judgment without any mention of an entry of default.

I disagree with the majority that it is simply the better practice to pursue the two-step process beginning with the entry of default followed by a motion for default judgment. I believe that it is mandatory. *See Strauss v. Hunt*, 140 N.C. App. 345, 349, 536 S.E.2d 636, 638-39 (2000) (observing that "[b]efore proceeding, we note that plaintiff should have first filed a motion for entry of default, which the clerk, or the trial court, should have ruled on before the trial court ruled on plaintiff's motion for judgment by default"; stating further that, in failing to move for entry of default, plaintiff committed "error of civil procedure" (internal citations omitted)); *Board of Transp. v. Williams*, 31 N.C. App. 125, 127, 229 S.E.2d 37, 39 (1976) ("[The defendants] argue that plaintiff failed to follow the provisions of G.S. 1A-1, Rule 55, which contemplates a two stage approach: entry of default by the clerk and, thereafter, entry of judgment by default. Obviously defendants are correct in their interpretation of the requirements of G.S. 1A-1, Rule 55, and if that Rule were applicable here, their position would have merit."). *See also* N.C. Gen. Stat. § 1A-1, Rule 55 comment (2007) (noting that there will be "an entry of default *in all cases* and a final judgment by default *entered only after everything required to its entry has been done*" (emphasis added)); Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 10A *Federal Practice and Procedure: Civil* § 2682 (3d ed. 2007) ("Prior to obtaining a default judgment under either Rule 55(b)(1) or Rule 55(b)(2), there must be an entry of default as provided by Rule 55(a).").

As the majority opinion indicates, nothing in Rule 55 specifically precludes a plaintiff from filing a single document requesting both an entry of default and a default judgment. Nevertheless, plaintiff, in this case, did not do so. Plaintiff never sought—in any document—entry of default. Further, no express entry of default ever occurred. Nothing in Judge Massey's "Default Judgment" indicates that he—or anyone else—entered default.

I believe that Judge Massey could have deemed plaintiff's motion for default judgment to be a motion for entry of default and entered default before considering the request for a default judgment. Moreover, this Court has indicated in dicta that the entry of default and the default judgment could, in certain circumstances, be contained in the same document. *See Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 715, 220 S.E.2d 806, 810 (1975) ("The entry of default and entry of default judgment by the Clerk may be simultaneous and can be contained in the same document."), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976). The record before this

Court, however, does not permit any conclusion other than that a default judgment was entered without a prior entry of default.

Contrary to the majority opinion, I would, therefore, hold that the trial court's default judgment violated the procedures set forth in Rule 55. This conclusion does not, however, necessarily require reversal. The only prejudice identified by defendant is that it was denied the more lenient standard of "good cause" applied under Rule 55(c) in considering whether an entry of default should be set aside.

As the majority opinion notes, a trial judge has concurrent authority to enter default under Rule 55(a). Judge Eagles concluded in her order that Judge Massey effectively entered default, and defendant failed to demonstrate good cause to set aside the entry. Thus, defendant received the benefit of the more lenient standard. I agree with the majority opinion that no basis exists to overturn Judge Eagles' determination regarding the lack of good cause.

Moreover, if Judge Massey had first entered default, as the rule requires, defendant would not then have been entitled to notice of plaintiff's application for a default judgment. Rule 55(b)(2)(a), addressing the entry of default judgment by a judge, specifies: "If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." When, however, the defaulting party has not "appeared," no notice of the application for a default judgment is required. *See Disney Enterprises, Inc. v. Farmer*, 427 F. Supp. 2d 807, 815 (E.D. Tenn. 2006) ("As [defendant] has never entered an appearance in this action, the notice requirement of Fed.R.Civ.P. 55(b)(2) does not apply."); Wright, Miller & Kane, *supra*, § 2687 ("[A] defaulting party who has failed to appear, thereby manifesting no intention to defend, is not entitled to notice of the application for a default judgment under either Rule 55(b)(1) or Rule 55(b)(2).").

Defendant has made no argument that it "appeared" in this case within the meaning of Rule 55(b). Accordingly, even if plaintiff had sought and obtained an entry of default, defendant would not have been entitled to notice that plaintiff had also applied for a default judgment. The trial court could have entered the default judgment without defendant's prior knowledge, and defendant would still be in the same position as it was during the proceedings below. In short, defendant was not prejudiced by the procedural errors. I, therefore, agree with the majority opinion that Judge Eagles did not

err in refusing to set aside the default judgment and that the orders below should be affirmed.

ANGELA D. STEWARD, PLAINTIFF v. MERLE C. GREEN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE GUILFORD COUNTY DEPARTMENT OF PUBLIC HEALTH, THE BOARD OF THE GUILFORD COUNTY DEPARTMENT OF PUBLIC HEALTH, GUILFORD COUNTY, THOMAS H. WRIGHT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF STATE PERSONNEL AND THE STATE PERSONNEL COMMISSION, DEFENDANTS

No. COA07-762

(Filed 4 March 2008)

Administrative Law; Declaratory Judgments— judicial review of final agency decision—substantially equivalent exemption—failure to exhaust administrative remedies

The trial court did not err in a declaratory judgment case by dismissing for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) plaintiff employee's complaint, seeking among other things a determination that the Guilford County Personnel Regulations (GCPR) were not substantially equivalent to the standards established by N.C.G.S. § 126-1 et seq. based on her contention that the memorandum terminating her employment did not give her any notice of any right to appeal to the superior court because: (1) a case should be dismissed for lack of subject matter jurisdiction based on a party's failure to exhaust administrative remedies; (2) although Regulation 28 of the GCPR does not include a provision that the final agency decision may be appealed to the superior court of the county, it only governs disciplinary action and states the employee should refer to Regulation 31 if an employee has a complaint or grievance unrelated to the pending disciplinary action; (3) there was no indication in the record that plaintiff had filed a grievance or complaint under Regulation 31 regarding whether the county's regulations are substantially equivalent to the State Personnel Act; (4) although plaintiff contends she exhausted the administrative remedies set forth in the pertinent regulations when Regulation 28 is silent on the issue of further appeals and based on the fact that she appealed to the Guilford County Human Resources Director, the question of whether she has exhausted the remedies of Regulation 28 was not dispositive of

whether she had exhausted all administrative remedies, and in fact plaintiff was also concurrently seeking redress in the North Carolina Office of Administrative Hearings; and (5) the final agency decision regarding whether the GCPR are substantially equivalent to the State Personnel Act may be reviewed by a trial court under Article 4, Chapter 150B of the Administrative Procedure Act only after the aggrieved person has exhausted all available administrative remedies made available to him by statute or agency rule.

Judge JACKSON concurring in result only.

Appeal by Plaintiff from order entered 7 February 2007 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 13 December 2007.

Jerry R. Everhardt, for Plaintiff-Appellant.

Guilford County Department of Social Services, by Deputy County Attorney James A. Dickens, for Respondents-Appellees.

ARROWOOD, Judge.

Plaintiff appeals from an order dismissing her complaint against Defendants pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6). For the reasons discussed herein, we affirm.

Angela D. Steward (Plaintiff) was employed by the Guilford County Department of Public Health (Defendant) on 29 August 1989. From 28 August 2000 to 11 May 2005, Plaintiff held the position of Social Worker II and was assigned to work with the Partnership for Health Management program of the Department.

On 17 February 2005, Plaintiff received her annual employee performance appraisal in which she was given a final rating of "2," which denotes job performance "partially below job expectations." This rating also constituted a "written warning" pursuant to Regulation 28 of the Guilford County Personnel Regulations. Plaintiff received a separate written warning from her supervisor stating that Plaintiff's "performance is inadequate and unacceptable." Plaintiff "put four to ten packets of aspirin in each packet of materials to be given to . . . clients[,]" "disregard[ing] . . . [an] instruct[ion] . . . not to distribute medications[.]" Plaintiff had been reminded numerous times that "giving aspirin to children was potentially dangerous."

On 11 March 2005, Plaintiff received a notification of administrative leave with pay "pending possible disciplinary and other action" pursuant to Regulation 29 of the Guilford County Personnel Regulations. Plaintiff appealed to the Guilford County Human Resources Director, and on 24 March 2005 received a written warning determination.

On 30 March 2005, Plaintiff received a copy of a memorandum recommending the termination of Plaintiff's employment, and on 4 April 2005, Plaintiff attended a conference regarding her employment status and her job performance. On 11 April 2005, Plaintiff received a memorandum dismissing her from employment stating that Plaintiff's "action could have [endangered children and] put the Public Health Department and Guilford County at considerable risk[.]"

Plaintiff filed a complaint in superior court on 30 August 2006. In Plaintiff's complaint, her first claim for relief prayed for declaratory judgment that the Guilford County Personnel Regulations were not "substantially equivalent" to the standards established by N.C. Gen. Stat. § 126-1, *et seq.* Plaintiff specifically contended that the memorandum terminating her employment "did not give [Plaintiff] any notice of any right to appeal" to the county superior court.

On 30 October 2006, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), Rule 12(b)(2) and Rule 12(b)(6), contending that the court did not have subject matter jurisdiction to determine whether the county's personnel regulations were substantially equivalent to the State Personnel Act.

On 7 February 2007, the trial court granted Defendant's motion to dismiss, concluding that the trial court lacked subject matter jurisdiction. From this order, Plaintiff appeals.

Plaintiff contends that the trial has subject matter jurisdiction to determine whether the Guilford County Personnel Guidelines were the "substantial equivalent" to N.C. Gen. Stat. § 126-11. We disagree.

When a party has not exhausted administrative remedies, the case should be dismissed for lack of subject matter jurisdiction. *See Vass v. Bd. of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989) (concluding that the trial court was without subject matter jurisdiction where plaintiff had not exhausted administrative remedies available to him under the Administrative Procedure Act (APA)). "[Q]uestions of subject matter jurisdiction may properly be raised at any [time]." *Forsyth*

County Bd. of Social Services v. Division of Social Services by Everhart, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986).

N.C. Gen. Stat. § 126-11(a) (2005) provides:

> The board of county commissioners of any county may establish and maintain a personnel system for all employees of the county subject to its jurisdiction, which system and any substantial changes to the system, shall be approved by the State Personnel Commission as substantially equivalent to the standards established under this Chapter for employees of local departments of social services, local health departments, and area mental health programs, local emergency management programs. If approved by the State Personnel Commission, the employees covered by the county system *shall be exempt from all provisions of this Chapter except Article 6.*

(Emphasis added).

N.C. Gen. Stat. § 126-11(d) (2005) also explicitly states:

> In order to define "substantially equivalent," the State Personnel Commission is authorized to promulgate rules and regulations to implement the federal merit system standards[.]

In the instant case, Guilford County has previously obtained a "substantially equivalent" exemption from N.C. Gen. Stat § 126-1, *et seq*. On 14 March 2006, the Guilford County Attorney's Office received a letter from E.D. Maynard, the managing partner of the N.C. Office of State Personnel regarding "Substantially Equivalent Status." The letter stated, "[i]n February 2000, the State Personnel Commission approved substantial equivalency for all of Guilford County's human resource program areas as they apply to departments of social services, public health and area mental health programs and their employees." The letter further stated, "[t]here has been no change in this status since that time." Regulation 1 of the Guilford County Personnel Regulations also states that the "[r]egulations have been approved by the State Personnel Commission as retaining substantial equivalency for Position Classification, Salary Administration, Recruitment and Selection, and Employment Relations (including Grievances and Appeals)[.]"

Notwithstanding the foregoing letter, the State Personnel Commission's rule N.C. Admin. Code tit. 25, r. 1I.2404 (June 2007 Cum. Supp.) states the following:

(b) In order to be declared substantially equivalent in the area of employee relations, a county shall adopt a grievance procedure that includes all of the following:

. . . .

(6) A provision that the final decision shall state in writing that if the employee/grievant disagrees with the decision of the local appointing authority, appeal from that decision may be made to the Superior Court of the county.

Regulation 28 of the Guilford County Personal Regulation does not include a provision that the final decision may be appealed to the Superior Court of the County. However, Regulation 28 of the County's Personnel Regulations only governs "disciplinary action" and states that "[i]f an employee has a complaint or grievance unrelated to a pending disciplinary action, the employee should refer to Regulation 31, 'Grievance/Complaint Resolution,' and follow the procedure set out in that Regulation." The record on appeal does not reflect the procedures regarding such grievances or complaints pursuant to Regulation 31; however, there is also no indication in the record that Plaintiff has filed a grievance or complaint pursuant to Regulation 31 regarding whether the County's regulations are substantially equivalent to the State Personnel Act.

The North Carolina Administrative Procedure Act also applies here. *See* N.C. Gen. Stat. § 150B-1(e) (2005) (stating that "[t]he contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter"); *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535-36, 648 S.E.2d 830, 834 (2007). A "person aggrieved" by an agency decision—in this case, the Office of State Personnel's determination that the Guilford County Personnel Regulations were substantially equivalent to the State Personnel Act—may commence a contested case pursuant to N.C. Gen. Stat. § 150B-23(a) (2005), "by filing a petition with the Office of Administrative Hearings[.]" A "contested case" means "an administrative proceeding . . . to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges[.]" N.C. Gen. Stat. § 150B-2 (2) (2005). "A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner." *Id.*

N.C. Gen. Stat. § 150B-43 (2005) governs judicial review of a final agency decision, stating that "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article[.]"

> In order to have standing to petition for judicial review under the statute: (1) the petitioner must be an aggrieved party; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review.

In re Rulemaking Petition of Wheeler, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987) (citation omitted).

In Plaintiff's complaint, she reasons that because Guilford County Regulation 28 is "silent on the issue of further appeals" and because Plaintiff appealed to the Guilford County Human Resources Director, Plaintiff "has [therefore] exhausted the administrative remedies set forth in the Guilford County Personnel Regulations." We find this argument unconvincing. The question of whether Plaintiff has exhausted the remedies of Regulation 28 of the Guilford County Personnel Regulations is not dispositive to the question of whether Plaintiff has exhausted all administrative remedies. In fact, concurrent to Plaintiff's appeal to this Court, Plaintiff also "seek[s] redress in the North Carolina Office of Administrative Hearings." The question of whether Guilford County's Personnel Regulations are "substantially equivalent" to the State Personnel Act is either a question properly submitted as a complaint or grievance pursuant to Regulation 31 of the Guilford County Personnel Regulations, or a question properly submitted as a contested case to an administrative law judge and the Office of Administrative Hearings. Only after Plaintiff has exhausted all administrative remedies may the question be reviewed by the Guilford County Superior Court.

We conclude that the final agency decision regarding whether the Guilford County Personnel Guidelines are "substantially equivalent" to the State Personnel Act may be reviewed by a trial court under Article 4, Chapter 150B of the Administrative Procedure Act only after the aggrieved person has exhausted all available administrative remedies made available to him by statute or agency rule. *See* N.C. Gen. Stat. § 150B-43; *In re Wheeler*, 85 N.C. App. at 153, 354 S.E.2d at 376.

Because Plaintiff's concedes that "the determination by the Court as to whether Regulation 28 of the Guilford County Personnel Regulations is . . . substantially equivalent to the State Personnel Act and the regulations thereunder will determine whether the Appellant has legal rights arising from her termination of employment[,]" and because the trial court did not have subject matter jurisdiction to make the foregoing determination, we do not reach the remaining arguments in Plaintiff's brief.

Affirmed.

Judge TYSON concurs.

Judge JACKSON concurs in result only with separate opinion.

Although I concur with the result reached by the majority opinion, I write separately as I believe we should not address the merits of plaintiff's appeal.

Our "review is solely upon the record on appeal, the verbatim transcript of proceedings, . . . and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)." N.C. R. App. P. 9(a) (2007). "It is the duty of the appellant to ensure that the record is complete. 'An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.' " *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) (internal citations omitted) (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)).

Here, the record before this Court only includes Guilford County Personnel Regulations 1, 2, and 28. Regulation 28, governing "Disciplinary Action," states in Subsection H that for complaints or grievances unrelated to *pending disciplinary actions*, employees should refer to and follow Regulation 31 governing "Grievance/ Complaint Resolution." Plaintiff's complaint or grievance is unrelated to a *pending disciplinary action* as her dismissal necessarily was a *fait accompli* at the time she filed this action. Regulation 31 appears to be controlling in this matter; however, we have no way to ascertain the scope of Regulation 31 as it is not a part of the record on appeal. Because the record does not include this regulation, we cannot, and should not, assess the merits of plaintiff's arguments. Therefore, I must concur only in the result reached by the majority opinion.

STATE OF NORTH CAROLINA, PLAINTIFF v. DAVID LESLIE NEWELL, DEFENDANT

No. COA07-253

(Filed 4 March 2008)

1. Embezzlement— fiduciary relationship—criminal intent—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss charges of embezzlement where defendant contended that the State failed to introduce substantial evidence that he was in an agency or fiduciary relationship with the victims, and that defendant acted with criminal intent.

2. Embezzlement— peremptory instruction—commingling funds—erroneous

The trial court erred in an embezzlement prosecution arising from leasing retail space to small vendors and serving as their sales agent where it essentially instructed the jury as a matter of law that defendant had acted with criminal intent if the vendors' receipts had been commingled with other corporate funds. The State was relieved of its obligation to prove criminal intent and the error was reversible as it was a close case, with a reasonable possibility that the jury would have found defendant not guilty without the instruction.

Appeal by defendant from judgments entered 12 May 2006 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 18 October 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen Mary Barry, for the State.

Nancy R. Gaines, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of twenty-five counts of embezzlement. We conclude that the trial court erred when it peremptorily instructed the jury on the issue of intent. Accordingly, we grant defendant a new trial on all charges.

I. Background

Defendant owned and operated several businesses in Buncombe County. One of his businesses was called Interiors Marketplace. Through another of his businesses, Unity Marketing of Piedmont, Inc. ("Unity Marketing"), he contracted to lease retail space in Interiors Marketplace and serve as sales agent for a number of small vendors of crafts, art, antiques and other items ("vendors").[1] Each boilerplate contract was nominally a lease agreement but included provisions for both leased retail space and cash receipting services. In addition to promising retail space to each vendor in exchange for a fixed monthly payment, each contract provided that defendant's employees would operate a central service desk and receive payments from purchases of each vendor's goods in exchange for a ten percent commission. The receipts were to be credited to a bookkeeping account in each vendor's name and remitted by check, less the ten percent commission, to each individual vendor, along with a sales report, by the 15th of each month. The contracts specifically authorized defendant "to commingle and deposit receipts and payments for Tenant's sales in a common bank account" between receipt and remittance.

On the advice of defendant's accountant, the receipts from the vendors went into a common bank account with the other funds of Unity Marketing. In 2001 some of defendant's businesses experienced cash flow problems and the businesses, including Unity Marketing, transferred cash from one to another as inter-company loans. By 2004, the cash transfers occurred "almost daily." Defendant filed a voluntary petition for bankruptcy on 30 July 2004. On 7 September 2004, flooding caused Interiors Marketplace to cease operations. On 8 September 2004, Unity Marketing transferred $8,500.00 to Commercial Flooring of Carolina, Inc., one of defendant's businesses. The vendors were not paid the money collected on their behalf in August when it became due on 15 September 2004.

Some of the vendors pursued criminal charges, and the Buncombe County Grand Jury returned twenty-five true bills of indictment[2] on 12 September 2005 charging that defendant, in violation of N.C. Gen. Stat. § 14-90, did

1. The evidence tends to show that Unity Marketing was the *alter ego* of defendant, and defendant did not argue that the fact that the contracts were entered into by Unity Marketing rather than him personally should serve to shield him from criminal liability. *See, e.g.*, *State v. Louchheim*, 296 N.C. 314, 329, 250 S.E.2d 630, 639-40, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47 (1979).

2. The trial court instructed the jury on twenty-six counts but the record contains only twenty-five indictments and twenty-five matching verdict sheets.

> embezzle, fraudulently and knowingly misapply and convert to the defendant's own use, and take and make away with and secrete with the intent to embezzle and fraudulently misapply and convert to the defendant's own use U.S. Currency in the amount of [$ ___] belonging to [alleged victim]. At the time the defendant was over sixteen years of age and was an agent and fiduciary of [alleged victim], and in that capacity had been entrusted to receive the property described above and in that capacity the defendant had received and taken that property into the defendant's care and possession.

Defendant was tried before a jury from 8 to 12 May 2006 and found guilty on all twenty-five counts. The trial court sentenced defendant to active sentences of 60 and 44 days, suspended twelve consecutive sentences of 6 to 8 months subject to 60 months of supervised probation, and ordered defendant to pay restitution in the amount of $29,121.61. Defendant appeals.

II. Motion to Dismiss

[1] On appeal, defendant contends that the trial court erred when it denied his motion to dismiss all of the charges against him. Defendant contends that the State did not introduce substantial evidence that defendant was in an agency or fiduciary relationship with the alleged victims, or evidence that defendant acted with criminal intent. We disagree.

> N.C. Gen. Stat. § 15A-1227 (2005) allows a defendant to move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense. The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*.

State v. Bagley, 183 N.C. App. 514, 522-23, 644 S.E.2d 615, 621 (2007) (internal citations and quotations omitted). The essential elements of embezzlement are:

> (1) the defendant, older than 16, acted as an agent or fiduciary for his principal, (2) he received money or valuable property of his principal in the course of his employment and through his fidu-

ciary relationship, and (3) he fraudulently or knowingly and willfully misapplied or converted to his own use the money of his principal which he had received in a fiduciary capacity.

State v. Britt, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987) (citation omitted), *cert. denied*, 321 N.C. 475, 364 S.E.2d. 924 (1988).

A. Fiduciary Relationship

Defendant relies on *In re Storms*, 28 B.R. 761 (Bankr. E.D.N.C. 1983) to argue that he was not in an agency or fiduciary relationship with the alleged victims. He argues that because (1) there was no express duty for defendant to segregate the funds received from the alleged victims, (2) none of the vendors ever inquired as to the segregation of funds, and (3) the relationship between defendant and the vendors was fairly informal, the State did not present substantial evidence of an agency or fiduciary relationship between defendant and the vendors.

We first note that *In re Storms* is a memorandum opinion in a bankruptcy case in which the trial court, *Storms* at 763, determined that the plaintiff had not established the existence of a fiduciary relationship with defendant by clear and convincing evidence. *Storms* at 765. *Storms* also expressly acknowledged that "the broader state law definition of 'fiduciary' . . . is not controlling in the [bankruptcy law] context." *Storms* at 764. For these reasons, *Storms* is neither controlling nor persuasive in determining whether the evidence viewed in the light most favorable to the State is substantial evidence of a fiduciary relationship between defendant and the vendors under North Carolina law.

In determining whether an agency or fiduciary relationship exists, "it is the terms of the relationship that are important and not how the relationship is designated. . . . The question which determines the nature of the relationship between the defendant and the [alleged victim] is the ownership of the money at the time it came into the hands of the defendant." *State v. McCaskill*, 47 N.C. App. 289, 292-93, 267 S.E.2d 331, 333, *cert. denied*, 301 N.C. 101, 273 S.E.2d 306 (1980). "An agent is one who, by the authority of another, undertakes to transact some business . . . and to render an account of it." *SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279, *disc. review denied*, 298 N.C. 204 (1979). An agreement to collect funds for a party, and remit those funds less a commission is sufficient to establish an agency relationship for purposes of N.C. Gen. Stat. § 14-90. *McCaskill*, 47 N.C. App. at 293, 267 S.E.2d at 333.

In the case *sub judice*, the State presented evidence that: Defendant entered into a contract with each vendor whereby he promised to collect receipts on their behalf and remit the money less a commission, with an accounting, on the 15th of each month. This is evidence that the tenants owned the money at the time it came into the hands of defendant. Furthermore, the contracts refer to defendant as "service agent" and the Operating Agreement incorporated into the contracts refers to defendant as a "non-exclusive [marketing] agent." While these terms are not dispositive by themselves, *McCaskill*, 47 N.C. App. at 292-93, 267 S.E.2d at 333, reading them in light of defendant's contractual duty to collect money for the sales of the vendors and remit it to them less a commission, and drawing all inferences in the State's favor, we conclude that the State presented substantial evidence of defendant's agency or fiduciary relationship with the vendors sufficient to survive a motion to dismiss on that element.

B. Criminal Intent

Even if the State offers proof of misapplication or conversion, it cannot survive the motion to dismiss without substantial evidence that defendant intended "to embezzle or otherwise willfully and corruptly use or misapply the property of the principal for purposes for which the property is not held." *Britt*, 87 N.C. App. at 153, 360 S.E.2d at 292. In short, the State must prove that defendant had criminal intent.

When a defendant receives money under an agency relationship and does not transmit it to the party to whom it is due, this is circumstantial evidence of intent. *McCaskill*, 47 N.C. at 293, 267 S.E.2d at 333 (finding substantial evidence of criminal intent where the State presented evidence that the defendant received money from the victim's customers which he was obligated to transmit to the victim after deducting a sales commission but did not transmit the money); *see also State v. Helsabeck*, 258 N.C. 107, 113-14, 128 S.E.2d 205, 209 (1962) (finding substantial evidence of criminal intent where the State presented evidence that victim paid the defendant monthly amounts which were to be forwarded to the mortgagee but the defendant wrote a worthless check to the mortgagee for the amounts); *State v. Rupe*, 109 N.C. App. 601, 609, 428 S.E.2d 480, 486 (1993) (finding substantial evidence of criminal intent where the State presented evidence that the defendant received refundable deposits but the money was not available when the victims requested refunds). Evidence that the defendant was experiencing personal

financial problems is also circumstantial evidence of intent. *State v. Barbour*, 43 N.C. App. 143, 150, 258 S.E.2d 475, 480 (1979).

The State presented evidence that defendant received money on behalf of the vendors and did not pay them when it was due. The State also presented evidence that defendant was experiencing personal financial problems. This evidence was sufficient to survive the motion to dismiss on the issue of intent.

III. Jury Instructions

[2] Defendant contends that the trial court erred when it instructed the jury that (1) "the . . . leases . . . created an agency principal relationship," between defendant and the vendors, and (2) that the "leases agree that the vendors' receipts can be commingled together in one account, but there is no agreement that said receipts can be commingled with other funds of the corporation." Defendant contends that because these allegations were not established beyond a reasonable doubt by uncontradicted evidence, it was error for the trial court to peremptorily instruct the jury. We agree with defendant.

"Peremptory instructions are only rarely proper in criminal cases. Only when uncontradicted evidence clearly establishes a fact beyond a reasonable doubt is a peremptory instruction appropriate." *State v. Hamilton*, 77 N.C. App. 506, 514, 335 S.E.2d 506, 512 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

"If a contract is plain and unambiguous on its face the court may interpret it as a matter of law, but where it 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). "An ambiguity exists where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties." *Kimbrell v. Roberts*, 186 N.C. App. 68, 73, 650 S.E.2d 444, 447, *disc. review denied*, 362 N.C. 87, —— S.E.2d —— (2007). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988).

The contract which defendant drafted and each of the vendors signed permitted defendant "to commingle and deposit receipts and payments for Tenant's sales in a common bank account." The trial court found this phrase to be plain and unambiguous and instructed

the jury accordingly. However, whether this phrase meant that the receipts had to be placed in a segregated bank account for only the vendors, and not commingled with the other funds of Unity Marketing or with the funds of other corporations which defendant owned, was contested by the State and defendant. Defendant's accountant testified that he did not believe that the contracts required "special handling" of the receipts from the vendors' sales. There is also some evidence that the vendors knew of defendant's practice of moving funds around, and that they did not object to it.

By its peremptory instruction, the trial court essentially instructed the jury as a matter of law that the receipts collected by defendant could not be commingled with other funds of the corporation. This instruction essentially declared that defendant had acted with criminal intent if the vendors' receipts had been commingled with other corporate funds, and thereby relieved the State of its obligation to prove the criminal intent of defendant beyond a reasonable doubt. This was error.

Having concluded that the trial court erred in instructing the jury, we now consider if the instruction "was reversible error which would entitle defendant to a new trial. Reversible error is present when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." *State v. Graham*, 186 N.C. App. 182, 192, 650 S.E.2d 639, 646-47 (2007) (internal citations and quotation marks omitted).

This was a close case. There was substantial evidence from which the jury could have found defendant acted with criminal intent, as discussed in Part II. B., *supra*, but also substantial evidence from which the jury could have found that defendant did not act with criminal intent, such as the accountant's testimony and the vendor's knowledge and silent acquiescence to defendant's business practice. The jury should have been allowed to weigh this evidence for itself. We conclude that if the trial court had not peremptorily instructed the jury that commingling the funds was criminal intent *per se*, there was a reasonable possibility that the jury would have found defendant not guilty. This error is therefore reversible, and defendant is entitled to a new trial on all charges.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err when it denied defendant's motion to dismiss the embezzlement charges against him. However, because we conclude that the

trial court committed reversible error when it essentially instructed the jury that the vendors' receipts could not be commingled with other corporate funds as a matter of law, we grant defendant a new trial on all charges. Because we grant defendant a new trial on this assignment of error, we need not consider defendant's other assignments of error as this is not likely to arise at a new trial.

NEW TRIAL.

Judges McCULLOUGH and TYSON concur.

IN THE MATTER OF: RUTH BUNN WINSTEAD

No. COA07-342

(Filed 4 March 2008)

1. **Guardian and Ward— adjudication of incompetency— standing to appeal**

   Appellant Mr. Winstead had standing to appeal to superior court an adjudication finding his wife of sixty years incompetent. The matter is controlled by N.C.G.S. § 35A-1115, and Mr. Winstead was an interested party as next of kin, was entitled to notice of the proceeding, and was authorized to appeal.

2. **Guardian and Ward— appointment of guardian—standing to appeal**

   Appellant Mr. Winstead had standing to appeal an order appointing another person to be the guardian of his wife of sixty years. The matter is controlled by N.C.G.S. § 1-301.3(c); Mr. Winstead had filed an application for letters of guardianship, he was a party to the proceedings, and he was aggrieved by the appointment of another.

Appeal by Ronald Winstead from order dated 26 January 2007 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 17 October 2007.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by C. Terrell Thomas, Jr., for Appellant Ronald Winstead.

Jayne B. Norwood for Petitioner-Appellee.

McGEE, Judge.

Nash County Department of Social Services (Petitioner) filed a petition for adjudication of incompetence and an application for appointment of guardian in this matter on 12 July 2006. Petitioner alleged that Ruth Bunn Winstead (Mrs. Winstead) was incompetent in that she "lack[ed] sufficient capacity to manage . . . her own affairs, [or] to make or communicate important decisions concerning . . . her person, family or property[.]" Petitioner also sought the appointment of an interim guardian for Mrs. Winstead because: (1) Mrs. Winstead "is in a condition that constitutes or reasonably appears to constitute an imminent or forseeable risk of harm to . . . her physical well being and requires immediate intervention[;]" and (2) "there is or reasonably appears to be an imminent or forseeable risk of harm to . . . her estate that requires immediate intervention in order to protect [her] interest." The petition listed Mrs. Winstead's husband, Ronald Winstead (Mr. Winstead), and daughter, Donna King, as Mrs. Winstead's next of kin.

The Clerk of Superior Court entered an order on Petitioner's motion for appointment of interim guardian on 13 July 2006. The Clerk named Laura S. O'Neal, in her capacity as Director of Nash County Department of Social Services, as Mrs. Winstead's interim guardian.

Mr. Winstead filed an application for letters of general guardianship on 28 August 2006, stating that he was Mrs. Winstead's spouse and that they had been married and had lived together for sixty years. A notice of hearing on incompetence was filed on 12 September 2006 and was served upon Mr. Winstead, *inter alios*.

Donna King filed an application for letters of guardianship of the person and for general guardianship on 9 October 2006. Following a hearing, the Clerk of Superior Court filed an order on petition for adjudication of incompetence on 18 October 2006, finding that Mrs. Winstead was incompetent. Donna King filed a second application for letters of general guardianship on 24 October 2006. An Assistant Clerk of Superior Court filed an order on application for appointment of guardian on 24 October 2006, appointing Donna King as Mrs. Winstead's general guardian.

Mr. Winstead filed a notice of appeal in the Superior Court from the order on petition for adjudication of incompetence and from the

order on application for appointment of guardian. Petitioner filed a motion to dismiss Mr. Winstead's appeals on the ground that Mr. Winstead lacked standing to appeal. The trial court filed an amended order dismissing Mr. Winstead's appeals on 26 January 2007, concluding that Mr. Winstead lacked standing to appeal. Mr. Winstead appeals the amended order.

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[1] Mr. Winstead argues the trial court erred by dismissing his appeals from the order on petition for adjudication of incompetence and from the order on application for appointment of guardian. Mr. Winstead argues that pursuant to N.C. Gen. Stat. § 35A-1115, he had standing to appeal both orders. In response, Petitioner argues that "[N.C. Gen. Stat. §] 1-271 and [N.C. Gen. Stat. §] 1-301.2 . . . apply and control with regard to whether [Mr.] Winstead [had] standing to appeal the adjudicatory portion of the hearing and [N.C. Gen. Stat. §] 1-301.3 applies with regard to the appointment of a guardian."

In addressing Mr. Winstead's standing to appeal the order on petition for adjudication of incompetence, we must determine which of the above-cited statutes applies. N.C. Gen. Stat. § 35A-1115 (2007) provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." N.C. Gen. Stat. § 1-271 (2007) provides: "Any party aggrieved may appeal in the cases prescribed in this Chapter." N.C. Gen. Stat. § 1-301.2(a) (2007) speaks more specifically to special proceedings: "This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office." Like N.C.G.S. § 1-271, N.C. Gen. Stat. § 1-301.2(e) (2007) provides for an appeal only by an aggrieved party: "A party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo." However, N.C. Gen. Stat. § 1-301.2(g)(1) (2007) states: "Appeals from orders entered in [proceedings for adjudication of incompetency] are governed by Chapter 35A to the extent that the provisions of that Chapter conflict with this section."

"When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979). In this case, N.C.G.S. § 35A-1115 is the

most specific statute dealing with appeals from an order adjudicating incompetency and is therefore the controlling statute.

While N.C.G.S. § 35A-1115 does not give specific guidance as to who may appeal from an order adjudicating incompetence, our Supreme Court has addressed this issue. In *In re Ward*, 337 N.C. 443, 446 S.E.2d 40 (1994), our Supreme Court held that an interested party to an incompetency adjudication who was entitled to notice of the incompetency proceeding, was also authorized, pursuant to N.C.G.S. § 35A-1115, to appeal from the order adjudicating incompetence. *Id.* at 448-49, 446 S.E.2d at 43.

In *In re Ward*, the respondent was in an automobile accident in Texas on 23 December 1987. *Id.* at 445, 446 S.E.2d at 41. The accident involved the respondent's U-Haul vehicle and a vehicle owned by the petitioner. *Id.* The respondent was injured as a result of the accident and filed an action against the petitioner in the United States District Court for the Middle District of North Carolina. *Id.* The petitioner filed a motion to dismiss based on a lack of personal jurisdiction and based on the expiration of the Texas two-year statute of limitations. *Id.* The respondent filed a motion for a change of venue. *Id.* The court granted the petitioner's motion to dismiss for lack of personal jurisdiction and respondent's motion for change of venue, but it declined to rule on the issue related to the statute of limitations. *Id.* The court then transferred the case to the United States District Court for the Southern District of Texas, where the respondent took a voluntary dismissal without prejudice. *Id.*

However, in *In re Ward*, prior to taking the voluntary dismissal, the respondent's attorney had filed a petition on 16 August 1990 for adjudication of incompetence and an application for appointment of guardian in North Carolina, seeking to have the respondent declared incompetent as of the date of the accident. *Id.* The petitioner was not listed in the petition as an interested party and did not receive notice of the hearing. *Id.* The Clerk of Superior Court in Durham County held a hearing and entered an order that the respondent "was rendered incompetent on 23 December 1987 as a result of the accident." *Id.* The Clerk also appointed the respondent's attorney as the respondent's guardian. *Id.*

The respondent's guardian filed suit against the petitioner in Texas state court on the day after the voluntary dismissal in federal court, and the petitioner then learned about the prior incompetency proceeding. *Id.* The petitioner sought to have the North Carolina

incompetency proceeding reopened by filing a motion in the cause under N.C. Gen. Stat. § 35A-1207(a). *Id.* The Clerk determined that the motion was improperly filed under N.C. Gen. Stat. § 35A-1207 but concluded that " 'in the interest of justice . . . the motion [was] properly before the court pursuant to Article I of G.S. 35A.' " *Id.* at 446, 446 S.E.2d at 41. The Clerk further determined that the respondent would be deemed incompetent as of 16 August 1990, the date that the respondent's attorney filed the petition for adjudication of incompetence. *Id.* The petitioner appealed to the superior court and the respondent filed a motion to dismiss the appeal, which the superior court granted. *Id.* The petitioner then appealed to the Court of Appeals, which affirmed the superior court's dismissal. *Id.* at 446, 446 S.E.2d at 41-42.

On appeal, our Supreme Court noted that pursuant to N.C. Gen. Stat. § 35A-1109 (Supp. 1993), the respondent's attorney, who filed the petition for adjudication of incompetence, was required to provide notice of the petition and notice of hearing to the alleged incompetent's next of kin and any other persons the clerk may designate. *Id.* at 447, 446 S.E.2d at 42. The Supreme Court recognized that "[b]ased on a purely literal reading of [N.C. Gen. Stat. § 35A-1109], [the respondent] [was] correct in contending that he followed the required notice procedure." *Id.* Nevertheless, the Supreme Court held that the petitioner was entitled to receive notice of the incompetency proceedings involving the respondent:

> Where a determination of the incompetency of a party to a lawsuit may effect the tolling of an otherwise expired statute of limitations, . . . the interest of the opposing party clearly falls within the intended scope of [N.C. Gen. Stat. § 35A-1109] and should be protected by notice to that party of the hearing.

Id.

Our Supreme Court also recognized that "nothing in Chapter 35A expressly provides for the rehearing of an incompetency adjudication." *Id.* However, it further held that the case was appropriate for application of Rule 60(b) of the North Carolina Rules of Civil Procedure. *Id.* The Court determined that "[t]he lack of notice to [the petitioner] of the original incompetency proceeding would clearly justify granting it relief pursuant to Rule 60(b)(6)." *Id.* at 448, 446 S.E.2d at 43. Most importantly for purposes of the case before us, the Supreme Court in *In re Ward* held that "*N.C.G.S. § 35A-1115 authorized* [*the petitioner*] *to appeal* from the . . . order which resulted from

the rehearing, and the Court of Appeals erred in affirming the superior court's dismissal of the appeal." *Id.* at 448-49, 446 S.E.2d at 43 (emphasis added).

Likewise, in the present case, Mr. Winstead was entitled to notice of the incompetency proceeding and was an interested party to that proceeding. *See* N.C. Gen. Stat. § 35A-1109 (2007) (providing that "[t]he petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition[.]"). Moreover, Mr. Winstead, as an interested party to the incompetency proceeding, was authorized, pursuant to N.C.G.S. § 35A-1115, to appeal from the order on petition for adjudication of incompetence. *See In re Ward*, 337 N.C. at 448-49, 446 S.E.2d at 43.

Our decision is also supported by a recent case from the Court of Appeals of Ohio, Second District. In *In re Guardianship of Richardson*, 875 N.E.2d 129 (Ohio Ct. App. 2 Dist. 2007), the Ohio Court of Appeals, Second District, recognized that pursuant to Rule 4(A) of the Ohio Rules of Appellate Procedure, "a notice of appeal from a final order or judgment authorized by App.R. 3 may be filed by a 'party' to the action in which the judgment or order was entered." *Id.* at 133. The court held that the alleged incompetent person's next of kin, "who [was] entitled by R.C. 2111.04(A)(2)(b) to notice of the guardianship application[,] . . . [had] an interest in the proceeding concerning her mother that confer[red] on [the next of kin] the status of a 'party' for purposes of App.R. 4(A). Therefore, [the next of kin] [did] not lack standing to appeal." *Id.* at 134.

For the reasons stated above, we hold that Mr. Winstead had standing to appeal the order on petition for adjudication of incompetence. Accordingly, the trial court erred by dismissing Mr. Winstead's appeal. We remand the matter to the Superior Court for reinstatement of Mr. Winstead's appeal and for other proceedings consistent with this opinion. *See In re Ward*, 337 N.C. at 449, 446 S.E.2d at 43.

[2] We next address Mr. Winstead's standing to appeal the order on application for appointment of guardian. Mr. Winstead argues that his appeal from this order is also governed by N.C.G.S. § 35A-1115. However, Petitioner argues that N.C. Gen. Stat. § 1-301.3 controls.

As recited above, N.C.G.S. § 35A-1115 provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." Based upon the

plain language of this section, this statute has no application to appeals from an order appointing a guardian. Therefore, N.C.G.S. § 35A-1115 is inapplicable to Mr. Winstead's appeal from the order on application for appointment of guardian. N.C. Gen. Stat. § 1-301.3(a) (2007) provides: "This section applies to matters arising in the administration of testamentary trusts and of estates of decedents, incompetents, and minors." N.C. Gen. Stat. § 1-301.3(c) (2007) provides: "A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or judgment." We hold that N.C.G.S. § 1-301.3(c) governs Mr. Winstead's appeal from the order appointing a guardian. *See In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (recognizing that guardianship proceedings are not strictly civil actions nor are they special proceedings; they are more in the nature of estate matters). We further hold that pursuant to N.C.G.S. § 1-301.3(c), Mr. Winstead must show that he was a "party aggrieved" by the Assistant Clerk of Superior Court's ruling.

"A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co., Inc.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). On this issue, Petitioner concedes that "Mr. Winstead is possibly aggrieved by the appointment of someone other than him as his wife's guardian. However, [Petitioner] continues to maintain that Mr. Winstead must be both a party to the action and aggrieved by the court's decision to seek appeal. [Mr. Winstead] is not a party."

Professor John L. Saxon has recently explained that "[t]he parties in a proceeding to appoint a guardian for an allegedly incapacitated adult are the petitioner (or petitioners), the respondent, [and] any person other than the petitioner who files an application requesting the appointment of a guardian for the respondent[.]" John L. Saxon, *North Carolina Guardianship Manual* (School of Government, The University of North Carolina at Chapel Hill), January 2008, § 4.1., at 45. Professor Saxon also specifically states that "[t]he respondent's next of kin or other interested persons may become parties to a pending guardianship proceeding by filing an application for the appointment of a guardian for the respondent pursuant to G.S. 35A-1210[.]" *Id.* § 4.1(E.), at 47. In the present case, Mr. Winstead filed an application for letters of general guardianship for Mrs. Winstead, seeking to be appointed as her general guardian. We hold that Mr. Winstead was therefore a party to the guardianship proceedings.

We further hold that Mr. Winstead was aggrieved by the appointment of Donna King, rather than himself, as Mrs. Winstead's general guardian. Accordingly, Mr. Winstead had standing to appeal the order on application for appointment of guardian. We remand the matter to the Superior Court for reinstatement of Mr. Winstead's appeal and for other proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. KENNETH EDWARD SOUTHARDS

No. COA07-546

(Filed 4 March 2008)

1. Appeal and Error— appealability—motion to dismiss after close of State's evidence—introduction of evidence after denial

Although defendant contends the trial court erred by denying defendant's motion to dismiss the charge of possession of stolen property at the close of the State's evidence, this argument is not properly before the Court of Appeals, because: (1) under N.C.G.S. § 15-173, a defendant who introduces evidence after his motion to dismiss is denied thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as a ground for appeal; and (2) defendant offered evidence following the trial court's denial of his motion.

2. Possession of Stolen Property— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of stolen property at the close of all evidence because: (1) there was substantial evidence that defendant possessed the stolen tools including that defendant had unrestricted access to the truck in which the stolen tools were found on 30 June 2004, defendant gave permission for the tools to be placed in the truck, defendant saw the tools placed in

the truck, and defendant had been given the tools by the passenger of the truck and gave no testimony that he refused the property; and (2) the evidence presented was sufficient to allow the question of whether defendant knew or had reasonable grounds to believe that the tools were stolen to go to the jury.

3. Sentencing— restitution—unrecovered items—failure to provide evidence

The trial court erred in a possession of stolen property case by awarding restitution in the amount of $3,125 to the victim, and this portion of the judgment is reversed and remanded, because while a trial court may award restitution under N.C.G.S. § 15A-1340.34(c) based on damages arising directly and proximately out of the offense committed by defendant, it cannot be concluded that defendant should be required to make restitution for a victim's unrecovered tools or lost wages when those losses are neither related to the criminal act for which defendant was convicted nor supported by the evidence in the record.

Appeal by defendant from judgment entered 19 April 2006 by Judge Zoro J. Guice, Jr. in Swain County Superior Court. Heard in the Court of Appeals 4 February 2008.

Roy Cooper, *Attorney General*, *by Ted R. Williams*, *Special Deputy Attorney General*, *for the State.*

Allen W. Boyer, *for defendant-appellant.*

MARTIN, Chief Judge.

Defendant was indicted for felonious breaking or entering of a motor vehicle owned by Dylan Hoyt with intent to commit larceny; felonious larceny of various tools belonging to Dylan Hoyt; and felonious possession of stolen property. He entered pleas of not guilty. At the close of the State's evidence, the trial court dismissed the charges of felonious breaking or entering of a motor vehicle and felonious larceny. A jury convicted defendant of possession of stolen property. He appeals from a judgment entered upon the verdict.

As relevant to the issues raised on appeal, the State's evidence tended to show that a generator, three saws, a drill, a weed eater, a box of bolts, a blue plastic toolbox, and several smaller tools were stolen from a trailer owned by Dylan Hoyt in the early morning hours of 30 June 2004. Hoyt testified that he had paid "at least" $3,000 or

$4,000 for the tools. Hoyt also testified that, as a result of the theft, he lost a construction job he was working because he could not afford to replace the stolen tools.

Deputy Sheriff David Southards, who is defendant's half-brother, testified that while on patrol he saw a truck on the highway that had been reported stolen. The officer testified that there were two male subjects in the vehicle—defendant, who was driving, and another male in the passenger side of the truck. When he approached the vehicle after it was stopped, the officer said he saw some tools partially covered up in the bed of the truck. The officer told defendant that there was a report that the truck he was driving was stolen. Defendant told the officer that he was "in the process of buying the truck." Since the truck that defendant was driving and its license plate had been "entered through NCIC as stolen," the officer placed defendant under arrest. The officer then searched the truck and found a saw, a blue plastic toolbox, and a box of bolts in the bed of the truck. The officer testified that the passenger left the area even though he was told not to leave. He later discovered that the passenger, known to defendant as Buddy Jordan, was actually Hubert Stroup. The truck was impounded and the tools were inventoried and secured at the Swain County Sheriff's Department.

About two weeks later, Hoyt was called in to the Swain County Sheriff's Department and positively identified the items found in the possession of defendant as some of his stolen tools. Hoyt asked the officers to release the saw into his possession so he could use it for work. The remainder of the items were secured at the sheriff's department until trial. None of Hoyt's other stolen tools were found in the possession of defendant.

Defendant testified that a friend whom he knew by the name of "Buddy" came to his house at around 8:30 a.m. on 30 June 2004. Buddy told defendant that he was "going to help [him] fix [his kitchen] floor," which defendant had talked with him about "a couple of weeks before that." Since they did not have any nails or screws to work with, defendant testified that he and Buddy decided to drive into town. Defendant said Buddy asked defendant if he could put his tools in the back of the truck defendant was driving, and defendant agreed. Defendant testified that he saw Buddy put one saw, a blue plastic toolbox, and some screws and bolts in the truck. Defendant said that, during one of their stops in town, Buddy told him that he (defendant) could "have" the tools in the back of the truck. On

their way back to defendant's house, they were stopped by Deputy Sheriff Southards.

I.

[1] Defendant first contends the trial court erred by denying his motion to dismiss the charge of possession of stolen property at the close of the State's evidence. Because this argument is not properly before us, we may not consider it.

N.C.G.S. § 15A-1227(a) provides, in part, that "[a] motion for dismissal for insufficiency of the evidence to sustain a conviction may be made . . . (1) [u]pon close of the State's evidence . . . [and] (2) [u]pon close of all the evidence." N.C. Gen. Stat. § 15A-1227(a) (2007). "A defendant's motion to dismiss under N.C.G.S. [§]15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under N.C.G.S. [§]15-173." *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). Under N.C.G.S. § 15-173, "[i]f the defendant introduces evidence [after his motion to dismiss is denied], he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." N.C. Gen. Stat. § 15-173 (2007). In the present case, "[b]ecause the defendant offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence, the trial court's denial of that motion is not properly before us for review." *Bruce*, 315 N.C. at 280, 337 S.E.2d at 515.

II.

[2] Defendant next contends the trial court erred by denying his motion to dismiss the charge of possession of stolen property at the close of all the evidence. We disagree.

"In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator." *State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986) (citing *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The evidence is to be considered in the light most favorable to the State and the State is entitled to every reason-

able inference to be drawn therefrom." *Triplett*, 316 N.C. at 5, 340 S.E.2d at 739.

The essential elements of felonious possession of stolen property are: "(1) possession of personal property, (2) which was stolen pursuant to a breaking or entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking or entering, and (4) the possessor acting with a dishonest purpose." *State v. McQueen*, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 385 (2005). Defendant contends that there was insufficient evidence that he (A) possessed the property, and (B) knew or had reasonable grounds to believe the property was stolen.

A.

"One has possession of stolen property when one has both the power and intent to control its disposition or use." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985) (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). "One who has the requisite power to control and intent to control access to and use of a vehicle or a house has *also the possession of the known contents thereof*." *State v. Eppley*, 282 N.C. 249, 254, 192 S.E.2d 441, 445 (1972) (emphasis added).

In the present case, defendant was stopped by Deputy Sheriff Southards on 30 June 2004 with stolen tools in the bed of the truck defendant was driving. Defendant contends that he did not own the truck he was driving on 30 June 2004, and was only "in the process of" buying the truck at that time. Defendant seems to argue that, since he did not own the truck in which the tools were found, he did not have "the requisite power to control and intent to control access to and use of [the truck]," *id.*, and so could not have been in possession of the stolen tools found therein. However, viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference which might be drawn from the evidence, the evidence does not support defendant's argument.

Defendant's wife testified that the person she believed to be the owner of the truck agreed to sell the truck and told her, "[J]ust drive it for a few days and then if you want it we'll work something out." She testified that, while neither she nor defendant paid any money for the truck, they had possession of the truck for at least three days, during which time defendant drove around in it. Defendant testified

that his friend Buddy asked defendant if "it [was] okay if [he] put [his] stuff on the truck." Defendant testified, "I said go ahead." After giving Buddy his permission to do so, defendant saw Buddy put "a saw and a blue box"—two of the stolen items—in the bed of the truck. Then defendant testified that Buddy told him that he (defendant) could "have" the tools in the back of the truck. Therefore, at the time of defendant's arrest: (1) defendant had unrestricted access to the truck in which the stolen tools were found on 30 June 2004; (2) defendant gave permission for the tools to be placed in the truck; (3) defendant saw the tools placed in the truck; and (4) defendant had been given the tools by the passenger of the truck and gave no testimony that he refused the property. Thus, we conclude that there was substantial evidence that defendant possessed the stolen tools.

B.

"Whether the defendant knew or had reasonable grounds to believe that . . . [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (citing *State v. Allen*, 45 N.C. App. 417, 263 S.E.2d 630 (1980)), *disc. review denied*, 320 N.C. 172, 358 S.E.2d 57 (1987). The evidence showed that, when asked whether defendant trusted the friend who gave him the tools, he answered: "Yes, in a way, but in a way not. I didn't really know him that well. He seemed like a pretty good buddy, you know, just a friend." "Well, I did [trust him] but I didn't, you know. I didn't know him well enough to really trust him, but I wanted to, you know." Defendant testified that, when his wife went to the Swain County Sheriff's Department to visit him two or three days after his arrest and asked him about a generator that had also been stolen, defendant "told her that [he] didn't know nothing about it, that if that stuff was stole [sic] that Buddy probably did it, if he done it; and it was probably in Robbinsville." When asked whether it surprised defendant that his friend "might have stolen some of this stuff," defendant answered: "Well, after that it didn't, but before I didn't think about him being—stealing, you know. . . . *I was iffy about him*. I didn't know, you know." (Emphasis added.) Defendant also testified that he did not remember that he (defendant) was convicted for a worthless check in 2003.

While defendant testified that he only suspected that the tools were stolen after he (defendant) was arrested, he also stated that he did not trust the person who gave him the tools nor was he surprised that the tools were stolen. We conclude that, in the light most favor-

able to the State, the evidence presented was sufficient to allow the question of whether the defendant knew or had reasonable grounds to believe that the tools were stolen to go to the jury. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge of possession of stolen property under 04 CRS 1176.

III.

[3] Defendant also contends the trial court erred by awarding restitution of $3,125.00 to Dylan Hoyt. We agree.

N.C.G.S. § 15A-1340.34(a) provides, in part: "When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense[, i.e., to any] . . . person directly and proximately harmed as a result of the defendant's commission of the criminal offense." N.C. Gen. Stat. § 15A-1340.34(a) (2007). "[T]he court may . . . require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c). To determine the amount of restitution "[i]n the case of an offense resulting in the damage, loss, or destruction of property of a victim of the offense," N.C. Gen. Stat. § 15A-1340.35(a)(2) (2007), the court must consider the following:

> a. *Return of the property to the owner of the property* or someone designated by the owner; or
>
> b. If return of the property under sub-subdivision (2)a. of this subsection is impossible, impracticable, or inadequate:
>
> 1. The value of the property on the date of the damage, loss, or destruction; or
>
> 2. *The value of the property on the date of sentencing, less the value of any part of the property that is returned.*

Id. (emphasis added). "The amount of restitution must be limited to that supported by the record . . . ." N.C. Gen. Stat. § 15A-1340.36(a) (2007); *see also State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) ("[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing."). "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

However, "[i]t is well settled that for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted . . . ." *State v. Valladares*, 182 N.C. App. 525, 526, 642 S.E.2d 489, 491 (2007) (internal quotation marks omitted).

In the present case, although the indictment alleged that the value of the stolen tools was "approximately $1,138.00," Hoyt gave sworn testimony that he paid "at least" $3,000 or $4,000 for all of the tools that were stolen from the truck bed of his trailer on 30 June 2004. The stolen tools included a generator, an 18-inch skill saw, an angle drill, a small porta-cable skill saw, a chainsaw, a weed eater, a box of 12-inch quarter-inch lag bolts used to assemble log cabins, a blue plastic toolbox, and several smaller tools. However, when defendant was stopped on 30 June 2004, only the small porta-cable skill saw, the blue toolbox, a lantern, and a tape measure were recovered from the truck defendant was driving. No testimony was presented that any of the other stolen tools were found in defendant's possession at any time. In addition, although Hoyt testified that he lost a construction job he was working as a result of the theft of his tools, the State presented no evidence on how much income was lost. Further, all of the property found in defendant's possession was immediately seized by the police and later returned to Hoyt.

During the sentencing hearing, the State "concede[d] and admit[ted] that the amount . . . requested for restitution involve[d] *all of the tools that were stolen* from [Hoyt's] vehicle that were not recovered," most of which were *not found* in defendant's possession. (Emphasis added.) The State further recognized that "all of the items that were recovered from [defendant] . . . which he had in his possession were returned [to Hoyt]." While a court may award restitution based on "damages arising directly and proximately out of the offense committed by the defendant," N.C. Gen. Stat. § 15A-1340.34(c), we cannot conclude that defendant should be required to make restitution for Hoyt's unrecovered tools or lost wages when those losses are neither related to the criminal act for which this defendant was convicted nor supported by the evidence in the record. Therefore, we reverse the trial court's award of restitution to Dylan Hoyt.

No error; remanded for correction of judgment to strike award of restitution.

Judges STEELMAN and STEPHENS concur.

IN RE A.F.H-G.

[189 N.C. App. 160 (2008)]

IN THE MATTER OF: A.F.H-G., A MINOR CHILD

No. COA07-1346

(Filed 4 March 2008)

Termination of Parental Rights— subject matter jurisdiction— failure to issue summons to juvenile

The trial court erred by terminating respondents' parental rights, and the order is vacated based on lack of subject matter jurisdiction, because no summons was issued to the juvenile as required by N.C.G.S. § 7B-1106(a)(5).

Judge STEPHENS concurring.

Appeal by respondent-mother from an order terminating parental rights entered 13 September 2007, *nunc pro tunc* 14 August 2007, by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 18 February 2008.

Hedahl & Radtke Family Law Center, *by Debra J. Radtke*, *for petitioner-appellees.*

Janet K. Ledbetter, *for respondent-appellant.*

STEELMAN, Judge.

Where no summons is issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106(a)(5), we must vacate an order terminating parental rights under N.C. Gen. Stat. Chapter 7B for lack of subject matter jurisdiction.

A.S. ("mother") gave birth to A.F.H-G., the minor child, in 1998. In 1999, following an incident that resulted in mother's hospitalization, the court granted custody of A.F.H-G. to a maternal aunt and uncle, with reasonable visitation by mother. On 23 October 2006, the custodial aunt and her husband filed a petition to terminate both mother's and father's parental rights. On 24 October 2006, a summons was issued that named both parents, but not the minor child, as respondents. On 13 September 2007, *nunc pro tunc* 14 August 2007, the trial court terminated mother's and father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(7). Mother appeals.

The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows

> that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (internal citations omitted). The judicial procedure for termination of parental rights includes procedural protections that must be followed to endow the court with subject matter jurisdiction. N.C. Gen. Stat. § 7B-1101 *et seq.* (2005). In relevant part, N.C. Gen. Stat. § 7B-1105(a)(5) requires that a summons be issued to the juvenile, "who shall be named as a respondent." *Id.* (2005).

In this case, petitioners failed to name the juvenile as a respondent in the summons. " 'In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute.' " *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993) (quoting *Everhart v. Sowers*, 63 N.C. App. 747, 750, 306 S.E.2d 472, 474 (1983)), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994).

This Court has recently held that the failure to issue a summons to the juvenile in accordance with N.C. Gen. Stat. § 7B-1106(a)(5) deprives the trial court of subject matter jurisdiction. *In re K.A.D.*, 187 N.C. App. 502, 504, 653 S.E.2d 427, 428-29 (2007) (citing *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007)). We are bound by our prior holdings on this issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

We vacate the order terminating parental rights.

VACATED.

Judge CALABRIA concurs.

Judge STEPHENS concurs in separate opinion.

STEPHENS, Judge, concurring.

While one panel of this Court "may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound

by that prior decision until it is overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004). In the case of *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007), a prior panel of this Court stated that we had "recently held that the failure to issue a summons to [a] juvenile [in a termination of parental rights proceeding] deprives the trial court of subject matter jurisdiction." *Id.* at 504, 653 S.E.2d at 428-29 (citing *In re C.T.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007)). The panel then held, "[w]hen a summons [in a termination of parental rights proceeding] is not properly issued, an order terminating parental rights must be vacated for lack of subject matter jurisdiction." *Id.* at 504, 653 S.E.2d at 429 (citing *C.T.*, 182 N.C. App. at 475, 643 S.E.2d at 25). Would that I were not bound by this decision, *Jones*, 358 N.C. 473, 598 S.E.2d 125; *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), for I believe *K.A.D.* misinterpreted the holding of *C.T.* Nevertheless, because I am bound by *K.A.D.*, I must concur with the result reached in the case *sub judice*.

In *C.T.*, 182 N.C. App. 472, 643 S.E.2d 23, the Forsyth County Department of Social Services filed a petition to terminate respondent's parental rights to her two children, R.S. and C.T. The clerk's office issued a summons, and the petition and summons were served on respondent.

> The petition to terminate parental rights was captioned with the names of both R.S. and C.T., but the summons that was issued referenced only C.T. Petitioner concedes that there is *no summons with respect to R.S.* in the Record on Appeal, or in the clerk's file.

Id. at 473, 643 S.E.2d at 24 (emphasis added). The trial court terminated respondent's rights to both children. On appeal, respondent argued "that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding concerning R.S., on the grounds that petitioner failed to issue a summons." *Id.* We stated, "the record fails to show that a summons was ever issued *as to* R.S.[,]" *id.* at 475, 643 S.E.2d at 25 (citation omitted and emphasis added), and we felt "constrained to conclude that the trial court lacked subject matter jurisdiction to terminate the respondent's parental rights in R.S." *Id.* at 475, 643 S.E.2d at 25. We vacated the termination order to the extent it terminated respondent's parental rights to R.S. We affirmed the termination order as to C.T.

In *K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427, the Wayne County Department of Social Services filed a petition alleging that K.A.D. was

neglected and dependent. Subsequently, the trial court granted sole custody of K.A.D. to the child's paternal grandfather and step-grandmother (the "grandparents"). Thereafter, on 25 July 2006, the grandparents filed a petition to terminate the parental rights of K.A.D.'s parents. "On the same day, Petitioners issued a summons to Respondent-father and K.A.D.'s mother." *Id.* at 503, 653 S.E.2d at 428. The trial court eventually terminated the parents' parental rights. On appeal, the father argued solely "that the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding" because of "Petitioners' failure to issue a summons to the juvenile[.]" *Id.* After setting forth the provisions of N.C. Gen. Stat. § 7B-1106(a) (2005), we noted,

> Petitioners issued a summons designating Respondent-father and K.A.D.'s mother as respondents on 26 July 2006. Accordingly, a summons was issued to Respondent-father and the juvenile's mother. However, K.A.D. was *not listed as a respondent* in the summons . . . and no summons was issued to K.A.D.

Id. (emphasis added). We then vacated the order terminating the father's parental rights, holding, as stated above, "[w]hen a summons is not properly issued, an order terminating parental rights must be vacated for lack of subject matter jurisdiction." *Id.* at 504, 653 S.E.2d at 430 (citing *C.T.*, 182 N.C. App. at 475, 643 S.E.2d at 25).

The facts of *K.A.D.* are readily distinguishable from the facts of *C.T.*, and I believe the *K.A.D.* Court misinterpreted the earlier holding. In both cases, summonses were issued. *See* N.C. Gen. Stat. § 1A-1, Rule 4(a) (2005) ("A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so."). In *C.T.*, the summons "referenced" C.T.,[1] but was silent "with respect to R.S." Thus, the jurisdictional problem in *C.T.* was that no summons was issued which "referenced" R.S. In *K.A.D.*, the summons clearly "referenced" K.A.D., but did not name K.A.D. as a respondent.[2] Thus, *C.T.* did not control the resolution of *K.A.D.* The proper resolution of *K.A.D.* was controlled by the long-standing jurisprudence of our State.

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1. A review of our court records reveals that the summons in *C.T.* utilized AOC form J-208 (7/99). C.T.'s name appeared only in the form's "Name of Juvenile" box, and C.T. was not named as a respondent. C.T.'s parents were the only named respondents. This Court had the summons before it and found it to be jurisdictionally sufficient.

2. The summons in *K.A.D.* was identical to the summons in *C.T.* in all pertinent respects. As in *C.T.*, K.A.D.'s name appeared in the summons's "Name of Juvenile" box. K.A.D.'s parents were the only named respondents.

The district courts have exclusive original jurisdiction over proceedings to terminate parental rights. N.C. Gen. Stat. § 7B-1101 (2005). Chapter 7B sets forth procedural requirements that must be met in order to confer jurisdiction upon the courts in such actions. The Rules of Civil Procedure as set forth in Chapter 1A are not to be superimposed upon termination cases, nor should they be ignored. *In re Bullabough*, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

A termination proceeding is commenced by the filing of a verified petition. N.C. Gen. Stat. § 1A-1, Rule 3 (2005); N.C. Gen. Stat. § 7B-401 (2005). "[V]erified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter." *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993).

> Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:
>
> (1) The parents of the juvenile;
>
> (2) Any person who has been judicially appointed as guardian of the person of the juvenile;
>
> (3) The custodian of the juvenile appointed by a court of competent jurisdiction;
>
> (4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and
>
> (5) The juvenile.

N.C. Gen. Stat. § 7B-1106(a). "Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (citation omitted).

In *Beck v. Voncannon*, 237 N.C. 707, 75 S.E.2d 895 (1953), the defendant asserted that the trial court was without jurisdiction and that "the whole proceeding" was "*void* and of no effect" because the summons, while admittedly served upon defendant, was signed by a deputy clerk of court and not by the Clerk of Superior Court in whom

the authority to issue summonses was then explicitly vested by statute. *Id.* at 710, 75 S.E.2d at 898 (emphasis added). The Supreme Court disagreed, announcing the following rule:

> To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as *nonjurisdictional irregularities*, subject to amendment.

Id. at 710-11, 75 S.E.2d at 898 (emphasis added).

In the case at bar, Petitioners filed a verified petition to terminate Respondent's parental rights. The child's name appeared in the caption of the petition. The Cumberland County Clerk of Court issued a summons in the case. The child is clearly referenced in the caption of the summons, and Respondent was served with both the petition and the summons. The child, however, is not named as a respondent in the summons. The failure to name the juvenile as a respondent in the summons, I believe, represents a mere "nonjurisdictional irregularit[y]," *Beck*, 237 N.C. at 710, 75 S.E.2d at 898, and did not deprive the trial court of subject matter jurisdiction. I note Respondent does not allege prejudice based on the summons's irregularity and has not sought any relief thereon.

Were I not bound by *K.A.D.*, I would conclude that the irregularity did not deprive the trial court of subject matter jurisdiction. Such a result is consistent with our decision in *C.T.* and with the longstanding jurisprudence of this State.

> "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else."

Wiles v. Welparnel Constr. Co., 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978) (quoting *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

STATE OF NORTH CAROLINA v. RODREGUISE LOWELL CALHOUN

No. COA07-580

(Filed 4 March 2008)

1. Appeal and Error— preservation of issues—Confrontation Clause issue—not raised at trial

Defendant waived review of a Confrontation Clause issue by not objecting at trial on constitutional grounds to testimony that the decedent in a murder prosecution had indicated to the witness that defendant and another were the shooters.

2. Constitutional Law— effective assistance of counsel—failure to raise Confrontation Clause issue—nontestimonial statements—dying declarations

A first-degree murder defendant received effective assistance of counsel even though his trial counsel did not raise a Confrontation Clause argument concerning identification testimony by the dying victim, and that argument could not then be considered on appeal. The statements were nontestimonial, and alternatively, dying declarations constitute a special exception to Sixth Amendment confrontation rights.

Appeal by defendant from judgment entered 25 May 2006 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 28 November 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Mark Montgomery for defendant-appellant.

HUNTER, Judge.

This is Rodreguise Lowell Calhoun's ("defendant") second appeal to this Court. In *State v. Calhoun*, 174 N.C. App. 626, 621 S.E.2d 343 (2005) (unpublished), this Court granted defendant a new trial "because the State used his silence as evidence of his guilt." *Id.* After the retrial, a jury found defendant guilty of first degree murder in violation of N.C. Gen. Stat. § 14-17, and the judgment was entered on 25 May 2006. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant now appeals to this Court. After careful consideration, we find no error in defendant's second trial.

There is no dispute that Kayla Samuels ("decedent") was shot and killed by a single .44 caliber bullet on 25 April 2002. There is also no dispute that defendant and Deshune "Worm" Bennett ("Bennett") were present when decedent was shot. The State presented evidence tending to show that defendant was the shooter, while defendant presented evidence indicating that Bennett was the shooter. The lone eyewitness to the shooting was decedent, who indicated that defendant and Bennett had shot him. Both defendant and Bennett were seen fleeing the scene.

The State's evidence tended to show that Esther Williams ("Williams") returned to her home and found defendant and Bennett inside. Williams told the two men that she was going to leave her house to shop, and they should leave before she returned home again. Williams also testified that she saw decedent next door to her home.

Albert Jones ("Jones"), a neighbor of Williams's, saw decedent walk into Williams's home. Later, Jones heard a gunshot from the Williams residence and saw defendant standing near a window in the same residence. Defendant noticed Jones and waved a gun at him, signaling Jones to move away from the back of the house. Jones complied, retrieved a shotgun, and waited for someone to come out of the Williams's home.

Defendant ran out of the home first, with something wrapped in his hand and his face covered. Bennett followed, with papers in his hands like "he had been in [decedent's] pocket[.]" At this point, Jones fired his shotgun, hitting Bennett.

At approximately 7:00 p.m., Officer Lee Hartman responded to a call concerning shots fired in the vicinity of Williams's home. Both Officer Hartman and Williams arrived at her home at the same time. Williams and Hartman entered the home, finding decedent motionless on the living room floor. Williams asked decedent who had shot him, and decedent told her that it was "Chico" and "Worm." Williams asked decedent to squeeze her hand to confirm that "Chico" and "Worm" were the shooters, and decedent did so. Officer Hartman witnessed and recorded the identification. Williams later identified defendant as "Chico" and Deshune Bennett as "Worm" from photographs at the Raleigh Police Department.

On 26 April 2002, the police stopped a taxi in which Bennett was a passenger. Bennett was carrying $853.00 in his front pocket and some loose cash in another pocket. A box of .44 caliber ammunition was taken from the waistband of another passenger. The box

of ammunition was designed to hold twenty bullets but contained only eighteen.

Defendant testified that Bennett was the shooter and that it was accidental. He also testified that he fled because he panicked after realizing that decedent had been shot, and heard more shots while fleeing. The day after the shooting, defendant learned that the police were investigating him as a possible suspect, so he turned himself in.

Defendant presents the following issues for this Court's review: (1) whether the trial court committed plain error by admitting statements from decedent into evidence; and (2) whether defendant received ineffective assistance of counsel.

I.

[1] Defendant first argues that Williams's testimony that decedent indicated that defendant and Bennett were the shooters was testimonial hearsay, admitted in violation of the Confrontation Clause, and the trial court's failure to exclude that evidence upon its own motion was plain error. The State argues that defendant, by failing to object to the admission of the testimony, has waived any review of this issue. We agree.

In *State v. Chapman*, 359 N.C. 328, 359, 611 S.E.2d 794, 819 (2005), our Supreme Court refused to review a defendant's Sixth Amendment challenge to testimony offered by a police officer because the defendant had failed to object on constitutional grounds to its admission at trial. Additionally, our Supreme Court has held that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (emphasis omitted). Defendant, having failed to object at trial on constitutional grounds, has therefore waived review of the issue by this Court. Accordingly, defendant's assignment of error as to this issue is rejected.

II.

[2] Defendant next argues that he received ineffective assistance of counsel because his trial counsel failed to raise a Confrontation Clause argument to the trial court. We disagree.

The Sixth Amendment of the United States Constitution guarantees an accused a right to counsel in criminal prosecutions.

Strickland v. Washington, 466 U.S. 668, 685, 80 L. Ed. 2d 674, 692 (1984). This right to counsel includes the right to the effective assistance of counsel. *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970)). In order to establish that trial counsel was ineffective, defendant must show: (1) that his counsel's performance was deficient under the circumstances of the case; and (2) that he suffered prejudice from the inadequate representation. *Strickland*, 446 U.S. at 700, 80 L. Ed. 2d at 702.

In the instant case, defendant argues that he was prejudiced by his counsel's failure to assert a Confrontation Clause objection to the testimony regarding the identity of the alleged shooters. Because we find that there was no Confrontation Clause violation in this case, even were defense counsel to have objected, defendant is unable to establish deficient performance, much less prejudice.

The Confrontation Clause of the Sixth Amendment guarantees "[i]n all criminal prosecutions [that] the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; *see also* N.C. Const. art. I, § 23 ("every person charged with [a] crime has the right to . . . confront the accusers and witnesses with other testimony"). This amendment applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923, 926 (1965).

The Confrontation Clause is violated when a "testimonial" statement from an unavailable witness is introduced against a defendant who did not have a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004) ("[w]here testimonial evidence is at issue . . . , the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). The rule in *Crawford* is not absolute, however, as the Court left open the possibility that testimonial statements from unavailable witnesses may still be admitted if they would have constituted a common law exception to the right of confrontation. Among the possible "special exceptions" are the so-called "dying declarations." *Id.* at 56 n.6, 158 L. Ed. 2d at 195 n.6. Accordingly, in this case, the admission of the testimony will not be error if: (1) the statements were non-testimonial; and/or (2) the "dying declaration" constitutes a special exception.[1] We address each issue in turn.

1. We note that in this Court's prior opinion regarding defendant's first trial, we held that the trial court did not abuse its discretion in admitting decedent's statements

A.

Testimonial statements include prior testimony and statements taken by police officers during the course of interrogations. *Id.* at 68, 158 L. Ed. 2d at 203. In the instant case, decedent's statement was not prior testimony or made to a police officer during the course of an interrogation. Instead, the statement was made to Williams, a private citizen. Thus, the Sixth Amendment is not implicated as the statements were non-testimonial.

Moreover, even if the statements were made to a police officer, the United States Supreme Court has held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, ——, 165 L. Ed. 2d 224, 237 (2006). Among the acceptable purposes of the interrogation is to "establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." *Id.* at ——, 165 L. Ed. 2d at 240. There being such an emergency here, we hold that decedent's statements were non-testimonial on this ground as well. Accordingly, defendant is unable to establish that he was prejudiced by his defense counsel's failure to object on Confrontation Clause grounds as he would not have prevailed on that objection. Defendant's assignment of error as to this issue is therefore rejected.

B.

We pause now to address in the alternative whether a dying declaration constituted a "special exception" to an accused's right to confront witnesses when the Sixth Amendment was adopted. After careful consideration, we conclude that it was and hold that dying declarations are not violative of the Sixth Amendment.

The first court to address the issue, which was left open by the Supreme Court in *Crawford*, was the California Supreme Court. *See People v. Monterroso*, 101 P.3d 956 (Cal. 2004). That court held that "the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." *Id.* at 972. The *Monterroso* court reasoned that, under *Crawford*, "the confrontation

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that defendant and Bennett were the shooters as it constituted a dying declaration under N.C. Gen. Stat. § 8C-1, Rule 804(b)(2) (2003). That issue, therefore, is not before us on appeal as it has already been decided by this Court and has become the law of the case. *See State v. Moore*, 276 N.C. 142, 145, 171 S.E.2d 453, 455 (1970) (when issue has already been determined in a prior appeal, no further discussion of it is required).

clause 'is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding[.]' " *Id.* (quoting *Crawford*). Accordingly, the court then reviewed the history of the dying declaration and determined that "[d]ying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken." *Id.* (citing T. Peake, Evidence (3d ed. 1808) p. 64.)

> In particular, the common law allowed " 'the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,' " provided that " 'the deceased at the time of making such declarations was conscious of his danger.' " (*King v. Reason* (K.B. 1722) 16 How. St. Tr. 1, 24-25.) To exclude such evidence as violative of the right to confrontation "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished." (*State v. Houser* (Mo. 1858) 26 Mo. 431, 438; *accord*, *Mattox v. United States* (1895) 156 U.S. 237, 243-44 [39 L. Ed. 409, 15 S.Ct. 337] ["from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility"].)

Id.

Other states have decided the issue and have also ruled that dying declarations serve as a common law exception to the right of confrontation and thus do not violate the Sixth Amendment. *See*, *e.g.*, *People v. Taylor*, 737 N.W.2d 790, 794 (Mich. Ct. App. 2007); *Harkins v. Nevada*, 143 P.3d 706, 711 (Nev. 2006); *People v. Gilmore*, 828 N.E.2d 293, 302-03 (Ill. App. Ct. 2005); *State v. Martin*, 695 N.W.2d 578, 585-86 (Minn. 2005); *State v. Manuel*, 685 N.W.2d 525, 532 (Wisc. 2004). There is not, however, complete agreement.

A federal district court held that dying declarations are violative of the Sixth Amendment because the statements are (1) unreliable and even if they were reliable, such is not a relevant consid-

eration; and (2) were not admissible at the time of the drafting of the Sixth Amendment. *United States v. Jordan*, 66 Fed. R. Evid. Serv. (Callaghan) 790 (D. Colo. 2005). The Illinois Court of Appeals disagreed with the reasoning of the Colorado District Court, stating that:

> We believe that the reasoning of *Monterroso* represents the sensible approach and choose to follow it instead of *Jordan*. *Crawford* provided an in-depth discussion of the right of confrontation as it existed at the time the sixth amendment was ratified and offered a strong statement regarding . . . the admissibility of dying declarations. Considering the Supreme Court's guidance on the issue, we are reluctant to expand that right beyond the historical parameters indicated in Crawford.

Gilmore, 828 N.E.2d at 302.

We agree with the *Gilmore* court's reasoning rejecting *Jordan* and follow the majority of states that have decided this issue and hold that a dying declaration is a "special exception" under *Crawford* to the Sixth Amendment right to confrontation. Defendant's assignments of error as to this issue are therefore rejected.

III.

In summary, we hold that defendant has waived review of the constitutional issue presented to this Court for failure to make such an argument to the trial court. We also hold that defendant is unable to establish deficient performance as declarant's statements were non-testimonial and, in the alternative, we hold that defendant's counsel's performance was not deficient as dying declarations constitute a special exception to the Sixth Amendment's confrontation rights. Accordingly, defendant's trial was free from error.

No error.

Judges CALABRIA and STROUD concur.

CITY OF WILMINGTON, PLAINTIFF v. BROADUS E. HILL, III, DEFENDANT

No. COA07-11

(Filed 4 March 2008)

1. Zoning— constitutional defense—failure to exhaust administrative remedies—agency requirement not authorized

The district court had jurisdiction to consider defendant's constitutional defense to a zoning ordinance in an action to collect civil penalties under the ordinance despite defendant's failure to exhaust administrative remedies. It has been held that it is not necessary to apply to an administrative agency for a permit which the agency is not authorized to issue before asserting the inapplicability of the ordinance.

2. Zoning— garage apartment ownership—use

The trial court did not err by declaring unconstitutional part of a zoning ordinance that required defendant to live on the site of a garage apartment. The city is only entitled to regulate the use of defendant's single-family residence with the accessory use of a garage apartment, not the ownership.

3. Zoning— garage apartments—scope of enabling statute

The trial court did not err by declaring that a zoning ordinance requiring on-site residence for garage apartments was beyond the scope of the enabling statute, N.C.G.S. § 160A-381(a).

Appeal by plaintiff from judgment entered 20 September 2006 by Judge Rebecca W. Blackmore in New Hanover County District Court. Heard in the Court of Appeals 9 October 2007.

Thomas C. Pollard, City Attorney and R. Lynn Coleman, Assistant City Attorney, for plaintiff-appellant.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Sarah M. Mancinelli, for defendant-appellee.

JACKSON, Judge.

The City of Wilmington ("plaintiff") appeals the trial court's order and judgment granting the motion to dismiss filed by Broadus E. Hill, III ("defendant"), and declaring unconstitutional the first sentence of Wilmington Land Development Code ("WLDC"), section 18-285(g). For the reasons stated below, we affirm.

On 21 July 2004, defendant applied for a building permit to build a garage apartment on property he owned at 303 McMillan Avenue. He was notified 20 July 2005 that his property was in violation of WLDC section 18. Plaintiff gave defendant until 20 August 2005 to bring the property into compliance. Section 18-285(g) requires the owner of a garage apartment to reside either in the main residence or the garage apartment. Defendant sought a text amendment to the ordinance on or about 21 July 2005 to eliminate the owner-residency requirement.

Defendant was cited $300.00 on 23 August 2005 for two days' violation of WLDC section 18-285(g). On 24 August 2005, defendant met with plaintiff to discuss an abatement of fines. He was notified on 25 August 2005 that violations must be corrected before a request for abatement could be considered; further, a pending text amendment does not stay the issuance of civil citations. Defendant then attempted to appeal plaintiff's determination.

The Planning Commission voted five to zero against the proposed text amendment on 7 September 2005. Defendant appealed on 9 September 2005, then withdrew his appeal on 20 September 2005.

On 21 September 2005, defendant met with plaintiff on issues related to several of his properties. He notified plaintiff that he was residing at 303 McMillan Avenue as of 20 September 2005. On 27 September 2005, plaintiff notified defendant that based upon his admission that he was in violation of WLDC from 24 August to 19 September 2005, he was being cited for twenty-seven days' violation, amounting to $5,400.00.

Defendant failed to pay any of the assessed civil penalties and was sent a final notice on 30 December 2005. Plaintiff voluntarily reduced the amount owed to $5,000.00 and filed the instant action in small claims court on 17 January 2006. Defendant moved the court on 16 March 2006 to dismiss the complaint, alleging the ordinance was unconstitutional. The magistrate entered judgment in plaintiff's favor that same date. On 24 March 2006, defendant appealed to the district court, and the case was set for mandatory arbitration. An arbitration award and judgment was entered in plaintiff's favor on 9 May 2006. Defendant requested a trial *de novo* on 15 May 2006.

The matter was heard in the district court on 19 June 2006. The court granted defendant's motion to dismiss, declared part of the ordinance unconstitutional, and declared defendant's citations null and void. The order was entered 20 September 2006. Plaintiff appeals.

[1] Plaintiff first argues that the district court lacked jurisdiction to consider defendant's defenses in that defendant failed to exhaust administrative remedies. We disagree.

Our Supreme Court has held that it is not necessary to apply to an administrative agency for a permit which that agency is not authorized to issue before asserting the inapplicability of the ordinance to the contemplated building project. *Town of Hillsborough v. Smith*, 276 N.C. 48, 58, 170 S.E.2d 904, 911 (1969). In *Hillsborough*, the Court cited *County of Lake v. MacNeal*, 181 N.E.2d 85 (Ill. 1962), as an example of a similar conclusion based upon a constitutional challenge.

> Although there is authority that the rule of exhaustion of administrative remedies has application whether the validity of a zoning ordinance is raised by a defendant or a moving party, there is at the same time the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an invalid ordinance, that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including a defense of the invalidity of the ordinance. Indeed, as one author has observed, "the tradition is deeply imbedded that . . . statutes may be challenged by resisting enforcement."

Id. at 89-90 (internal citations omitted) (alteration in original) (quoting 3 Kenneth Culp Davis, Administrative Law Treatise § 23.07 (1st ed. 1958)).

In addition, it is well settled that "[w]here an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999) (citing *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998)). Accordingly, plaintiff's assignment of error is overruled.

[2] Plaintiff next argues the trial court erred in declaring part of the ordinance unconstitutional and granting defendant's motion to dismiss. We disagree.

When a trial court sits without a jury, the standard of review upon appeal is "whether there was competent evidence to support [the court's] findings of fact and whether its conclusions of law were proper in light of [the] facts." *In re Norris*, 65 N.C. App. 269, 275, 310

S.E.2d 25, 29 (1983) (citations omitted), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984). The trial court's conclusions of law are reviewed *de novo*. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973).

The trial court based its decision primarily on this Court's holding in *Graham Court Assoc. v. Town of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981). In *Graham Court Associates*, the central question presented was "whether the power to control the *uses* of property through zoning extends to control of the manner in which the property is owned." *Id.* at 544, 281 S.E.2d at 419 (emphasis in original). There, the owner of a prior non-conforming apartment complex sought to sell the individual apartments and convert the property to condominiums. The Town of Chapel Hill denied a special use permit, and the landowner appealed, arguing that the special use permit requirement was an unconstitutional regulation of ownership. The property in question fell within a zoning district in which multi-family residential property was a permissible use. The change in ownership from a single owner to multiple owners did not alter the property's character as to multi-family residential use. This Court held that the landowner was not required to apply for or receive a special use permit in order to convert the formerly tenant-occupied apartments to owner-occupied condominiums. "If a use is permitted, as here, it is beyond the power of the municipality to regulate the manner of ownership of the legal estate." *Id.* at 551, 281 S.E.2d at 422-23 (citations omitted).

In *Graham Court Associates*, this Court also quoted with approval the New Jersey case of *Beers v. Bd. of Adjust. of Wayne Tp.*, 183 A.2d 130 (N.J. Super. 1962). The *Beers* court stated that the municipal

> [d]efendants do not even suggest, nor do we believe they properly could, that owner-occupation of a dwelling is a different use of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family.

Id. at 136. In *Beers*, the subject property held five small tenant-occupied houses, built prior to the enactment of the zoning ordinance at issue. The houses were sold to their tenants and the resulting use of each individual house remained the same—only the ownership changed. Similarly, in the case *sub judice*, defendant does not seek to change the use of one of the structures on his lot, merely the nature of the occupancy.

In the instant case, the property in question is located in a district that is zoned for single-family residences; however, garage apartments are permitted as an accessory use, incidental and subordinate to the principal use as a single-family residence. *See* WLDC § 18-179 (2005). Garage apartments also are allowed in certain multi-family districts in connection with conforming single-family residences within the district. *See* WLDC § 18-285 (2005). Plaintiff only is entitled to regulate the *use* of defendant's single-family residence with the accessory use of a garage apartment, not the *ownership*. *See Graham Court Assoc.*, 53 N.C. App. at 546, 281 S.E.2d at 420 (quoting *O'Connor v. City of Moscow*, 202 P.2d 401, 404 (Idaho 1949) (" 'A zoning ordinance deals basically with the use, not ownership, of property.' ")).

In support of its proposition that its owner occupancy requirement is constitutional, plaintiff cites two cases: *Anderson v. Provo City Corp.*, 108 P.3d 701, 706 (Utah 2005) ("We reject the proposition that placing an owner occupancy condition on a supplementary accessory dwelling use constitutes an impermissible regulation of 'ownership.' ") and *Kasper v. Town of Brookhaven*, 142 A.D.2d 213, 220-21 (N.Y. 1988) ("Inasmuch as the owner-occupancy requirement is an integral component of the town's legislative strategy to achieve" the goal of aiding occupying homeowners in retaining and maintaining their properties while answering the need for affordable housing, the court declined to determine whether the ordinance was the "wisest or most expeditious means" of accomplishing this goal.). As these cases do not constitute binding authority and their reasoning is at odds with *Graham Court Associates*, we disagree with plaintiff's reliance upon them.

In North Carolina, "[a] zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 71 L. Ed. 303, 314 (1926)), *disc. rev. denied*, 305 N.C. 299, 290 S.E.2d 702 (1982).

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body

> charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

In re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709 (citations omitted), *appeal dismissed, Parker v. Greensboro*, 305 U.S. 568, 83 L. Ed. 358 (1938). Here, the owner occupancy requirement of WLDC § 18-285(g) is at odds with our precedents, as it is "beyond the power of the municipality to regulate the manner of ownership of the legal estate." *Graham Court Associates*, 53 N.C. App. at 551, 281 S.E.2d at 422-23 (citations omitted). Therefore, this assignment of error is overruled.

[3] Plaintiff's final argument is that the trial court erred in declaring WLDC section 18-285(g) beyond the scope of the zoning enabling statute. We disagree.

North Carolina General Statutes, section 160A-381(a) grants the city the power to "regulate and restrict the . . . use of buildings, structures and land." N.C. Gen. Stat. § 160A-381(a) (2006).

> Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: . . . to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; [and] to secure safety from fire, panic, and dangers; . . . . The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

N.C. Gen. Stat. § 160A-383 (2006). As discussed above, WLDC section 18-285(g) impermissibly regulates the ownership rather than the use of defendant's property.

For the foregoing reasons, the dismissal of plaintiff's claim was without error.

Affirmed.

Judges WYNN and HUNTER concur.

CHARLES M. GREENE AND SANDRA MCNEIL, CO-EXECUTORS OF THE ESTATE OF PANSY FERGUSON GREENE, PLAINTIFFS v. SUZANNE HOEKSTRA, M.D. AND BREVARD SURGICAL ASSOCIATES, P.A., DEFENDANTS

No. COA07-490

(Filed 4 March 2008)

Costs— deposition expenses—expert witness fees—abuse of discretion standard

The trial court did not abuse its discretion in a medical malpractice and wrongful death case by awarding costs of $14,218.28 to defendants because: (1) the decision to award deposition expenses as costs was supported by the common law and by documentation for each cost; and (2) in regard to the expert witness fees, the right to compensation depends on a subpoena being served on the witness instead of service on the opposing party, and plaintiffs concede that subpoenas were served on both expert witnesses for which defendants sought costs.

Judge JACKSON concurring in the result.

Appeal by plaintiffs from order entered on or about 8 March 2007 by Judge Albert Diaz in Superior Court, Transylvania County. Heard in the Court of Appeals 1 November 2007.

Long, Parker, Warren, & Jones, P.A., by Steve Warren, for plaintiff-appellants.

Roberts & Stevens, P.A. by James W. Williams and Ann-Patton Nelson for defendant-appellees.

STROUD, Judge.

Plaintiffs appeal from an order awarding costs to defendants. We conclude that plaintiffs have not shown that the trial court abused its discretion when it awarded costs to defendants. Accordingly, we affirm.

I. Background

Pansy Ferguson Greene ("Greene") died on or about 5 September 2001. The executors of Greene's estate filed a medical malpractice complaint on 18 July 2002, alleging that her death had been caused by the negligence of defendants and seeking compensation for wrongful death. Defendants filed an answer on or about 17 September 2002, denying the material allegations in the complaint.

The action was tried before a jury at the 23 October 2006 civil session of Superior Court, Transylvania County. Pursuant to the jury's verdict in defendants' favor, the trial court dismissed the action with prejudice by judgment entered 7 November 2006.

Defendants moved for costs on or about 20 December 2006. The trial court awarded costs to defendants in the amount of $14,218.28 by order entered on or about 8 March 2007. From that order, plaintiffs appeal.

II. Analysis

A. Deposition-Related Expenses

Plaintiffs contend that the trial court erred by awarding deposition expenses as costs. Plaintiffs rely on *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39 (2005) to contend that an award of deposition expenses is improper as a matter of law. Defendants rely on *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516 (2005), *disc. review denied*, 360 N.C. 648, 636 S.E.2d 808 (2006), to contend that an award of deposition costs is within the discretion of the trial court, and that the trial court did not abuse its discretion in awarding deposition costs to defendants.[1]

We review an award of deposition costs for abuse of discretion. *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545 (2007). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). In the case *sub judice*, "[t]he trial court's decision to award these costs was supported by the common law," *Vaden*, 187 N.C. App. at 439-40, 653 S.E.2d at 547, and by documentation for each cost. We find no abuse of discretion in the trial court's award of deposition costs.

B. Expert Witness Costs

Plaintiffs contend that the trial court erred when it awarded costs for expert witnesses to defendants. Specifically, plaintiffs rely on the

1. We acknowledge that this Court's opinions have been inconsistent with regard to deposition costs. *Compare Oakes*, 173 N.C. App. at 520, 620 S.E.2d at 48 (holding that deposition expenses are not an allowable cost), *with Morgan*, 173 N.C. App. at 581, 619 S.E.2d 519 (holding that deposition expenses are an allowable cost). As we noted in *Vaden*, 187 N.C. App. at 438-39, 653 S.E.2d at 546 nn.3-4, the legislature amended N.C. Gen. Stat. § 7A-305, effective for motions filed on or after 1 August 2007, to expressly allow deposition costs in the discretion of the trial court. N.C. Gen. Stat. § 7A-305(d)(11) (2007).

2003 rewrite of Rule 45[2] to contend that the trial court is barred from taxing the cost of an expert witness against a party unless the witness has appeared in obedience to a subpoena *and* the subpoena has been served on the party.

We agree that the cost of an expert witness cannot be taxed unless the witness has been subpoenaed. *Vaden*, 187 N.C. App. at 440, 653 S.E.2d at 547; N.C. Gen. Stat. § 7A-314 (2005). We also agree that the North Carolina Rules of Civil Procedure require witness subpoenas to be served on the parties to the action. N.C. Gen. Stat. § 1A-1, Rule 45 (b)(2) (rewritten effective 1 October 2003). However, plaintiffs' reliance on rewritten Rule 45 to oppose the order awarding expert witness fees against them is misplaced. The public policy underlying the rule allowing payment of witnesses is that a witness should be compensated for what he is obligated by the State to do. *See State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 659 (1972) (citing *State v. Means*, 175 N.C. 820, 822, 95 S.E. 912, 913 (1918)); N.C. Gen. Stat. § 7A-314. If a witness appears voluntarily, then he is entitled to no compensation. *Johnson*, 282 N.C. at 27, 191 S.E.2d at 659. Subject to the protections of Rule 45(c), the obligation to appear as a witness is perfected when the subpoena is served on the witness. N.C. Gen. Stat. § 1A-1, Rule 45(e)(1). Therefore the right to compensation depends on the subpoena being served on the witness, and is not dependent on service of a copy of the subpoena on the opposing party. It follows therefore, in determining whether the trial court is barred by the lack of a subpoena from awarding the costs of an expert witness, that it is the service of the subpoena on the witness, not the service of the subpoena on the opposing party, which is dispositive. *Town of Chapel Hill v. Fox*, 120 N.C. App. 630, 632, 463 S.E.2d 421, 422 (1995). Plaintiffs concede that subpoenas were served on both expert witnesses for which defendants sought costs.

In sum, we find no abuse of discretion in the trial court's award of either deposition costs or of expert witness costs. Accordingly, the trial court's order awarding costs to defendants is affirmed.

AFFIRMED.

Judge TYSON concurs.

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2. "A copy of the subpoena . . . shall also be served upon each party . . . ." N.C. Gen. Stat. § 1A-1, Rule 45(b)(2) (Rule 45 was rewritten effective 1 October 2003. Prior to the 2003 rewrite, Rule 45 did not require service of witness subpoenas on the parties to the action.)

Judge JACKSON concurs in the result by separate opinion.

JACKSON, Judge concurring in the result.

Although I concur in the result reached by the majority in this case, I respectfully disagree with the analysis employed with respect to the expert witness fees. Specifically, I cannot agree with the majority opinion's statement that "in determining whether the trial court is barred by the lack of a subpoena from awarding the costs of an expert witness, . . . it is the service of the subpoena on the witness, not the service of the subpoena on the opposing party[,] which is *dispositive*." (Emphasis added). I, therefore, write separately to express my concern that the majority opinion diminishes the significance of or eliminates altogether the issue of prejudice to the opposing party from the lack of service of a witness subpoena.

Prejudice, however, should be a relevant factor in determining whether the trial court abused its discretion. As defendants correctly note in their appellee brief, "[t]he essential purpose of the requirement under N.C.R. Civ. P. 5 that all papers be served on all parties is undoubtedly to prevent prejudice or surprise." Without a copy of a witness subpoena, the opposing party may be prejudiced by the loss of the opportunity to object. *See Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998) ("While abuse of the subpoena process harms both opposing counsel and public confidence in the judicial system, the purpose behind the notice requirement is to provide opposing counsel an opportunity to object to the subpoena." (internal citation omitted)). Indeed, some federal courts have ordered the party issuing the subpoena to a witness to pay the opposing party's costs when the party fails to comply with the federal notice requirements. *See Murphy v. Bd. of Educ. of Rochester Sch. Dist.*, 196 F.R.D. 220, 222-23 (W.D.N.Y. 2000) (ordering the payment of attorney's fees and costs where plaintiff's counsel issued twelve subpoenas without prior notice to the opposing parties). Although the federal notice requirement differs from the state requirement,[3] the issue of prejudice still should be a factor in determining whether a trial court abuses its discretion in awarding witness expenses when the opposing party was not served with a copy of the subpoena as mandated by Rule 45(b)(2).

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3. Pursuant to Federal Rule 45, notice to the opposing party is only required when "the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial." Fed. R. Civ. P. 45(b)(1).

Although the majority correctly concludes that plaintiffs' failure to serve a copy of the subpoenas on plaintiffs did not deprive the trial court of the authority to award witness expenses, service of the subpoenas on the witness should not be "dispositive." Instead, in exercising its discretion with respect to awarding expenses, the trial court should consider—in addition to whether the witness was served properly—whether the failure to serve the opposing party pursuant to Rule 45(b)(2), like most other procedural irregularities, prejudiced the opposing party. *See, e.g.*, *Beck v. Voncannon*, 237 N.C. 707, 713, 75 S.E.2d 895, 900 (1953) (discussing a defect in a summons and noting that "[a]s to the procedural irregularities alleged by the plaintiffs, they have shown no prejudice in law resulting therefrom.").

Ultimately, in the instant case, plaintiffs fail to argue, and the record fails to demonstrate, that plaintiffs were prejudiced by defendants' violation of Rule 45(b)(2). In fact, plaintiffs stipulated that (1) pursuant to a consent discovery order, the witnesses were identified and designated by defendants as expert witnesses who would testify at trial; and (2) defense counsel provided plaintiffs with at least one-day advance notice of the witness's trial appearance. Therefore, I agree that the trial court's order should be affirmed, and accordingly, I respectfully concur in the result.

KAREN COULTER, AS GUARDIAN FOR JOSHUA COULTER, DON AND KAREN COULTER, INDIVIDUALLY v. CATAWBA COUNTY BOARD OF EDUCATION

No. COA07-717

(Filed 4 March 2008)

1. Tort Claims Act— school bus accident—insufficient evidence of negligence

The Industrial Commission did not err by dismissing a tort claims action arising from a school bus accident where the evidence supported its findings, and the findings supported the conclusion that the bus driver was not negligent.

2. Tort Claims Act— appellate review—only from decision of full Commission

Questions of whether a deputy commissioner erred in an evidentiary ruling and wrongfully expressed an opinion were not re-

viewed on appeal where plaintiffs did not assign as error the Industrial Commission's failure to address these contentions. Appellate review is limited to the decision and order of the Industrial Commission.

Appeal by plaintiffs from an Opinion and Award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2008.

Bryce O. Thomas, Jr., for plaintiff-appellants.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tina Lloyd Hlabse, for defendant-appellee.

STEELMAN, Judge.

The Industrial Commission's findings of fact are supported by competent evidence, and the Industrial Commission did not err in concluding that plaintiffs failed to prove that defendant's employee was negligent and that the negligence of defendant's employee caused injury to the minor plaintiff.

I. Factual and Procedural Background

On 17 August 2001, Joshua Coulter (plaintiff) was a student passenger on a school bus driven by Brenda Foster (Foster), an employee of the Catawba County Board of Education (defendant). At approximately 3:30 p.m., Foster was returning to Webb A. Murray Elementary School in Newton, N.C. Foster was traveling on Section House Road towards Garren Drive, the driveway leading into the school. As Foster was making the right turn onto Garren Drive, she saw a car coming towards her at a "fairly fast rate of speed." The front tire of the car was across the center line and in Foster's lane of travel. In order to avoid a collision, Foster turned the bus to the right, causing the rear tire to hit the curb. When the tire went over the curb, plaintiff was thrown against the side window of the bus, breaking the window. Plaintiff was taken to the hospital and treated for cuts to his left neck, chin, upper lip, and scalp.

On 12 August 2004, plaintiffs filed this action against defendant pursuant to Article 31 of Chapter 143 of the General Statutes (Tort Claims Act). This matter was docketed and heard by the North Carolina Industrial Commission. On 2 February 2007, the Industrial Commission filed its Opinion and Award, which held that "Plaintiff

failed to prove that defendant was negligent and that negligence caused the damages of which plaintiff complains." Plaintiffs appeal.

II. Commission's Dismissal of Plaintiff's Claim

[1] In their first argument, plaintiffs contend the Commission erred in dismissing their claim. We disagree.

The North Carolina Tort Claims Act provides for payment of damages for personal injuries sustained by any person

> as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291 (2007). "To recover under the Tort Claims Act, plaintiff must show that the injuries sustained by his son were the proximate result of a negligent act of a state employee acting within the course and scope of his employment." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citations omitted). "Under the Act, negligence is determined by the same rules as those applicable to private parties." *Id.* (citation omitted). "Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Dunning v. Warehouse Co.*, 272 N.C. 723, 725, 158 S.E.2d 893, 895 (1968) (citation omitted).

N.C. Gen. Stat. § 143-293 governs appeals from the Industrial Commission to this Court, and provides in pertinent part:

> . . . Such appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. . . .

N.C. Gen. Stat. § 143-293 (2007).

> On appeal, 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.

McGee v. N.C. Dep't of Revenue, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87-88 (1999) (citations and quotations omitted).

Plaintiffs argue that Foster made inconsistent statements, and that these alleged inconsistent statements prove that she was negligent and that this negligence was the proximate cause of the minor plaintiff's injuries.

The Commission found that:

> 16. As a whole Ms. Foster's testimony is credible. Though there are slight differences in Ms. Foster's reported statements, they are not inconsistent to the point of making Ms. Foster's testimony not believable.

While Foster's testimony was not totally consistent, there is competent evidence in the record to support the Commission's findings of fact. *See Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 472, 598 S.E.2d 629, 631 (2004) (citation omitted). "Moreover, the Commission is the sole judge of the credibility of witnesses and the weight to be given the evidence." *Id.* (citation omitted).

Plaintiffs point to an alleged statement by Foster to Ms. Coulter that she was going faster than she should have been. However, Foster did not recall making this statement. Foster also testified that she was going less than five miles per hour when she turned off of Section House Road. This testimony is supported by the report prepared by Clarence Teague, Director of Transportation for defendant.

Plaintiffs further contend that the Industrial Commission's findings of fact 7-11 were not supported by the evidence. These findings read as follows:

> 7. Thereafter, Ms. Foster's attention was focused on turning onto Garren Drive.
>
> 8. Ms. Foster slowed her bus, checked her reference points and mirrors and specifically recalled looking out her bus door and seeing the curb, as she was trained to do in order to miss hitting the curb.
>
> 9. As she was making the turn, Ms. Foster estimated her speed to be less than five miles per hour.
>
> 10. As Ms. Foster was turning onto Garren Drive, she saw a small, dark vehicle coming off of Garren Drive at a high rate of speed toward her school bus and dart across the centerline.
>
> 11. Ms. Foster reacted to the oncoming vehicle in her lane by turning the school bus sharply to the right causing the rear tire of the school bus to go up on the curb and off again.

There is competent evidence in the record to support these findings. Foster testified as to facts supporting each of these findings, and the Commission found her testimony to be credible and determined the appropriate weight to give to it. *See Vaughn*, 165 N.C. App. at 472, 598 S.E.2d at 631.

Plaintiffs further contend that the Commission's findings of fact 22 and 29-32 were not supported by the evidence. These findings read as follows:

> 22. Dr. Munoz testified that the accident and severity of the scar had an impact on Joshua psychologically. However, there were no new diagnoses made for Joshua after this incident. There are no references made in Dr. Munoz's notes as to what affect, if any, this incident had on Joshua's self-esteem or self-image. . . .
>
> 29. Jewell Blount and Darlene Woodruff, both school bus drivers at Murray Elementary, testified that they have run up on the curb as they were turning onto Garren Drive from Section House Road.
>
> 30. There was no evidence presented by plaintiff as to what speed was too fast for that turn. The other bus drivers testified that they routinely and safely made the turn onto Garren Drive from Section House Road going ten to fifteen miles per hour.
>
> 31. The only testimony as to Ms. Foster's speed on August 17, 2001 was Ms. Foster's testimony that she was traveling less than five miles per hour.
>
> 32. There was insufficient evidence to support a finding that Ms. Foster was in violation of any law in her operation of the bus.

As to finding of fact 29, Jewell Blount, a school bus driver, testified "I've hit the curb several times." Darlene Woodruff, another school bus driver, testified that she has hit the curb when turning onto Garren Drive. This testimony constitutes competent evidence supporting this finding.

With respect to finding of fact 30, the record reveals that plaintiffs presented no evidence regarding what speed would have been too fast to make the right turn onto Garren Drive. Jewell Blount and Darlene Woodruff testified that they routinely made the turn safely while traveling at a speed of ten to fifteen miles per hour.

As to finding of fact 31, Foster testified that she was traveling at less than five miles per hour. As previously discussed, although Ms. Coulter testified that Foster made contradictory statements, the Commission found Foster's testimony to be credible.

Finding of fact 32 is supported by competent evidence in the record. Foster testified that she was going less than five miles per hour and that she checked her mirrors, oncoming traffic, and traffic behind her and to her right and left before making the turn. Before turning, Foster looked to see if there were any vehicles coming out of Garren Drive, and she did not see any. Foster also checked that the curb was visible through the glass door to ensure that she would clear it upon making the turn. The Commission's finding that there is insufficient evidence of a violation of any law is supported by the record.

Each of the above discussed challenged findings of fact is supported by the evidence. The Commission's conclusions of law that plaintiff failed to prove that defendant was negligent and failed to prove that defendant's negligence caused the damages of which plaintiff complains are supported by the findings. Because the Commission did not err in concluding that plaintiff failed to prove that defendant was negligent, we need not discuss finding of fact 22, which pertains only to damages.

We affirm the Commission's dismissal of plaintiffs' claim. This argument is without merit.

III. Alleged Errors by Deputy Commissioner

[2] In their next argument, plaintiffs contend that the Deputy Commissioner erred in denying their request to use deposition testimony in lieu of live testimony. Plaintiffs further contend that the Deputy Commissioner wrongfully expressed an opinion during the 24 August 2005 hearing. We disagree.

Appellate review is limited to the decision and order of the Industrial Commission. *See* N.C. Gen. Stat. § 143-293 (2007). Although plaintiffs' assigned as error the Deputy Commissioner's alleged errors, they have not assigned as error the Industrial Commission's failure to address this alleged error. Thus, this issue has not been properly preserved for our review.

This argument is without merit.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

NATALIE HILL, BY AND THROUGH HER GUARDIANS AD LITEM, HARVEY GENE HILL, JR., AND REGINA HILL, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF NATALIE HILL, A MINOR, PLAINTIFFS-APPELLANTS v. TERESA HENSON WEST, C.F. WEST, INC., CHARLES F. WEST, SR., ANNETTE WEST, AND CHARLES F. WEST, JR., DEFENDANTS-APPELLEES

No. COA07-468

(Filed 4 March 2008)

1. **Collateral Estoppel and Res Judicata— party or privity— minor plaintiff and parents**

   Plaintiff's complaint in the present case (arising from an automobile accident) was not barred by res judicata because the minor plaintiff was not a party to the first case nor was she in privity with a party. Although defendants contended the contrary, plaintiff's parents did not represent her legal rights in the first case and she was not in privity with them.

2. **Motor Vehicles— negligent entrustment—ownership of vehicle**

   The trial court correctly granted summary judgment for several of the defendants in an action for negligent entrustment of a vehicle where the evidence was that they did not own the vehicle.

3. **Motor Vehicles— negligent entrustment—consent to drive vehicle**

   The trial court did not err by granting summary judgment for defendants in an action for negligent entrustment of a vehicle where the evidence showed that defendants did not give the driver consent to drive the vehicle, even if it was foreseeable that she would do so.

Appeal by Plaintiffs from order entered 6 September 2006 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County. Heard in the Court of Appeals 1 November 2007.

Lucas, Denning & Ellerbe, P.A., by Sarah Ellerbe, for Plaintiffs-Appellants.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford, for Defendants-Appellees.

McGEE, Judge.

Plaintiffs appeal from an order granting summary judgment to C.F. West, Inc., Charles F. West, Sr., Annette West, and Charles F. West, Jr. (Defendants) on the grounds of *res judicata* and collateral estoppel. The facts of this case are set forth in detail in a companion case, *Hill v. West*, (No. COA07-467) 189 N.C. App. 194, 657 S.E.2d 694 (filed 4 March 2008). Teresa Henson West is not a party to this appeal. For the reasons set forth below, we affirm the trial court's order.

"[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.* "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

[1] "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. "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 v. Onslow Cty.*, 151 N.C. App. 269, 271-72, 564 S.E.2d 920, 923 (2002) (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)).

We hold that Plaintiffs' complaint in the present case was not barred by *res judicata*. Although there had been a final judgment in the first case as to each of the defendants except Teresa Henson West, and there was an identity of causes of action between the first case and the present case, the minor Plaintiff Natalie Hill (Natalie Hill) was not a party to the first case, nor was she in privity with a party to the first case. However, Defendants argue the following:

> The minor Plaintiff Natalie Hill is represented in the New Action *solely* by her parents Harvey Gene Hill, Jr., and Regina Hill, both of whom were parties to the First Action, satisfying the privity requirement for application of *res judicata* to her claim. Additionally, because of the presence of her parents and representatives in the First Action, the claims of Natalie Hill clearly *could have*—and arguably *should have*—been brought in the First Action. As stated above, *res judicata* encompasses not only claims *actually* asserted, but claims which *could have been* asserted.

Although the meaning of the term " 'privity' for purposes of *res judicata* and collateral estoppel is somewhat elusive[,] . . . [t]he prevailing definition that has emerged from our cases is that 'privity' . . . 'denotes a mutual or successive relationship to the same rights of property.' " *Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 333-34, 445 S.E.2d 590, 594 (1994) (quoting *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983)). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996) (quoting 47 Am. Jur. 2d *Judgments* § 663 (1995)). Where a party "had no control over the previous litigation and nothing in the record indicates that [the party's] interests were legally represented in the previous trial, there can be no privity." *Kaminsky v. Sebile*, 140 N.C. App. 71, 81, 535 S.E.2d 109, 116 (2000) (citing *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990)).

> An accident may cause damage or injury to more than one person. Since each of such persons is entitled to his cause of action against the wrongdoer, it seems to follow that each is entitled to litigate the issues of negligence or contributory negligence without regard to prior litigation of such issues by the other person or persons injured in the same accident. As will be noted in the two sections which immediately follow, the above proposition pre-

> vails regardless of whether the verdict in the prior suit was for or against the plaintiff therein.

C. S. Patrinelis, Annotation, *Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action*, 23 A.L.R.2d 710, § 3 at 714 (1952).

In *Thompson v. Hamrick*, 23 N.C. App. 550, 209 S.E.2d 305 (1974), the minor plaintiff was a passenger in a vehicle operated by his father when it collided with a vehicle operated by the defendant. *Id.* at 550, 209 S.E.2d at 305. The minor plaintiff filed an action through his guardian ad litem against the defendant to recover for injuries the minor plaintiff sustained in the accident. *Id.* However, in a previous action, the defendant had sued the minor plaintiff's father and "the jury found [the minor] plaintiff's father negligent and found that [the defendant] was not contributorily negligent." *Id.* In *Thompson*, the defendant filed a motion for summary judgment against the minor plaintiff on the ground of *res judicata*, and the trial court granted summary judgment to the defendant on that ground. *Id.* at 550, 209 S.E.2d at 305-06. However, our Court held:

> The minor plaintiff in this case was neither a party nor one in privity with a party to the other action and, of course, he had no control over the other lawsuit. That his father was a party in the other action is irrelevant to this minor's right to prosecute his separate cause of action. The judgment from which [the minor] plaintiff appealed is contrary to law and must be reversed.

Id. at 551, 209 S.E.2d at 306.

Natalie Hill was not a party in the first case. Moreover, she was not in privity with her parents, who were parties to the first action, because her parents did not represent her legal rights in the first case. *See Frinzi*, 344 N.C. at 417, 474 S.E.2d at 130. Natalie Hill "had no control over the previous litigation and nothing in the record indicates that [her] interests were legally represented in the previous trial[.]" *Kaminsky*, 140 N.C. App. at 81, 535 S.E.2d at 116. As a separate plaintiff injured in the accident, Natalie Hill was entitled to "litigate the issue[] of negligence . . . without regard to prior litigation of such issue[] by the other person or persons injured in the same accident." 23 A.L.R.2d 710, § 3 at 714. Furthermore, similar to *Thompson*, the fact that Natalie Hill's parents were parties to the first case "is irrelevant to [her] right to prosecute [her] separate cause of action." *Thompson*, 23 N.C. App. at 551, 209 S.E.2d at 306.

[2] Nevertheless, we must affirm the trial court's order of summary judgment in favor of Defendants. "When a plaintiff fails to produce any evidence of an essential element of her claim, the trial court's grant of summary judgment is proper." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 452, 579 S.E.2d 505, 509 (2003). "[T]he theory of negligent entrustment requires proof of ownership in order to impose liability[.]" *Coble v. Knight*, 130 N.C. App. 652, 654, 503 S.E.2d 703, 705 (1998). In the present case, Plaintiffs alleged that the vehicle operated by Teresa Henson West at the time of the accident "was owned by . . . [D]efendant, C.F. West, Inc." Moreover, Charles F. West, Sr. testified at his deposition that C.F. West Inc. owned the vehicle involved in the accident. Accordingly, because Defendants Charles F. West, Sr., Annette West, and Charles F. West, Jr. did not own the vehicle alleged to have been entrusted to Teresa Henson West, summary judgment as to them was properly granted.

[3] We also hold that the trial court did not err in granting summary judgment because the evidence showed that Defendants did not give Teresa Henson West consent, express or implied, to drive the vehicle involved in the accident. "Among the necessary elements of a cause of action for negligent entrustment of a motor vehicle to an unlicensed operator is that the motor vehicle be operated with the consent or authorization of the entrustor[.]" Karen L. Ellmore, J.D., Annotation, *Negligent Entrustment of Motor Vehicle to Unlicensed Driver*, 55 A.L.R.4th 1100, § 9 at 1119 (1987). Although our Courts have not had occasion to analyze the term "entrustment" under these circumstances, where a party did not give another permission to use the vehicle involved in the accident, our Courts do not appear to have applied the doctrine of negligent entrustment in a situation where the vehicle was operated without the owner's knowledge or consent. *See, e.g.*, *Swicegood v. Cooper*, 341 N.C. 178, 179-81, 459 S.E.2d 206, 206-08 (1995) (where the Supreme Court, in analyzing whether the plaintiff was contributorily negligent by entrusting his vehicle to his son, recognized that "[t]he plaintiff had given his son permission to drive the automobile on this occasion.").

In the present case, there was no evidence that Defendant C.F. West, Inc., any of its agents, or any other Defendants gave Teresa Henson West permission to drive the vehicle and, therefore, summary judgment was properly entered in favor of Defendants. Teresa Henson West testified at her deposition that other than on 21 January 2001, she had never driven a vehicle owned by C.F. West, Inc. She also testified that she had never been authorized to drive a vehicle for C.F.

West, Inc. Specifically, she testified that she did not have any reason to believe that she was authorized to drive the C.F. West, Inc. vehicle on 21 January 2001, nor did she have any reason to believe that the keys to the vehicle had been given to her. Teresa Henson West also testified that as a result of her driving the vehicle on 21 January 2001, she pleaded guilty to the charge of unauthorized use of a motor vehicle because she was guilty of that offense. Charles F. West, Sr. testified that when, prior to the accident, he learned that a C.F. West, Inc. vehicle would be parked at the home of Charles F. West, Jr. and Teresa Henson West, who were married, he told Teresa Henson West that she did not have permission to drive the vehicle. Charles F. West, Jr. also testified that he had spoken to Teresa Henson West prior to the accident and had told her that she was not authorized to drive any vehicles owned by C.F. West, Inc.

Plaintiffs counter that given all of the facts and circumstances, it was foreseeable that Teresa Henson West would drive a vehicle owned by C.F. West, Inc. on 21 January 2001. However, even if foreseeable, Teresa Henson West did not have consent, either express or implied, to drive the vehicle. Therefore, Plaintiffs cannot show that Defendants entrusted the vehicle to Teresa Henson West, and we must affirm the order of summary judgment entered in favor of Defendants.

Affirmed.

Judges HUNTER and BRYANT concur.

HARVEY GENE HILL, JR., PLAINTIFF-APPELLANT v. TERESA HENSON WEST, C.F. WEST, INC., CHARLES F. WEST, SR., ANNETTE WEST, AND CHARLES F. WEST, JR., DEFENDANTS-APPELLEES

No. COA07-467

(Filed 4 March 2008)

Collateral Estoppel and Res Judicata— multiple parties— prior final judgment as to some

Summary judgment on res judicata for all of the defendants except Teresa West (who was not a party to this appeal) was proper. Although there were multiple orders, interlocutory

appeals, and decisions, there were final judgments on the merits as to these defendants, and it is clear that the present action involves the same plaintiffs, the same claims, and the same defendants as the first case.

Appeal by Plaintiff from order entered 6 September 2006 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County. Heard in the Court of Appeals 1 November 2007.

Lucas, Denning & Ellerbe, P.A., by Sarah Ellerbe, for Plaintiff-Appellant.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford, for Defendants-Appellees.

McGEE, Judge.

Harvey Gene Hill, Jr. appeals from an order granting summary judgment to C.F. West, Inc., Charles F. West, Sr., Annette West, and Charles F. West, Jr. on the grounds of *res judicata* and collateral estoppel. For the reasons set forth below, we affirm the trial court's order.

In an earlier action (the first case), the following plaintiffs filed a complaint on 16 October 2002 and an amended complaint on 18 December 2002: Hayden Hill, a minor, by and through his guardian ad litem; Harvey Gene Hill, Jr., individually and as parent and natural guardian of the minor, Hayden Hill; and Regina Hill, individually and as parent and natural guardian of the minor, Hayden Hill. The plaintiffs named the following as defendants: Teresa Henson West; C.F. West, Inc.; Charles West, Sr.; Annette West; Charles West, Jr.; and Richard Lester.

In the first case, the plaintiffs alleged that on 21 January 2001, Teresa Henson West was operating a vehicle owned by C.F. West, Inc. with the "expressed and/or implied owner's permission[.]" The plaintiffs further alleged that Teresa Henson West "negligently operated said vehicle [on US Highway 70] by crossing the grass median and going into the west bound lane, striking the plaintiffs' vehicle head on." The plaintiffs alleged that they suffered injuries as a result of the crash. The plaintiffs alleged a negligence claim against Teresa Henson West for the negligent operation of the vehicle, and alleged claims against the remaining defendants for negligent entrustment of the vehicle to Teresa Henson West.

In the first case, the defendants filed a motion to dismiss on 19 December 2002, and the trial court granted the motion on 17 February 2003 as to Charles F. West, Jr. and Richard Lester. C.F. West, Inc., Charles F. West, Sr., and Annette West filed a motion for summary judgment, which the trial court allowed on 28 October 2003. The plaintiffs appealed.

In the present case, Harvey Gene Hill, Jr. (Plaintiff) filed a complaint on 8 January 2004 and an amended complaint on 20 January 2004 against C.F. West, Inc., Charles F. West, Sr., Annette West, and Charles F. West, Jr. (Defendants), and Teresa Henson West. Teresa Henson West is not a party to this appeal.

Plaintiff again alleged that on 21 January 2001, Teresa Henson West was operating a vehicle owned by C.F. West, Inc. with the "expressed and/or implied owner's permission[.]" Plaintiff further alleged that Teresa Henson West "negligently operated said vehicle [on US Highway 70] by crossing the grass median and going into the west bound lane, striking . . . [Plaintiff's] vehicle head on." Plaintiff alleged injuries as a result of the crash. Plaintiff again alleged a negligence claim against Teresa Henson West for the negligent operation of the vehicle, and alleged claims against the remaining Defendants for negligent entrustment of the vehicle to Teresa Henson West.

Defendants filed a motion to dismiss the complaint on the grounds of *res judicata* and collateral estoppel on 27 January 2004. Defendants further alleged that because the first case was still pending, the present action was abated. The trial court entered an order dated 10 February 2004, staying the present case pending the outcome of the appeal of the first case.

With regard to the first case, our Court filed an opinion on 15 February 2005, *Hill v. West*, 168 N.C. App. 595, 608 S.E.2d 416 (2005) (unpublished). Our Court dismissed the appeal in the first case as interlocutory and as not affecting a substantial right because the plaintiffs still had claims pending against Teresa Henson West.

The trial court entered a consent order in the first case on 19 April 2005, dismissing without prejudice the plaintiffs' claims against Teresa Henson West. The plaintiffs again appealed from the 28 October 2003 summary judgment order and from the 19 April 2005 consent order. Our Court filed an opinion on 4 April 2006, *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006), dismissing the plaintiffs' appeal for an appellate rules violation and because "no *final*

determination of the plaintiffs' rights as to Teresa Henson West [had] been made in the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 54." *Id.* at 136, 627 S.E.2d at 664.

In the present case, Plaintiff filed a motion on 25 July 2006 to lift the stay entered 10 February 2004. Defendants renewed their motion to dismiss on 1 August 2006. The trial court granted Plaintiff's motion to lift the stay on 28 August 2006. The trial court converted Defendants' motion to dismiss into a motion for summary judgment and granted summary judgment on 6 September 2006 for all Defendants, except Teresa Henson West.

The trial court entered an order for entry of default against Teresa Henson West on 3 November 2006, and entered judgment by default against Teresa Henson West on 6 February 2007. Plaintiff filed his notice of appeal in the present case on 21 February 2007. In an order entered 23 May 2007, our Court consolidated the present case for hearing with two other related cases, *Hill v. West*, (No. COA07-468) 189 N.C. App. 189, 657 S.E.2d 698 (2008), and *Hill v. West*, (No. COA07-469) 189 N.C. App. 209, 657 S.E.2d 446 (unpublished) (2008). For clarity, we issue three separate opinions.

In the present case, Plaintiff argues the trial court erred by granting summary judgment for Defendants. Specifically, Plaintiff argues there was a genuine issue of material fact as to "whether . . . Defendants should have forseen the danger of Teresa Henson West driving a C.F. West Inc. vehicle." Although Plaintiff does not argue that the trial court erred by granting summary judgment for Defendants on the ground of *res judicata*, we find that issue dispositive.

"[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.

"[I]t is well settled in this State 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)). Moreover, "[i]n general, a cause of action determined by an order for summary judgment is a final judgment on the merits." *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).

In the first case, the trial court granted the defendants' motion to dismiss on 17 February 2003 as to Charles F. West, Jr. and Richard Lester. The trial court did not specify that the dismissal was without prejudice. The trial court also entered summary judgment on 28 October 2003 for all of the remaining defendants except Teresa Henson West, and dismissed the plaintiffs' claims with prejudice. Our Court dismissed the defendants' appeal from this summary judgment order, and the order was thus final. *See Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006). We hold these orders were final judgments on the merits that precluded "a second suit involving the same claim between the same parties or those in privity with them[.]" *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 261.

As to the second and third elements of *res judicata*, Plaintiff states in his brief that in his complaint in the present case, he alleged "the same causes of action for negligence against the same Defendants previously sued." Accordingly, it is clear that the present action involves one of the same plaintiffs and the same defendants as the first case. Therefore, the trial court did not err by granting summary judgment to Defendants in the present case on the ground of *res judicata*. We overrule Plaintiff's assignment of error.

Plaintiff has failed to set forth argument pertaining to his remaining assignment of error, and we deem that assignment abandoned pursuant to N.C.R. App. P. 28(b)(6).

Affirmed.

Judges HUNTER and BRYANT concur.

IN THE MATTER OF: B.L.H. AND Z.L.H., MINOR CHILDREN

No. COA07-1313

(Filed 4 March 2008)

Termination of Parental Rights— subject matter jurisdiction— no summons to children

A termination of parental rights order was vacated for lack of subject matter jurisdiction (which may be raised at any time on the court's motion) where the record does not show that a summons was issued to the minor children as required by N.C.G.S. § 7B-1106(a)(5).

Judge STEPHENS concurring.

Appeal by respondent from orders entered 25 July 2007 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 18 February 2008.

Charlotte W. Nallan for petitioner-appellee Buncombe County Department of Social Services.

Annick Lenoir-Peek for respondent-appellant mother.

Jerry W. Miller for the Guardian ad Litem.

CALABRIA, Judge.

C.L.H. ("respondent") appeals from orders terminating her parental rights to B.L.H. and Z.L.H. (collectively "the minor children"). We vacate the orders for lack of subject matter jurisdiction.

On 30 January 2007 and 5 February 2007, the Buncombe County Department of Social Services ("petitioner") filed petitions and issued summonses for an action to terminate respondent's parental rights to B.L.H. and Z.L.H. Respondent was timely served copies of the summonses and petitions to terminate her parental rights to the minor children. The respondent is the biological mother of the minor children, B.L.H. and Z.L.H. The biological fathers of B.L.H. and Z.L.H. are unknown. Respondent has indicated she does not know the iden-

tity of the biological fathers. Although the legal father of Z.L.H. was identified, DNA testing confirmed that he was not the biological father. Petitioner accomplished service by publication for the unknown fathers. The petitions were heard on 16 May 2007 and 4 June 2007. On 25 July 2007, the trial court entered separate orders terminating respondent's parental rights to B.L.H. and Z.L.H. Respondent appeals.

The dispositive issue in this appeal is whether the trial court had subject matter jurisdiction to proceed with the termination petitions in this case. Although respondent did not assign the issue of subject matter jurisdiction as error, nor raise the issue in her brief, subject matter jurisdiction may be raised at any time upon the court's own motion. "This Court recognizes its duty to insure subject matter jurisdiction exists prior to considering an appeal. A court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *In re S.E.P., L.U.E.*, 184 N.C. App. 481, 486, 646 S.E.2d 617, 621 (2007) (internal citations and quotations omitted).

In proceedings to terminate parental rights, N.C. Gen. Stat. § 7B-1106(a)(5) (2007) requires a civil summons to be issued to certain persons, not otherwise a party petitioner, including the juvenile. "[T]he failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction." *In re K.A.D.*, 187 N.C. App. 502, 504, 653 S.E.2d 427, 429 (2007) (citing *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007)).

The record before this Court fails to establish that petitioner issued summonses to the minor children in this case, as required by N.C. Gen. Stat. § 7B-1106(a)(5) (2007). According to the record, copies of the summonses and petitions were issued and served on respondent. Further, the trial court's orders terminating respondent's parental rights indicate that the minor children were in petitioner's custody, that respondent was properly served with the petitions to terminate her parental rights, and that both the legal and biological fathers of the minor children in this case were properly served through publication.

This Court is reluctant to vacate a termination of parental rights order. However, since the record is entirely silent as to any issuance or service of summonses to B.L.H. or Z.L.H., we vacate the orders terminating respondent's parental rights to B.L.H. and Z.L.H. *In re K.A.D.*, 187 N.C. App. at 504, 653 S.E.2d at 429.

Prior to the amendment of N.C. Gen. Stat. § 7B-1106 in 2001, that became effective January 1, 2002, service upon a juvenile under twelve years of age was not required. *See* 2001 N.C. Sess. Laws 208, § 28. Since the children in this case and all termination cases do not benefit from delays, we dislike vacating termination cases. Nevertheless, we are bound by prior holdings of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (Where a panel on the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by the precedent, unless it is overturned by a higher court.). Based upon our review of the record before this Court and precedent we are bound to follow, we conclude the trial court lacked subject matter jurisdiction to proceed with the termination petitions and therefore we vacate the orders terminating respondent's parental rights to B.L.H. and Z.L.H.

Vacated.

Judge STEELMAN concurs.

Judge STEPHENS concurs in a separate written opinion.

STEPHENS, Judge, concurring.

For the reasons set forth in my concurring opinion in *In re A.F.H-G.*, 189 N.C. App. ——, —— S.E.2d —— (2008), I concur in the result of the opinion of the Court.

STATE OF NORTH CAROLINA v. TRANQUERE SANCHEZ IRONS

No. COA07-909

(Filed 4 March 2008)

Burglary— second-degree—evidence sufficient

There was sufficient evidence of second-degree burglary where defendant argued that the State did not prove an intent to commit armed robbery at the time of the breaking and entering of the victim's motel room. The victim was not present the first time that defendant and others forcibly entered the motel room, but the evidence was more than sufficient to show defendant's intent to commit armed robbery when the victim returned to his room.

Furthermore, the evidence was sufficient to show a constructive breaking when the victim was controlled and forced into the room while being assaulted.

Appeal by defendant from judgment dated 26 September 2006 by Judge Thomas D. Haigwood in Robeson County Superior Court. Heard in the Court of Appeals 6 February 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BRYANT, Judge.

Tranquere Sanchez Irons (defendant) appeals from a judgment dated 26 September 2006 and entered consistent with a jury verdict finding defendant guilty of second-degree burglary, robbery with a dangerous weapon, and felony conspiracy. For the reasons given below, we find no error.

Facts

The evidence at trial tended to show that on 9 February 2006, Kevin Leach (Leach) was staying at the Redwood Motel in Lumberton, North Carolina when his cousin, Anthony McRay (McRay) and another individual named Tyrone Davis (Davis) approached Leach as he returned to his motel room. Leach allowed McRay and Davis to enter his room where both individuals asked Leach if they could have five dollars. After Leach gave them the money, McRay and Davis left the hotel room. Leach testified he saw them get into a white Cadillac with another man and drive away. Leach also testified that because his cousin McRay was known for stealing and McRay saw where he kept his money, Leach placed his remaining money in his socks before leaving his room to place a call at the phone booth located in the front of the motel. Leach testified that as he was leaving the motel room, he saw defendant driving by in a gold Ford Explorer. Defendant asked Leach if he needed anything and Leach indicated that he did not.

While Leach was placing the phone call, he saw the white Cadillac return to the motel. Leach ended the phone call and headed back to his room. When Leach turned the corner, he saw defendant and other men standing at the corner. When Leach walked around the

individuals, he saw his cousin, McRay, standing by the door of his motel room. Leach noticed that the lock on his motel room door was broken and the door was pushed in. Leach attempted to turn around and go back to the motel office when defendant approached him and "pulled a gun out" on him. When Leach began screaming, another individual nicknamed "Boots," struck Leach. Leach testified there were four individuals, including defendant and Boots, that approached him. After Boots struck him, Leach was pushed into his motel room. Defendant kept the gun on Leach while his cousin, McRay, demanded the rest of Leach's money. At this point, defendant cocked the trigger on the gun. Leach then told the men that the money was hidden in his sock. One of the individuals removed Leach's left sock and found five twenty-dollar bills. After defendant cocked the trigger on the gun again, Leach informed the individuals that his remaining money was in his right sock. After the individuals removed the money, they began to leave as Boots fired a pistol into the air. The men then ran from the motel room.

After the men left, Leach called the police. Officer Marcus Norton was on patrol duty with the Lumberton Police Department on 9 February 2006. Officer Norton testified he responded to the call at the Redwood Motel. He also testified that later that evening, he saw a white Cadillac fitting the description given by Leach with six individuals inside, including defendant. He stopped the car and awaited backup before approaching the car.

Officer Chris Germaine testified he was on duty with the Robeson County Sheriff's Department on the night of 9 February 2006. Officer Germaine testified he arrived at the location where Officer Norton stopped the white Cadillac, he searched the car, and photographed it. Officer Germaine also testified that on the morning of 10 February 2006, he took two statements from Defendant wherein defendant admitted being present at the Redwood Motel, but denied any involvement in the robbery of Leach.

On 8 May 2006, defendant was indicted on one count each of second-degree burglary, robbery with a dangerous weapon, and felony conspiracy. On 26 September 2006, a jury returned a verdict finding defendant guilty of all three charges. In a judgment dated 26 September 2006, defendant was sentenced to a minimum of 77 months and a maximum of 102 months imprisonment. Defendant appeals the second-degree burglary conviction.

Defendant raises one issue on appeal: whether defendant's conviction for second-degree burglary must be vacated because there was insufficient evidence of each element of the crime charged.

Standard of Review

The standard of review for a motion to dismiss in a criminal case is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Pointer*, 181 N.C. App. 93, 95, 638 S.E.2d 909, 911 (2007) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

I

Defendant argues the State failed to prove that defendant intended to commit the felony of robbery with a dangerous weapon inside Leach's motel room at the time of the breaking and entering. We disagree.

"The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *State v. Key*, 180 N.C. App. 286, 292, 636 S.E.2d 816, 821 (2006) (quotation omitted); *see also* N.C. Gen. Stat. § 14-51 (2007). Although a burglary indictment is no longer required to state the specific felony a defendant intended to commit, *State v. Worsley*, 336 N.C. 268, 281, 443 S.E.2d 68, 74 (1994), "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged," *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996) (quoting *State v. Faircloth*, 297 N.C. 389, 395, 255 S.E.2d 366, 370 (1979)).

In this case, the indictment for second-degree burglary specifically alleged that defendant "broke and entered with the intent to commit a felony therein, Robbery With a Dangerous Weapon[.]" The 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. McCree*, 160 N.C. App. 19, 30, 584 S.E.2d 348, 356 (2003). Here, the question is not whether there is sufficient evidence of robbery with a dangerous weapon but whether there is sufficient evidence of defendant's intent at the time he broke and entered Leach's motel room.

A "breaking" is any act of force, however slight, used to gain entrance through any usual or unusual place of ingress, whether open, partly open, or closed. *State v. Jolly*, 297 N.C. 121, 128, 254 S.E.2d 1, 5-6 (1979). "A breaking may be actual or constructive." *Id.* "A constructive breaking occurs where entrance is obtained in consequence of violence commenced or threatened by defendant." *Id.*

The evidence at trial tended to show that Leach was not present the first time defendant and the other individuals forcibly entered Leach's motel room to look for money by breaking the lock. However, the evidence shows that when Leach attempted to return to his motel room, he was approached by defendant who pulled out a gun while another individual hit Leach and forced Leach into his room where he was then robbed at gunpoint. Defendant argues this evidence is insufficient to show he intended to commit robbery with a dangerous weapon in the unoccupied room at the time he broke the lock and entered the room. However, the evidence is more than sufficient to show that defendant intended to commit robbery with a dangerous weapon at the time Leach returned to his motel room and attempted to reenter. Further, the evidence is sufficient to show that a constructive breaking occurred when Leach was directly controlled and forced into the motel room at gunpoint while being physically assaulted. *See Jolly*, 297 N.C. 121, 254 S.E.2d 1 (pushing victim into the hotel room as he opened the door was constructive breaking sufficient to sustain a charge of second degree burglary). Therefore, we hold the State presented sufficient evidence of each element of second-degree burglary. Accordingly, this assignment of error is overruled.

No error.

Judges HUNTER and JACKSON concur.

IN RE J.T., J.T., A.J.

[189 N.C. App. 206 (2008)]

IN THE MATTER OF J.T. (I), J.T. (II), A.J.

No. COA07-1372

(Filed 4 March 2008)

Termination of Parental Rights— subject matter jurisdiction— failure to issue summons to juveniles

The trial court erred by terminating respondents' parental rights, and the order is vacated based on lack of subject matter jurisdiction, because no summons was issued to the juveniles as required by N.C.G.S. § 7B-1106(a)(5).

Judge STEPHENS concurring in the result.

Appeal by respondent-mother and respondent-father J.T. from order terminating parental rights filed 24 August 2007 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 18 February 2008.

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

Beth A. Hall, attorney advocate, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-mother.

Peter Wood for respondent-father J.T.

STEELMAN, Judge.

Where no summons has been issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106(a)(5), we must vacate an order terminating parental rights under N.C. Gen. Stat. Chapter 7B for lack of subject matter jurisdiction.

While married to J.J., respondent-mother M.J. ("mother") gave birth to A.J. in 1999, J.A.T. ("J.T. II") in 2003, and J.T.T. ("J.T. I") in 2004. A.J., J.T. I, and J.T. II ("minor children") were removed from their mother's care in October 2004 pursuant to a non-secure custody order alleging neglect and dependency. On 15 December 2004, the trial court awarded legal and physical custody of the children to Cumberland County Department of Social Services ("DSS"). The minor children were adjudicated dependent in an order entered on 17 October 2005 and neglected and abused in an order entered on 22

December 2005. Although the two younger children were returned on a trial basis to mother's care during this time, they were again removed in January 2006 for mother's failure to supervise or to provide proper medical attention. On 31 July 2006, the permanency plan for the minor children was changed from reunification to adoption.

On 26 May 2006, following a paternity test, respondent father J.T. ("father") was adjudicated to be the father of minor children J.T. I and J.T. II.

On 6 October 2006, following mother's move out-of-state and father's incarceration, DSS filed a petition to terminate parental rights. On the same date, a summons was issued that named respondent-mother and the fathers, but not the minor children, as respondents. The trial court terminated respondents' parental rights by order[1] entered on 24 August 2007. N.C. Gen. Stat. § 7B-1110, 7B-1111(a) (2007).

Mother appeals the order terminating her rights as to all three minor children. Father appeals from the same order terminating his parental rights as the biological father of the minor children J.T. I and J.T. II.

> The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (internal citations omitted). The judicial procedure for termination of parental rights includes procedural protections that must be followed to endow the court with subject matter jurisdiction. N.C. Gen. Stat. § 7B-1101 *et seq.* (2005). In relevant part, N.C. Gen. Stat. § 7B-1105(a)(5) requires that a summons be issued to the juvenile, "who shall be named as a respondent." *Id.* (2005).

The record reveals that DSS failed to cause to be issued a summons to the juveniles, as required by N.C. Gen. Stat. § 7B-1106(a)(5) (2005). " 'In order for a summons to serve as proper notification, it

1. Although the rights of father J.J. were also terminated, he is not a party to the instant appeal.

must be issued and served in the manner prescribed by statute.' " *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993) (quoting *Everhart v. Sowers*, 63 N.C. App. 747, 750, 306 S.E.2d 472, 474 (1983)), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994).

"This Court has recently held that the failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction." *In re K.A.D.*, 187 N.C. App. 502, 504, 653 S.E.2d 427, 428-29 (2007) (citing *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007)). We are bound by our prior holdings on this issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). We do not reach the assignments of error set forth and argued by the parties to this appeal.

We vacate the order terminating parental rights.

VACATED.

Judge CALABRIA concurs.

Judge STEPHENS concurs in separate opinion.

STEPHENS, Judge, concurring.

For the reasons set forth in my concurring opinion in *In re A.F.H-G.*, 189 N.C. App. ——, —— S.E.2d —— (2008), I concur in the result of the opinion of the Court.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 MARCH 2008

BROWN v. BLACK & DECKER CORP. No. 07-734	Indus. Comm. (I.C. No. 282656)	Affirmed
BROWN v. VIA ELECTRIC CO. No. 07-1027	Indus. Comm. (I.C. No. 503132)	Dismissed
BUREK v. MANCUSO No. 07-591	Dare (04CVS133)	Reversed and remanded
CAROLINA TAILORS, INC. v. WAGNER No. 07-776	Carteret (03CVS1214)	Dismissed
ELIXSON v. ADVANCED RESIDUALS MGMT., LLC No. 07-841	Indus. Comm. (I.C. 447570)	Affirmed
ELLISON v. DANA CORP. No. 07-778	Indus. Comm. (I.C. 488865)	Affirmed
FREEMAN v. BULLARD No. 06-58	Montgomery (01CVS274)	No error
HILL v. WEST No. 07-469	Johnston (04CVS55)	Affirmed
HOUSEHOLD REALTY CORP. v. GUINN No. 07-862	Moore (05CVD1109)	Dismissed
IGLESIAS v. CITY OF OXFORD No. 07-347	Granville (06CVS994)	Affirmed
IN RE J.E.C.M. & R.E.S. No. 07-1424	Carteret (05J119-20)	Affirmed
IN RE K.J.H. No. 07-1408	Cleveland (06JT142)	Affirmed
IN RE M.A.R. No. 07-991	Mecklenburg (93J455)	Reversed and remanded
IN RE M.J.M. & M.L.S. No. 07-1350	New Hanover (03JT414-15)	Affirmed
IN RE WILL OF BEANE No. 07-231	Richmond (05SP83)	Affirmed
INK PEN RETREAT CORP. v. HUNTER HEATH TR. No. 07-418	Onslow (06CVS714)	Dismissed and remanded with instructions

ISAAC v. WELLS No. 07-1039	Buncombe (06CVD2918) (03-J245)	Affirmed in part and remanded with instructions
JAMES v. CAROLINA POWER & LIGHT No. 07-625	Indus. Comm. (I.C. No. 985521)	Dismissed
LEE v. LEE No. 07-339	Halifax (97CVD748)	Affirmed in part; remanded in part with instructions
MAJORS v. MAJORS No. 07-392	Rowan (05CVS2954)	Affirmed
MORRISON v. OUTBACK STEAKHOUSE No. 07-898	Indus. Comm. (I.C. No. 248201) (I.C. No. 281383)	Affirmed
OWENS v. OWENS No. 07-230	Rowan (00CVD3118)	Affirmed in part, reversed in part and remanded
POWELL v. POWELL BAIL BONDING, INC. No. 07-540	New Hanover (06CVS914)	Affirmed in part, reversed in part
ROBINSON v. ALTRIA GRP., INC. No. 07-976	Indus. Comm. (I.C. No. 406538)	Affirmed
SISK v. AMINI No. 07-1013	Union (06CVS2454)	Affirmed
SKEEN v. McINTYRE No. 06-910	Gaston (05CVS3246)	Affirmed
SKEEN v. WARREN & SWEAT MFG., INC. No. 06-999	Gaston (05CVS1261)	Reversed
STATE v. BALLARD No. 07-860	McDowell (05CRS50583) (05CRS50587) (06CRS2677)	No prejudicial error
STATE v. BOGAR No. 07-1019	Mecklenburg (06CRS213894-95)	No error
STATE v. BRIGHTWELL No. 07-556	Davidson (05CRS61088-89)	Affirmed
STATE v. BRINKLEY No. 07-521	Edgecombe (05CRS54345) (05CRS54347)	No error
STATE v. BROOKS No. 07-924	Alleghany (05CRS50176)	No error

STATE v. BROWN No. 07-843	Mecklenburg (05CRS220621-22) (06CRS14614)	No error
STATE v. CALDWELL No. 07-464	Jackson (06CRS3075-76)	Affirmed
STATE v. CROWELL No. 07-954	Forsyth (05CRS54479)	No error
STATE v. DAVIS No. 07-1023	Wake (06CRS29794)	No error
STATE v. DOCKERY No. 07-649	Cumberland (06CRS56336)	Affirmed
STATE v. GRAY No. 07-962	Rutherford (06CRS51189) (06CRS51190)	No error
STATE v. HILL No. 07-769	Onslow (06CRS51991)	No error
STATE v. HORTON No. 07-771	Wilkes (06CRS50757-58) (06CRS1778)	Reversed in part, no error in part
STATE v. HOWEY No. 07-750	Mecklenburg (06CRS242184-86)	Affirmed
STATE v. KEARNS No. 07-666	Forsyth (00CRS21374) (04CRS38557-64)	Vacated
STATE v. LARSON No. 07-472	Davidson (04CRS62473-75) (04CRS62479)	No error
STATE v. LEACH No. 07-411	Guilford (05CRS23009-10)	No error
STATE v. MITCHELL No. 07-956	Wake (06CRS26800)	No error
STATE v. PAYNE No. 07-773	Caldwell (05CRS52064-5)	No error
STATE v. PHILLIPS No. 07-1061	Rutherford (06CRS1525)	Affirmed
STATE v. RHODES No. 07-632	Mecklenburg (06CRS42795)	Affirmed

STATE v. SYKES No. 07-537	Bladen (05CRS52870)	No error
STATE v. TANTE No. 07-457	Onslow (06CRS1267) (06CRS51259)	No error
STATE v. TOLER No. 07-337	Johnston (06CRS50669-71)	No error
STATE v. UPCHURCH No. 07-779	Buncombe (06CRS50756)	Reversed
STATE v. UZZELL No. 07-597	Wayne (05CRS56029) (06CRS4895)	No error
STATE v. WOMACK No. 07-514	Guilford (04CRS96897)	New trial
STATE v. WOOD No. 07-912	Forsyth (05CRS64949) (06CRS11511)	No error
THOMAS v. THOMAS No. 07-957	Stanly (04CVD531)	Affirmed
WALLACE v. ESTATE OF WALLACE No. 07-1053	Richmond (04CVS239)	Appeal dismissed
WATTIKER v. BOWENS No. 07-805	Durham (05CVD6313)	Affirmed
WINROW v. DISCOVERY INS. CO. No. 06-1681	Pasquotank (04CVD525)	Affirmed

HEATHERLY v. STATE

[189 N.C. App. 213 (2008)]

CHARLES HEATHERLY; THOMAS SPAMPINATO; W. EDWARD GOODALL, JR.; PAUL STAM; WAKE COUNTY TAXPAYERS ASSOCIATION; AND THE NORTH CAROLINA FAMILY POLICY COUNCIL, PLAINTIFFS, WILLIS WILLIAMS; NORTH CAROLINA FAIR SHARE; AND NORTH CAROLINA COMMON SENSE FOUNDATION, PLAINTIFF-INTERVENORS v. STATE OF NORTH CAROLINA; CHARLES A. SANDERS, BRYAN E. BEATTY, LINDA CARLISLE, ROBERT A. FARRIS, JR., JOHN R. MCARTHUR, JIM WOODWARD, AND ROBERT W. APPLETON, MEMBERS OF THE NORTH CAROLINA LOTTERY COMMISSION, IN THEIR OFFICIAL CAPACITY; NORTH CAROLINA LOTTERY COMMISSION; THOMAS N. SHAHEEN, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA EDUCATION LOTTERY, IN HIS OFFICIAL CAPACITY; MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA06-770

(Filed 18 March 2008)

1. Constitutional Law— state constitution—Lottery Act—not a revenue bill

The Lottery Act does not meet the conditions to be considered a revenue bill and was not required to be passed pursuant to the requirements of N.C. Constitution, Article II, Section 23. The Lottery Act neither pledges the faith of the State for payment of a debt nor attempts to raise money on the credit of the State. Moreover, given the voluntary nature of participation in the lottery, the Lottery Act does not impose any tax upon the people of the State.

2. Costs— assessed against plaintiffs—findings relevant—no abuse of discretion

The trial court did not abuse its discretion by ordering plaintiffs and the plaintiff-intervenors to pay the costs of litigation challenging the N.C. Lottery Act. Findings that were challenged as irrelevant (concerning the timing of the action and the ongoing preparation for the lottery) bore directly on the question of whether the trial court employed reason when exercising its discretion to assess costs.

Judge CALABRIA dissenting.

Appeal by plaintiffs from order entered 21 March 2006 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 22 May 2007.

North Carolina Institute for Constitutional Law, by Robert F. Orr and Jeanette Doran Brooks, for plaintiffs-appellants Charles Heatherly, Thomas Spampinato, W. Edward Goodall, Jr., Paul Stam, Wake County Taxpayers Association, and the North Carolina Family Policy Council.

North Carolina Justice Center, by Jack Holtzman, for plaintiff-intervenors-appellants Willis Williams and the North Carolina Common Sense Foundation.

Attorney General Roy Cooper, by Special Deputy Attorneys General Norma S. Harrell and Ronald M. Marquette, for defendant-appellee the State of North Carolina.

Maupin Taylor, P.A., by Charles B. Neely, Jr. and Kevin W. Benedict, for amicus curiae the Tax Foundation.

WYNN, Judge.

To pass constitutional muster, revenue bills must, *inter alia*, be "read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days."[1] Here, Plaintiffs argue that the trial court erred in holding that the North Carolina Education Lottery Act is not a revenue bill and thus was not required to be enacted under the mandated constitutional procedural requirements. Because we conclude that the Lottery Act was not a bill "enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State,"[2] we agree with the trial court that the Lottery Act does not constitute a revenue bill.

In December 2005, Plaintiffs Charles Heatherly, Thomas Spampinato, W. Edward Goodall, Jr., Paul Stam, the Wake County Taxpayers Association, and the North Carolina Family Policy Council, brought an action under the Uniform Declaratory Judgment Act challenging the constitutionality of the Lottery Act. Plaintiffs allege that the Lottery Act violates Article II, Section 23 of the North Carolina Constitution, which requires that all revenue bills meet certain constitutional mandates in their enactment into law. Indeed, all parties to the lawsuit agree that the Lottery Act was not passed in

1. N.C. Const. art. II, § 23.

2. *Id.*

compliance with those requirements, outlined in Article II, Section 23 of the North Carolina Constitution, as the Lottery Act did not receive the requisite three readings on three separate days, nor were the yeas and nays properly entered. As such, the lawsuit filed by Plaintiffs turns on the question of whether the Lottery Act is, indeed, a revenue bill, such that its passage must comply with the provisions of Article II, Section 23 of the North Carolina Constitution. Plaintiffs further contend that the Lottery Act violates Article V, Section 7 of the North Carolina Constitution, which prohibits the drawing of money from the State treasury except in consequence of appropriations made by law.

On 30 August 2005, the General Assembly passed the Lottery Act providing for the creation of the North Carolina State Lottery Commission ("the Lottery Commission"):

> There is created the North Carolina State Lottery Commission to establish and oversee the operation of a Lottery. The Commission shall be located in the Department of Commerce for budgetary purposes only; otherwise, the Commission shall be an independent, self-supporting, and revenue-raising agency of the State. The Commission shall reimburse other governmental entities that provide services to the Commission.

N.C. Gen. Stat. § 18C-110 (2005). Governor Michael Easley signed the Lottery Act into law the following day. Under the Lottery Act, the State provided ten million dollars to the Lottery Commission for start-up costs, and the agency began moving forward with hiring employees, entering into contracts, and engaging in other activities necessary for the establishment of a lottery.

In addition to the creation of the Lottery Commission, the Lottery Act established the North Carolina State Lottery Fund as an enterprise fund within the state treasury, "appropriated to the Commission and may be expended without further action of the General Assembly for the purposes of operating the Commission and the lottery games." *Id.* § 18C-160. Moreover, the Lottery Act specified the types of revenue income to be deposited into the North Carolina State Lottery Fund: "(1) [a]ll proceeds from the sale of lottery tickets or shares[;] (2) [t]he funds for initial start-up costs provided by the State[;] (3) [a]ll other funds credited or appropriated to the Commission from any source[; and] (4) [i]nterest earned by the North Carolina State Lottery Fund." *Id.* § 18C-161.

The Lottery Act earmarked the proceeds of the lottery to fund education-related projects. Specifically, the Lottery Act provides for total annual revenues from the lottery to be allocated in the following manner, "[t]o the extent practicable": at least fifty percent for prizes to the general public; at least thirty-five percent for the Education Lottery Fund; no more than eight percent for lottery expenses; and no more than seven percent for compensation paid to lottery game retailers. *Id.* § 18C-162(a). The net revenues from the North Carolina State Lottery Fund "shall be transferred periodically to the Education Lottery Fund, which shall be created in the State treasury." *Id.* § 18C-164(a). In turn, the remaining net revenue of the Education Lottery Fund is designated to support reduction of class size in early grades, to the Public School Building Capital Fund, and to the State Educational Assistance Authority to fund college and university scholarships. *Id.* § 18C-164(c). Additionally, the Lottery Act states that, from the Education Lottery Fund, "the Commission shall transfer a sum equal to five percent (5%) of the net revenue of the prior year to the Education Lottery Reserve Fund[,]" which will be used to make up for any shortfall between actual net revenues and the amount of funds appropriated by the General Assembly for projects in a given year. *Id.* § 18C-164(b), (d), (e).

After the filing of the initial complaint, Plaintiff-Intervenors Willis Williams and the North Carolina Common Sense Foundation moved to intervene on 21 December 2005. On 31 December 2005, Plaintiffs moved for a preliminary injunction to enjoin Defendants from proceeding with implementation of the Lottery Act. Defendants thereafter filed a motion to dismiss on 18 January 2006. On 13 February 2006, the trial court allowed the motion to intervene and heard Plaintiffs and Defendants on the other two motions. On 15 February 2006, the trial court denied the motion for preliminary injunction and granted Defendants' motion to dismiss for failure to state a claim upon which relief may be granted as to Plaintiffs' two counts alleging that the Lottery Act unconstitutionally created an express tax on residents and non-residents, respectively.

Following a final hearing, the trial court entered an order on 23 March 2006, dismissing Plaintiffs' claims alleging that the Lottery Act unconstitutionally raises money on the credit of the State for the payment of lottery winnings, pledges the faith of the State for the payment of a debt, and creates an implicit tax, for failure to state claims upon which relief could be granted. The trial court also dismissed all of the claims asserted by the corporate Plaintiffs, namely, Wake

County Taxpayers Association, the North Carolina Family Policy Council, and the North Carolina Common Sense Foundation, for lack of standing, and assessed the costs of litigation to Plaintiffs.

Plaintiffs appeal, arguing that the trial court erred by (I) holding that the Lottery Act was not a revenue bill and thus, did not constitute legislation within the purview and mandates of Article II, Section 23 of the North Carolina Constitution; (II) holding that the corporate plaintiffs Wake County Taxpayers Association, the North Carolina Family Policy Council, and the North Carolina Common Sense Foundation lacked standing to prosecute their claims; and (III) ordering Plaintiffs and Plaintiff-Intervenors to pay the costs of this litigation.

I.

[1] Plaintiffs argue that the trial court erred by holding that the Lottery Act was not a revenue bill, such that it was not required to comply with the requirements of Article II, Section 23 of the North Carolina Constitution. Plaintiffs contend that the Lottery Act's provisions meet all three fiscal conditions to be considered a revenue bill under the state Constitution. We disagree.

The North Carolina Constitution defines revenue bills as those "enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so[.]" N.C. Const. art. II, § 23. To pass constitutional muster, such bills must meet certain procedural requirements, namely:

> [Revenue bills] shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

Id. Again, all parties to this lawsuit agree that the Lottery Act did not meet these procedural requirements. We therefore turn to the question of whether the provisions of the Lottery Act satisfy the fiscal conditions to define the legislation as a revenue bill.

Raises money on the credit of the State and Pledges the faith of the State for the payment of a debt

Plaintiffs contend that the Lottery Act raises money on the credit of the State and pledges the faith of the State for the payment of a debt because lottery winners are entitled to payment of their respective winnings from the State. We disagree.

First, we note that the Lottery Act explicitly states that "[a]t least fifty percent (50%) of the total annual revenues [of the North Carolina State Lottery Fund] . . . shall be returned to the public in the form of prizes." N.C. Gen. Stat. § 18C-162(a). The Lottery Act also established the North Carolina State Lottery Fund as an enterprise fund "appropriated to the [Lottery] Commission and may be expended without further action of the General Assembly[,]" and defined the Lottery Commission as an "independent, self-supporting, and revenue-raising agency[.]" *Id.* §§ 18C-110, 160. As such, the Lottery Act by its terms establishes that the Lottery Commission, not the State, is responsible for payment of prizes and debts incurred in the course of the administration of the lottery.

Nevertheless, Plaintiffs assert that the General Assembly should have limited the liability to pay lottery prizes to the Lottery Commission and expressly absolved the State from paying lottery winners. Plaintiffs state in their brief that "[a]dmittedly, the Lottery Act specifies that lottery winners are to be paid from lottery revenues . . . , but that legislative directive is irrelevant." We find this argument to be without merit, as the legislative directive would be determinative of any direct action by a lottery winner to recover from the State rather than the Lottery Commission and would reflect that the General Assembly created a dedicated revenue stream, i.e., the sale of lottery tickets by the Lottery Commission, to pay prize winners, as well as a limitation of liability to those revenues.

Further, we see no reason why the sale of lottery tickets should be considered to be the functional equivalent of the issuance of state bonds. With the latter, a consumer chooses to make an investment, essentially loaning money to the State for the financing of certain projects, in exchange for the guarantee that the loan will be repaid with interest, either from the treasury (in the case of general obligation bonds) or from the dedicated revenue stream in question (in the case of revenue bonds). However, with the lottery, a consumer chooses to purchase a ticket that promises only the possibility of winning a cash prize in return. There is no guarantee of payment or any

investment made; the lottery ticket is a simple purchased good that represents the possibility of payment. As such, the State is not "pledging" its faith or credit for a debt it definitively owes. Accordingly, the two are materially different and should not be treated in the same manner under the law.

Moreover, even assuming *arguendo* that a lottery ticket is the functional equivalent of a state bond, tickets would certainly be considered revenue bonds, which do not pledge the State's credit, rather than general obligation bonds, which do. *See*, *e.g.*, *North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955) ("[S]uch revenue bonds do not constitute 'debts' of the State agency by which they are issued.") (citing *Brockenbrough v. Board of Water Comm'rs*, 134 N.C. 1, 46 S.E. 28 (1903) and *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90 (1938)). A revenue bond is distinguished from a general obligation bond because it has both an exclusive, dedicated revenue stream and a statutory limitation of liability to that revenue stream. *See generally North Carolina Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 117, 143 S.E.2d 319, 325 (1965) (holding that a bond issued for the Turnpike Authority was a revenue bond, not a general obligation bond, because the statute specified a dedicated revenue stream and a limitation of liability). As noted above, the Lottery Act likewise meets both those criteria.

Our Supreme Court has further remarked that, when considering if the State's faith and credit has been pledged, "[w]hat is being pledged as security is the constitutionally significant factor." *Wayne County Citizens Ass'n for Better Tax Control v. Wayne County Bd. of Comm'rs*, 328 N.C. 24, 31, 399 S.E.2d 311, 316 (1991). Although that case involved a comparison between general obligation bonds, "wherein the taxing power of the governmental unit is pledged," and installment purchase contracts, where "only the property improved is pledged[,]" we find instructive the Court's observation that "[t]he possibility that appropriations which might include income from tax revenues will be used to repay the indebtedness under the contract is not a constitutionally significant factor." *Id.* In the instant case, the statute does not even pledge income from tax revenues; rather, it pledges *only* the revenues raised by the sale of lottery tickets, which is not constitutionally significant.

We observe, too, that the General Assembly established the Education Lottery Reserve Fund to make up for shortfalls. Even more significantly, the number and amount of prizes are determined by

ticket sales and the amount of revenue generated; as such, and given that prizes are limited to only fifty percent of revenues, it is difficult to envision a scenario in which the prizes claimed by winners would ever outstrip the capacity of the Lottery Commission to pay. Moreover, while the dissent would argue that the phrase "[t]o the extent practicable" in N.C. Gen. Stat. § 18C-162(a)(1) does not limit the State's liability, we believe the General Assembly's insertion of this phrase was deliberate and should be taken according to its plain meaning, which is to define and limit the scope of revenue allocation and liability.[3]

Because the Lottery Act neither pledges the faith of the State for payment of a debt nor attempts to raise money on the credit of the State, these assignments of error are overruled.

Creates an implicit tax

According to Plaintiffs, the Lottery Act is "an attempt . . . to raise revenue to defray the necessary governmental expenses of providing an adequate educational opportunity for all of North Carolina's children," as required by the State Constitution.[4] While we agree that the lottery is unquestionably intended and designed to raise revenue, we find that this purpose does not transform such revenue into a tax.

We have previously defined a tax as "a pecuniary charge or levy *enforced by government* to raise money for the maintenance and expense of government[.]" *North Carolina Assoc. of ABC Bds. v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694 (emphasis added),

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3. Additionally, although the dissent states that "[t]here is no statutory provision prohibiting prize winners from asserting claims against other State funds in the event of a shortfall of lottery revenues[,]" neither is there any provision that would allow a prize winner to assert such a claim against other state funds. The lottery is operated by a separate entity, the Lottery Commission, which does have a dedicated revenue stream—ticket sales—from which it pays prizes. It is unclear under what legal theory a prize winner could bring a successful claim against the State for payment out of other state funds.

4. Plaintiffs do not challenge the creation of the lottery system itself as unconstitutional; instead, Plaintiffs contend that distributing at least thirty-five percent of the revenues from the lottery to the Education Lottery Fund constitutes an unconstitutional tax. Since the establishment of a lottery system itself is not challenged by Plaintiffs, an ostensible remedy to Plaintiffs' tax claim would be to strike that part of the bill directing funds to benefit education. *See, e.g.*, *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969) ("It is well settled that if valid provisions of a statute, or ordinance, are separable from invalid provisions therein, so that if the invalid provisions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent." (citations omitted)).

disc. review denied, 314 N.C. 667, 336 S.E.2d 400 (1985).[5] More specifically, "a tax [i]s 'a charge' levied and collected as a contribution to the maintenance of the general government . . . [It is] *imposed upon the citizens in common at regularly recurring periods* for the purpose of providing a continuous revenue." *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 683, 446 S.E.2d 332, 347 (1994) (citations and quotation omitted) (alterations in original) (emphasis added).

Nevertheless, as noted by our Supreme Court, raising revenue alone is insufficient to meet the definition of a revenue bill: "Revenue bills, as defined by law, are those that *levy taxes in the strict sense of the word* and are not bills for other purposes which may incidentally create revenue." *Hart v. Board of Comm'rs*, 192 N.C. 161, 164, 134 S.E. 403, 404 (1926) (citations omitted) (emphasis added); *see also Carolina Util. Customers Ass'n*, 336 N.C. at 683, 446 S.E.2d at 347 (noting that the collection of funds is not a tax if it "is not a charge *levied upon the general citizenry* for the general maintenance of the government" (emphasis added)). As such, our Supreme Court has also held that, "Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll. 'Taxes are levied for the support of government, and *their amount is regulated by its necessities*.' " *Pine Island*, 265 N.C. at 116-17, 143 S.E.2d at 325 (quoting *Ennis v. State Highway Comm'n*, 231 Ind. 311, 323, 108 N.E.2d 687, 693 (1952)) (emphasis added).

For purposes of defining what constitutes a tax, we find the payment of a toll to be analogous to the purchase of a lottery ticket. In both instances, an individual chooses to engage in a purely voluntary activity by paying a fee; in neither situation can the government be said to be "levying" or "enforcing" a charge against citizens. Rather, unlike the compulsory nature of a tax, a toll and participation in the lottery are activities freely undertaken by citizens of their own volition.

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5. The dissent refers to the *San Juan Cellular* test, applied by this Court in *State Farm Mutual Auto Insurance Company v. Long*, 129 N.C. App. 164, 497 S.E.2d 451 (1998), *aff'd per curiam*, 350 N.C. 84, 511 S.E.2d 303 (1999), to determine "whether a government charge is a fee or tax." Our opinion in *Long* indeed applied the *San Juan Cellular* test to an insurance regulatory charge to determine if it was a regulatory fee or a tax. *Id.* at 168-71, 497 S.E.2d at 453-55. However, the charge imposed in *Long* was compulsory, not voluntary, and was imposed by the Commissioner of Insurance, a state agency, as part of the cost of doing insurance business in North Carolina. *Id.* at 164-65, 497 S.E.2d at 451-52. Moreover, we are not considering here whether the lottery is a regulatory fee or a tax; we are determining only whether it is a tax. As such, the *San Juan Cellular* test is largely irrelevant to the question at hand.

Moreover, unlike a sales tax, the lottery is not imposed on consumers as part of each transaction they undertake with businesses in the State; instead, the Lottery Commission itself is the business selling the product, a lottery ticket, directly to the consumer citizen, who chooses to pay for that product. That citizen—and any other who purchases a ticket—receives the exclusive benefit of the right to a chance of winning the lottery prizes, a benefit that is not conferred upon the general population of the State through the disbursement of state funds. A sales tax, by contrast, is a cost of conducting business in North Carolina and is imposed on all members of the general population; it can hardly be considered to be "voluntary" under any practical definition of the term.

Although the General Assembly openly declared that "the purpose of [the Lottery Act] is to establish a State-operated lottery to generate funds for the public purposes described in this Chapter[,]" N.C. Gen. Stat. § 18C-102, namely, the education-related projects outlined in the Act's provisions, the revenue-raising purpose of the lottery is not the critical factor in determining if the Lottery Act imposes a tax. Indeed, notwithstanding the dissent's focus on "the purpose behind the fee," we note that the purpose behind virtually *any* fee is to raise revenue. Instead, the constitutional language itself answers the question of whether the Lottery Act meets the definition of a revenue bill: "to *impose* any tax." (Emphasis added). Given the voluntary nature of participation in the lottery, we find that the Lottery Act does not "impose any tax upon the people of the State."

For the foregoing reasons, we conclude that the Lottery Act is not a revenue bill within the meaning of Article II, Section 23 of the North Carolina Constitution. Accordingly, we affirm the trial court's grant of Defendants' motion to dismiss.

II.

Next, Plaintiffs argue that the trial court erred by holding that the corporate plaintiffs Wake County Taxpayers Association, the North Carolina Family Policy Council, and the North Carolina Common Sense Foundation lacked standing to prosecute their claims. Because we hold that the trial court did not err in finding that the Lottery Act was not a revenue bill, the question of the corporate plaintiffs' standing to prosecute their claims is no longer relevant. We therefore decline to consider this issue.

III.

[2] Finally, Plaintiffs argue that the trial court erred by ordering Plaintiffs and Plaintiff-Intervenors to pay the costs of this litigation. We disagree.

In any proceeding under the Uniform Declaratory Judgment Act, "the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263 (2005). Such a decision is within a trial court's discretion. *See City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994) ("It was within the trial court's discretion under this statute to apportion costs as it deemed equitable."). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). Additionally, under longstanding precedent of the North Carolina courts, if nothing in the record appears to the contrary, we will presume that the trial court exercised discretion in awarding such costs. *See*, *e.g.*, *Wooten v. Walters*, 110 N.C. 251, 259, 14 S.E. 734, 737 (1892).

In the instant case, the trial court included in the findings and conclusions of the order that Plaintiffs' allegations were "without merit and should be dismissed," as well as that "no justification has been shown for the delay in initiating this litigation in December 2005[,]" three and a half months after the passage of the Lottery Act. In that time period, the trial court found that the Lottery Commission was established and "hired employees, entered into contracts, collected application fees, expended large sums of money and engaged in other activities necessary for the establishment of a lottery." Furthermore, the trial court noted that "the money expended by the Lottery Commission cannot be unspent[,]" "the legal position and reliance of those who entered into contracts with the Lottery Commission cannot be dimissed[,]" "a large number of people (notably the employees of the Lottery Commission) altered their economic, legal and planning positions in reliance on the Lottery Act[,]" and "it is doubtful that lottery employees could return to their former employment." Perhaps most significantly, the trial court found that "the plaintiffs and plaintiff-intervenors had actual and constructive knowledge of their claims and of the efforts being made to implement the Lottery Act prior to the filing of their respective complaints."

Although Plaintiffs challenge several of these findings of fact on appeal, they do not dispute the truth of the findings related to the

establishment and activities of the Lottery Commission; rather, they contend only that the findings are irrelevant to the legal issues at hand. Nevertheless, we conclude that the findings bear directly on the question of whether the trial court employed reason when exercising discretion to assess costs in this matter. Plaintiffs have failed to make any showing that the trial court abused its discretion in awarding costs beyond conclusory statements to that effect.[6]

In light of the trial court's findings, as well as the presumption we accord the trial court that it exercised discretion, we decline to find an abuse of discretion in ordering Plaintiffs to bear the costs of this litigation. This assignment of error is overruled.

Affirmed.

Judge HUNTER concurs.

Judge CALABRIA dissents by separate opinion.

CALABRIA, Judge, dissenting.

Since I conclude that the Lottery Act is a revenue bill that was not passed in accordance with constitutional mandates, I respectfully dissent from the majority opinion. I further conclude that the trial court abused its discretion in determining plaintiffs should bear the costs of this action.

I. Revenue Bill

Article II, Section 23 of the North Carolina Constitution states in pertinent part:

> No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the

6. We emphasize again that we review the trial court's imposition of attorneys' fees for an abuse of discretion. As such, our agreement or disagreement with its decision is immaterial; rather, to reverse its ruling, we must conclude that the trial court had no reasonable basis to support its decision. Although we—and the dissent—may define what is "equitable and just" differently than did the trial court here, we cannot conclude after reviewing the extensive and thorough findings of fact and conclusions of law that the trial court employed no reason in imposing attorneys' fees on Plaintiffs. Accordingly, the proper application of our standard of review compels that we find no abuse of discretion.

> State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

N.C. Const. art. II, § 23.

The principles governing constitutional interpretation are generally the same as those "which control in ascertaining the meaning of all written instruments." *Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002) (internal quotation marks omitted) (citations omitted). In determining the will or intent of the people as expressed in the North Carolina Constitution, "all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)). If the meaning of the language of Article II, § 23 is plain, then we must follow it. *See Martin v. State of North Carolina*, 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991) ("where the meaning is clear from the words used we will not search for a meaning elsewhere.") (quotation omitted). In the case *sub judice*, the language regarding raising money on the credit of the State, pledging the faith of the State for payment of a debt, and not imposing a tax is straightforward. Yet, the majority incorrectly concludes the Lottery Act does not raise money on the credit of the State, does not pledge the faith of the State for the payment of a debt, and does not impose a tax, and therefore does not constitute a revenue bill.

The majority holds that because the Lottery Act establishes the Lottery Commission as an independent agency and pays prize winners from the pool of lottery revenues, that the State has not raised money on its credit or pledged its faith for payment of a debt. The relevant statutory provision states as follows:

> § 18C-162. Allocation of revenues
>
> (a) *To the extent practicable*, the Commission shall allocate revenues to the North Carolina State Lottery Fund in the following manner:

> (1) At least fifty percent (50%) of the total annual revenues, as described in this Chapter, shall be returned to the public in the form of prizes.

N.C. Gen. Stat. § 18C-162(a)(1) (2005) (emphasis supplied).

This provision makes it clear that while the State intends to pay lottery winners from lottery revenues, it has not expressly limited its liability to lottery revenues. Thus, although lottery proceeds are used to pay prize winners "to the extent practicable," there is no statutory provision prohibiting prize winners from asserting claims against other State funds in the event of a shortfall of lottery revenues. *Id.* The majority mistakenly asserts that a dedicated revenue stream alone is sufficient to insulate the State's liability to that particular revenue stream, but such is not the case.

The State's obligations created by the Lottery Act can be analogized to the sale of state bonds. The State at times finances projects with revenue bonds backed by a dedicated revenue stream, as the State has done with the creation of the Lottery Commission. Revenue bonds are not general obligations of the State when the State has taken care to limit its liability to the revenue stream identified to service the debt. *See generally Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 117, 143 S.E.2d 319, 325 (1965). Here, the State has failed to limit its liability in any way, although it certainly could have chosen to do so. Such a limitation of liability would have prevented the Lottery Act from raising money on the credit of the State or pledging its credit for the repayment of a debt, and would have successfully circumvented Art. II, § 23.

By selling lottery tickets, the State is contracting with purchasers for the opportunity to have a claim for State revenues, but it has neither dedicated an exclusive revenue stream from which they are to be paid nor has it limited its liability to such a revenue stream. As such, a prize winner may assert a claim generally against the State and thus the State has pledged its credit for payment of prizes. This fact alone makes the Lottery Act a revenue bill for purposes of Article II, § 23.

Contrast the language of N.C. Gen. Stat. § 18C-162(a)(1), which does not require payment from lottery revenues to lottery winners, with the language enabling the sale of bonds by the North Carolina Housing Authority, which states:

> An authority shall have power to issue bonds from time to time in its discretion for any of its corporate purposes. An authority shall

also have power to issue or exchange refunding bonds for the purpose of paying, retiring, extending or renewing bonds previously issued by it. An authority may issue such types of bonds as it may determine, including (without limiting the generality of the foregoing) bonds on which the principal and interest are payable from income and revenues of the authority and from grants or contributions from the federal government or other source. Such income and revenues securing the bonds may be:

(1) Exclusively the income and revenues of the housing project financed in whole or in part with the proceeds of such bonds;

(2) Exclusively the income and revenues of certain designated housing projects, whether or not they are financed in whole or in part with the proceeds of such bonds; or

(3) The income and revenues of the authority generally.

Any such bonds may be additionally secured by a pledge of any income or revenues of the authority, or a mortgage of any housing project, projects or other property of the authority.

Neither the commissioners of an authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof. *The bonds and other obligations of an authority (and such bonds and obligations shall so state in their face) shall not be a debt of any city or municipality and neither the State nor any such city or municipality shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of said authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation of the laws of the State.* Bonds may be issued under this Article notwithstanding any debt or other limitation prescribed in any statute.

This Article without reference to other statutes of the State shall constitute full and complete authority for the authorization, issuance, delivery and sale of bonds hereunder and such authorization, issuance, delivery and sale shall not be subject to any conditions, restrictions or limitations imposed by any other law whether general, special or local.

N.C. Gen. Stat. § 157-14 (2005) (emphasis supplied).

The State, in passing the Lottery Act, could have added similar language to the statute and limited lottery prizes to lottery revenues. However, it chose not to do so. Absent a limiting provision, the State has exposed itself to claims against general funds and thus has pledged the credit of the State of North Carolina.

In determining that the Lottery Act does not constitute a tax, the majority incorrectly focuses on the voluntary nature of purchasing a lottery ticket. This Court has adopted the balancing approach commonly called the *San Juan Cellular* test, first articulated by Judge Breyer of the First Circuit Court of Appeals, in determining whether a government charge is a fee or tax. *See State Farm Mut. Auto. Ins. Co. v. Long*, 129 N.C. App. 164, 168, 497 S.E.2d 451, 453 (1998). In *State Farm*, this Court specifically utilized the *San Juan Cellular* test:

> In applying *San Juan Cellular* to determine whether a charge is a tax, courts have developed a three-part test considering (1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.

Id., 129 N.C. App. at 168, 497 S.E.2d at 453-54 (internal quotation marks omitted) (citations omitted). The majority incorrectly states that because the *Long* Court applied the *San Juan Cellular* test to determine whether a government charge was a regulatory fee or tax, the test is "largely irrelevant" to the case *sub judice*. However, our opinion in *Long* did not restrict the *San Juan Cellular* test solely to cases where this Court must determine whether a charge is a regulatory fee or a tax.

Applying the *San Juan Cellular* test to the case *sub judice* leads to the conclusion that the thirty-five percent assessment is a tax. First, the General Assembly imposed the assessment, and such enactments favor the finding of a tax. *See id.*, 129 N.C. App. at 168, 497 S.E.2d at 454. Second, the assessment is imposed on every purchaser of lottery tickets. *Id.* ("An assessment imposed upon a broad class of parties is more likely to be a tax . . . .") (quoting *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)). Third, the purpose of the assessment is to raise revenue for education programs which is a "general public purpose[]." *Id.*; *see* N.C. Gen. Stat. § 18C-102 (2005) ("The General Assembly declares that the pur-

pose of this Chapter is to establish a State-operated lottery to generate funds . . . ."). Unlike a fee, the assessment does not merely create incidental revenue used for education. Rather, the revenues generated are placed in a special state fund unrelated to gambling which indicates the assessment does not merely create incidental revenue used for education.

This Court has defined a tax as "a pecuniary charge or levy enforced by government to raise money for the maintenance and expense of government." *N.C. Association of ABC Boards v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694 (1985). The majority analogizes lottery revenues to toll revenues, which we have held are not taxes. *Turnpike Authority*, 265 N.C. at 116-17, 143 S.E.2d at 325. Likewise, we have held that a surcharge on liquor is not a tax. *N.C. Association of ABC Boards*, 76 N.C. App. at 293, 332 S.E.2d at 695. However, in those cases we noted that the surcharge was a fee and not a tax because the revenue was used to support the administration and regulation of the facility or product, and was not used "to provide revenue for the maintenance and expense of government." *Id.*

The toll revenue and liquor surcharge cases are distinguishable from the case *sub judice* because in those cases, the use of the fees is reasonably related to the facilities generating the fees. Although the revenue may find its way into the general fund coffers, the purpose of the facilities is not primarily to raise general revenues but to provide a service. As such, the surplus revenues are incidental to the operation of the facilities.

As in the toll revenue and liquor surcharge cases, the key point in the case *sub judice* is the purpose behind the fee. The majority focuses on whether a person voluntarily chooses to purchase a lottery ticket. Yet, it does not matter whether a person voluntarily chooses to purchase a lottery ticket or voluntarily chooses to pay a toll. Virtually every purchase is voluntary and the majority's analysis would convert nearly every assessment, including a general sales tax, into a "fee."

Rather than focusing on the voluntary nature of purchasing a lottery ticket, the focus must be on the purpose behind the fee. The purpose of a toll payment is to generate funds to pay for state highway expenses. However, the purpose of the lottery is to raise revenues for North Carolina's education fund. As such, the revenues raised are not incidental to the game nor reasonably related to the maintenance and

operation of the game, but are central to the game's purpose; therefore the revenues from the lottery are taxes. The Lottery Act is unconstitutional because it is a revenue bill and was not passed in accordance with the constitutional mandates pursuant to Article II, § 23.

The majority opinion correctly states that all parties to the lawsuit agree that the Lottery Act was not passed in compliance with the constitutional requirements, outlined in Article II, § 23 of the North Carolina Constitution, as the Lottery Act did not receive the requisite three readings on three separate days, nor were the yeas and nays properly entered. Neither the trial court nor the majority opinion propose a solution to an act that is a legal nullity.

The trial court was faced with a case of first impression. Therefore, as a practical matter, the trial court found that the Lottery Commission was established and "hired employees, entered into contracts, collected application fees, expended large sums of money and engaged in other activities necessary for the establishment of a lottery." The trial court also noted that "the money expended by the Lottery Commission cannot be unspent[;]" "the legal position and reliance of those who entered into contracts with the Lottery Commission cannot be dismissed[;]" "a large number of people (notably the employees of the Lottery Commission) altered their economic, legal and planning positions in reliance on the Lottery Act[;]" and "it is doubtful that lottery employees could return to their former employment." These are valid concerns, but they cannot be our only concerns. Constitutionally-mandated procedures are a concern of the highest order, and they may not be estopped by a hurry to sell lottery tickets.

If it is our Legislature's will that there be a statewide lottery, it may gather and pass a measure that is constitutionally sound. This decision has a 20 day mandate. A twenty day period is ample time for the Legislature to cure the constitutional defects in the Lottery Act.

Our State legislators may not skirt our State's constitutional mandates simply because the Lottery Commission already is an established, ongoing business. This is not to suggest the Lottery Commission should refund or return any money that our State treasury previously transferred to it, nor to suggest halting the lottery. While there is nothing in our State's Constitution prohibiting the enactment of a lottery, such an act must, as all our laws must, follow constitutional commands.

II. Attorneys' Fees

The majority disagrees with the plaintiffs' contention that the trial court erred by ordering plaintiffs and plaintiff-intervenors to pay the costs of this litigation. In affirming the trial court's award of costs to plaintiffs and plaintiff-intervenors, the majority cites N.C. Gen. Stat. § 1-263 (2005), which states, "In any proceeding under this article the court may make such award of costs as may seem equitable and just." The trial court's award of costs will not be reversed absent an abuse of discretion. *See City of New Bern v. New Bern-Craven Co. Bd. of Educ.*, 338 N.C. 430, 450 S.E.2d 735 (1994). Specifically, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (2005).

In the case *sub judice*, the trial court found that plaintiffs' allegations were "without merit and should be dismissed," as well as that "no justification has been shown for the delay in initiating this litigation in December 2005." I disagree that a valid constitutional challenge to enacted legislation with meritorious arguments should be dismissed. More importantly, there was a justification for the December 2005 litigation.

The trial court found that "the plaintiffs and plaintiff-intervenors had actual or constructive knowledge both of their claims and of the efforts being made to implement the Lottery Act prior to the filing of their respective complaints." However, the trial court's reasoning for imposing costs to plaintiffs because of their "actual or constructive knowledge" is wrong. On 17 November 2005, plaintiffs hand delivered letters addressed to the Chairman of the Lottery Commission, Dr. Charles A. Sanders, State Treasurer, Richard H. Moore, and Attorney General Roy Cooper. Significantly, each letter notified the defendants of possible legal action to challenge the constitutionality of the Lottery Act and demanded that defendants refrain from carrying out the Lottery Act. On 15 December 2005, less than 30 days after notifying the defendants, plaintiffs filed suit.

In addition, although plaintiffs may have been generally aware of the terms of the proposed lottery, they were unaware of its provisions until its enactment. Because plaintiffs were unaware of the Lottery Act's specific provisions until the lottery was implemented, they could not allege a constitutional challenge to specific sections of the Lottery Act. Moreover, as plaintiffs note, this case is one of great

complexity requiring extensive research due to multiple issues requiring constitutional interpretation.

In conclusion, Article II, § 23 is applicable to the Lottery Act. Imposing costs upon litigants who bring forth important constitutional challenges to legislation may have a chilling effect on such challenges in the future. It was not "equitable and just" to determine that plaintiffs bear the costs of this action. N.C. Gen. Stat. § 1-263. The plaintiffs' allegations are meritorious. The trial court abused its discretion in ordering plaintiffs and plaintiff-intervenors to pay the costs of litigation. Since there is no dispute that the Lottery Act was not passed in accordance with that constitutional provision, it is a legislative nullity. Therefore, the judgment of the trial court should be reversed.

JAMES T. CROUSE AND MINEO & CROUSE, PLLC A/K/A MINEO & CROUSE, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFFS-APPELLANTS v. ROBERT A. "TONY" MINEO, DEFENDANT-APPELLEE

No. COA07-344

(Filed 18 March 2008)

1. Appeal and Error— appealability—allowance of motion to dismiss—interlocutory order—substantial right—possibility of inconsistent verdicts on same factual issues

Although plaintiffs appeal from an interlocutory order granting defendant's motion to dismiss and from the orders dated 8 December 2006, the orders are immediately appealable because plaintiffs demonstrated the orders affect a substantial right since: (1) these claims raise factual issues that are identical to the factual issues raised by defendant's counterclaims which were not dismissed; and (2) the denial of an immediate appeal creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.

2. Corporations— professional limited liability company—standing to cause lawsuit by LLC

A member-manager of a legal professional limited liability company (LLC) did not have authority to cause the LLC to institute an action against the other co-member-manager to recover assets of the LLC allegedly misappropriated by the co-

member-manager because the usual business of the LLC was the provision of legal services to clients; the filing of the action was not "carrying on in the usual way the business of the limited liability company" within the meaning of N.C.G.S. § 57C-3-23 but was a management decision; and defendant, as the other member-manager of the LLC, did not authorize or ratify the filing of the lawsuit.

3. Corporations— professional limited liability company— petition for dissolution—standing to bring derivative action—sufficiency of pleadings

Plaintiff member-manager of a professional limited liability company (LLC) did not cease to be a member of the LLC under N.C.G.S. § 57C-3-02(3)(d) at the time he filed a petition for dissolution of the LLC and he had standing to bring a derivative action against defendant co-member-manager on behalf of the LLC. Furthermore, plaintiff sufficiently pled with particularity the efforts he made to obtain the desired action and the reason for his failure to obtain that action as required by N.C.G.S. § 57C-8-01(b) for a derivative action where he alleged that plaintiff and defendant had agreed to divide the proceeds of legal cases handled by their LLC, that plaintiff demanded by two letters and by voice mail messages that defendant share such proceeds, and that defendant had refused to do so.

4. Quantum Meruit— LLC member's individual action against co-member—statement of claim

Plaintiff member of a legal professional limited liability company (LLC) stated an individual claim in quantum meruit against defendant co-member where he alleged that plaintiff provided services to defendant by lending money to defendant and to the LLC to assist defendant in the litigation of legal actions originated by defendant, that defendant accepted those services, and that defendant wrongfully refused to share the profits from those cases.

5. Unfair Trade Practices— LLC member's individual action against co-member—failure to state claim

Plaintiff member of a legal professional limited liability company (LLC) did not have standing to bring an individual claim against a co-member for unfair or deceptive trade practices where all of plaintiff's allegations of breach of fiduciary duty by defendant relate to the parties' relationship through the LLC.

6. Appeal and Error— mootness—case remanded

Although plaintiffs contend the trial court abused its discretion by denying their motion to amend the order dismissing their complaint, this issue is moot where the Court of Appeals held that plaintiff did not lack standing to file a derivative action and remanded as to that claim.

7. Corporations— professional limited liability company— motion to appoint individual to wind up affairs

The trial court did not err by denying plaintiffs' motion to appoint plaintiff individual to wind up the affairs of the pertinent PLLC because: (1) plaintiffs failed to cite case law or authority in support of their argument as required by N.C. R. App. P. 28(b)(6); and (2) under the unique circumstances existing at the time the trial court denied the motion and with plaintiffs' complaint having been dismissed in its entirety, it cannot be said that the trial court abused its discretion by denying plaintiffs' motion.

Appeal by Plaintiffs from order entered 18 August 2006 and from orders dated 8 December 2006 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 17 October 2007.

Smith Moore LLP, by Mark A. Finkelstein, for Plaintiffs-Appellants.

Mineo & Mineo, by Athena R. Mineo, for Defendant-Appellee.

McGEE, Judge.

James T. Crouse (Mr. Crouse) and Mineo & Crouse, PLLC (collectively, Plaintiffs) filed a complaint against Robert A. "Tony" Mineo (Defendant) on 3 December 2004, alleging claims for breach of fiduciary duty and anticipatory breach of fiduciary duty, anticipatory breach of contract, an accounting, *quantum meruit*, *quantum valebant*, and unfair or deceptive trade practices. Plaintiffs alleged that at all relevant times, Mr. Crouse and Defendant were members of Mineo & Crouse, PLLC. Plaintiffs further alleged that Defendant misappropriated funds that were owed to Mineo & Crouse, PLLC or to Mr. Crouse.

Defendant filed an answer and counterclaims for an accounting and for *quantum meruit* dated 2 February 2005. Plaintiffs filed a reply on 1 April 2005. Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 26 June 2006, alleging

> [P]laintiffs have no standing to prosecute this action; that [Mr.] Crouse is not a proper party plaintiff and has not satisfied the conditions precedent to pursuing this action on behalf of Mineo & Crouse, PLLC; that Mineo & Crouse in any form is without authority to pursue this action; and that G.S. Chapter 75 is inapplicable to the dispute between these parties.

Plaintiffs filed a "motion for appointment of [Mr.] Crouse to wind up affairs of Mineo & Crouse, PLLC and motion to amend complaint to reflect this appointment" on 17 August 2006.

The trial court entered an order allowing Defendant's motion to dismiss on 21 August 2006. Plaintiffs filed a "motion to amend judgment pursuant to Rules 52(b) & 59(b) or in the alternative, for relief from judgment pursuant to Rule 60(b)(1) and 60(b)(6)," and the trial court denied the motion in an order dated 8 December 2006. The trial court also denied Plaintiffs' "motion for appointment of [Mr.] Crouse to wind up affairs of Mineo & Crouse, PLLC and motion to amend complaint to reflect this appointment" in an order dated 8 December 2006. The trial court did not dismiss Defendant's counterclaims. Plaintiffs appeal from the order granting Defendant's motion to dismiss and from the orders dated 8 December 2006.

[1] Plaintiffs acknowledge that the orders are interlocutory because the orders did not dispose of the case in its entirety. *See Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). As a general rule, interlocutory orders are not immediately appealable. *Id.* However, immediate review of an interlocutory order is available in two limited circumstances: (1) where the trial court certifies, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that there is no just reason for delay of an appeal from a final order as to one or more, but not all, of the claims; and (2) where the interlocutory order affects a substantial right in accordance with N.C. Gen. Stat. § 1-277(a). *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579.

In the present case, the orders that Plaintiffs appeal do not contain a Rule 54(b) certification. Nevertheless, Plaintiffs contend that the interlocutory orders affect their substantial right to avoid the possibility of two trials on the same factual issues. An appellant bears the burden of demonstrating that an order will adversely affect a substantial right. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "A substantial right . . . is considered affected if 'there are overlapping factual issues between the claim determined and any claims which have not yet been

determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)).

Defendant filed counterclaims for an accounting and for *quantum meruit*, which have not been dismissed. However, these claims raise factual issues that are identical to the factual issues raised by Plaintiffs' claims, which were dismissed. Accordingly, Plaintiffs have demonstrated that the denial of an immediate appeal in the present case "creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *See Liggett Group*, 113 N.C. App. at 24, 437 S.E.2d at 677. Therefore, we hold that the orders Plaintiffs have appealed affect a substantial right and are immediately appealable.

I.

Plaintiffs argue the trial court erred by granting Defendant's motion to dismiss Plaintiffs' complaint for lack of standing. Plaintiffs contend that Defendant waived the defense of lack of standing by failing to specifically raise the defense in Defendant's answer. However, "[a] lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000). Plaintiffs' argument fails because the first defense in Defendant's answer clearly alleged that Plaintiffs' complaint failed to state a claim upon which relief may be granted. Defendant subsequently filed an additional motion to dismiss specifically contending the Plaintiffs "had no standing to prosecute this action." Furthermore, because standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction," a challenge to standing may be made at any time. *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002).

A.

[2] Plaintiffs next argue the trial court erred in dismissing their complaint because the allegations in the complaint did not allege facts that could constitute a complete bar to recovery. Specifically, Plaintiffs argue that Mr. Crouse, in his capacity as a member-manager of Mineo & Crouse, PLLC, had the authority to cause Mineo & Crouse, PLLC to institute this lawsuit.

The standard of review of an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. review denied*, 355 N.C. 748, 565 S.E.2d 665 (2002). Rule 12(b)(6) " 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Id. Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (citation omitted).

A limited liability company (LLC) is a " 'statutory form of business organization . . . that combines characteristics of business corporations and partnerships.' " *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporate Law* § 34.01, at 34-2 (rev. 7th ed. 2006) (hereinafter *Robinson*)).

> The [LLC] Act contains numerous "default" provisions or rules that will govern an LLC only in the absence of an explicitly different arrangement in the LLC's articles of organization or written operating agreement. Because these default provisions can be changed in virtually any way the parties wish, an LLC is primarily a creature of contract.

Robinson, § 34.01, at 34-2 to 34-3. In the present case, the parties agree that they never entered into a written operating agreement. Therefore, the default provisions of the LLC Act govern the present case.

Plaintiffs rely upon agency principles to argue that an LLC manager has "the inherent authority to authorize lawsuits to protect the LLC's interests." Plaintiffs cite N.C. Gen. Stat. § 57C-3-23, which provides:

> Every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including execution in the name of the limited liability company of

> any instrument, for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, binds the limited liability company, unless the manager so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no authority.

N.C. Gen. Stat. § 57C-3-23 (2007). Plaintiffs also cite *Robinson*, which notes that "[a] manager's agency power is similar to that of a corporate officer and a general partner." *Robinson*, § 34.04[2], at 34-21 n.22.

Defendant counters that the filing of the present action was a managerial decision, requiring the approval of a majority of the managers. Defendant cites N.C. Gen. Stat. § 57C-3-20(b), which provides:

> Subject to any provisions in the articles of organization or a written operating agreement or this Chapter restricting, enlarging, or modifying the management rights and duties of any manager or managers, or management procedures, each manager shall have equal rights and authority to participate in the management of the limited liability company, and management decisions shall require the approval, consent, agreement, or ratification of a majority of the managers.

N.C. Gen. Stat. § 57C-3-20(b) (2007). *Robinson* also cites N.C.G.S. § 57C-3-20(b) for the following propositions: "[A]ll managers have equal rights and authority to participate in management, and management decisions require the approval of a majority of the managers." *Robinson*, § 34.04[2], at 34-21. However, *Robinson* further notes:

> The Act does not require managers to take actions in accordance with a statutory procedure, such as through a meeting of the managers or by written consent, nor does it distinguish between routine decisions regarding the day-to-day affairs that a manager may make without the approval of other managers and more fundamental or otherwise significant decisions that should be made by all or a majority of managers.

Id. § 34.04[2], at 34-21 n.21.

Again relying on corporate law, Plaintiffs argue that

> a corporate officer, as the corporation's agent, has authority to bring a lawsuit on the corporation's behalf *unless that power is*

> *withdrawn by the corporation's board of directors or some other authorized authority*. . . . Logically, if a [corporate officer] has authority to authorize a corporation to file an appeal on behalf of a corporation, a 50% owner and manager of a PLLC has authority to file a lawsuit for the PLLC.

In support of this contention, Plaintiffs cite *Lowder v. All Star Mills*, 91 N.C. App. 621, 372 S.E.2d 739 (1988), *disc. review denied*, 324 N.C. 113, 377 S.E.2d 234 (1989). However, in *Lowder*, our Court merely held that the appointment of a receiver suspended Lowder's right as a corporate officer to pursue an appeal on behalf of the corporations of which he was an officer. *Id.* at 625, 372 S.E.2d at 741. Regarding the inherent authority of a corporate officer, *Robinson* explains: "The implied or inherent authority of an officer depends primarily on the powers and duties assigned to his office, which differ from company to company." *Robinson*, § 16.04[1], at 16-11. However, in *Lowder*, because the issue was not presented, our Court did not discuss the nature of the business of the corporations of which Lowder had been an officer. Therefore, we cannot determine the source of Lowder's supposed authority to file an appeal on behalf of those corporations.

Mineo & Crouse, PLLC was a law firm whose members were authorized to practice law in North Carolina, and the usual business of Mineo & Crouse, PLLC was the provision of legal services to clients. We hold that the filing of an action by one manager of an LLC against a co-manager to recover purported assets of the LLC allegedly misappropriated by that co-manager is a management decision and is not "carrying on in the usual way the business of the limited liability company[.]" *See* N.C.G.S. § 57C-3-23. Moreover, N.C.G.S. § 57C-3-23 provides: "An act of a manager that is not apparently for carrying on the usual course of the business of the limited liability company does not bind the limited liability company unless authorized in fact or ratified by the limited liability company." In the present case, Defendant filed a verified response to Plaintiffs' post-judgment motions, stating that "[a]fter a threatening letter from counsel for [P]laintiffs to [Defendant], [Defendant's counsel] met with counsel for [P]laintiffs on September 30, 2004, in an attempt to discourage counsel for [P]laintiffs from pursuing the litigation." Therefore, it is clear that Defendant, as the other member-manager of Mineo & Crouse, PLLC, did not authorize or ratify the filing of the lawsuit. For the reasons stated above, Mr. Crouse lacked authority to cause Mineo & Crouse, PLLC to institute the present action on its own behalf.

B.

[3] Because Mr. Crouse did not have authority to cause Mineo & Crouse, PLLC to sue in its own right, we must determine whether Mr. Crouse had standing to file a derivative action on behalf of Mineo & Crouse, PLLC. Pursuant to N.C. Gen. Stat. § 57C-8-01(a)-(b) (2007):

> (a) A member may bring an action in the superior court of this State in the right of any domestic or foreign limited liability company to recover a judgment in its favor if the following conditions are met:
>
> > (1) The plaintiff does not have the authority to cause the limited liability company to sue in its own right; and
> >
> > (2) The plaintiff (i) is a member of the limited liability company at the time of bringing the action, and (ii) was a member of the limited liability company at the time of the transaction of which the plaintiff complains, or the plaintiff's status as a member of the limited liability company thereafter devolved upon the plaintiff pursuant to the terms of the operating agreement from a person who was a member at such time.
>
> (b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the managers, directors, or other applicable authority and the reasons for the plaintiff's failure to obtain the action, or for not making the effort.

Because we hold that Mr. Crouse lacked the authority to cause Mineo & Crouse, PLLC to sue in its own right, Plaintiffs have satisfied the first requirement for bringing a derivative action. Plaintiffs also argue that pursuant to N.C.G.S. § 57C-8-01(a)(2)(i), Mr. Crouse was a member of Mineo & Crouse, PLLC at the time of the filing of this action. However, Defendant contends that Mr. Crouse ceased to be a member of Mineo & Crouse, PLLC when Mr. Crouse filed a petition for dissolution of Mineo & Crouse, PLLC on 29 July 2003, and that Mr. Crouse therefore was not a member of Mineo & Crouse, PLLC at the time he filed the present action. In support of this contention, Defendant cites N.C. Gen. Stat. § 57C-3-02(3)(d), which provides:

> A person ceases to be a member of a limited liability company upon the happening of any of the following events of withdrawal:
>
> . . .

> (3) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, the person's:
>
> . . .
>
> d. Filing a petition or answer seeking *for him* any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation[.]

N.C. Gen. Stat. § 57C-3-02(3)(d) (2007) (emphasis added). Defendant appears to argue that the term "person," as used in N.C.G.S. § 57C-3-02(3)(d) means only a natural person. Therefore, Defendant argues, as soon as Mr. Crouse filed for dissolution of Mineo & Crouse, PLLC, Mr. Crouse ceased to be a member of Mineo & Crouse, PLLC. Defendant is mistaken.

Under N.C. Gen. Stat. § 57C-1-03(17) (2007), the term "person" is defined broadly as "[a]n individual, a trust, an estate, or a domestic or foreign corporation, a domestic or foreign professional corporation, a domestic or foreign partnership, a domestic or foreign limited partnership, a domestic or foreign limited liability company, an unincorporated association, or another entity." Citing this section, our Supreme Court recently recognized that member-managers of an LLC "can be natural persons or business entities." *Hamby*, 361 N.C. at 636, 652 S.E.2d at 235.

"Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466, *disc. review denied*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L. Ed. 2d 770 (1999). In the present case, it is clear that under the LLC Act, the term "person" can be either a natural person or a business entity. It is also clear that N.C.G.S. § 57C-3-02(3)(d) refers to members who are business entities and provides that a business entity member who seeks dissolution *for itself* ceases to be a member of an LLC. The statute does not cause the disassociation of a member who files a petition for dissolution of the LLC of which he is a member.

Cases from other jurisdictions that speak to this issue support our decision. In *Sayers v. Artistic Kitchen Design, LLC*, 633 S.E.2d

619 (Ga. Ct. App. 2006), two members of an LLC (the Landaus) filed an action seeking a reorganization of the LLC so as to divest two other members (the Sayerses) of their membership rights. *Id.* at 620. The Sayerses argued that the Landaus lacked standing under a provision of the Georgia Limited Liability Company Act that provided that "a person ceases to be a member of a limited liability company when 'the member . . . files a petition or answer seeking *for the member* any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation.' " *Id.* at 620-21 (quoting Ga. Code Ann. § 14-11-601.1(b)(4)(D)). The Georgia Court of Appeals rejected the Sayerses' standing argument, stating that the subsection at issue

> establishes a default rule that a member who seeks reorganization "for the member" ceases to be a member of the company. The subsection does not say that a member who seeks reorganization *for a different member* ceases, himself, to be a member of the company. The Landaus sought the disassociation of the Sayerses, not of themselves. Thus, subsection 14-11-601.1(b)(4)(D) does not apply here.

Id. at 621.

In *Darwin Limes, L.L.C. v. Limes*, No. WD-06-049, 2007 WL 1378357 (Ohio Ct. App. 6 Dist. 2007) (unpublished), the appellant argued that one of the appellees ceased to be a member of the LLC upon the appellee's filing of a claim for judicial dissolution of the LLC. *Id.* at *5. The appellant relied upon § 1705.15(C)(4) of the Ohio Revised Code, which provides that a member withdraws as a member of an LLC if the member " '[f]iles a petition or answer in any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief proceeding under any law or rule *that seeks for himself* any of those types of relief[.]' " *Id.* (quoting Ohio Rev. Code Ann. § 1705.15(C)(4)). The Ohio Court of Appeals, Sixth District, held that this subsection "applies to corporate or partnership members of an LLC, not natural persons." *Id.* The Court also recognized that the appellant "did not seek dissolution *for himself*. He filed an alternative complaint for dissolution for the LLC." *Id.* The Court further recognized that its interpretation of the withdrawal provision was

> consistent with R.C. 1705.15(G)-(I), which provides other events triggering dissociation:

> "(G) Unless otherwise provided in writing in the operating agreement, if a member is a partnership, the dissolution and commencement of winding up of the partnership.
>
> (H) Unless otherwise provided in writing in the operating agreement, if a member is a separate limited liability company, the dissolution and commencement of winding up of the separate limited liability company.
>
> (I) Unless otherwise provided in writing in the operating agreement, if a member is a corporation, a certificate of dissolution or its equivalent is filed for the corporation, or its charter is revoked and is not reinstated within ninety days after the revocation."

Id. (quoting Ohio Rev. Code Ann. § 1705.15(G)-(I)).

Although these opinions are not binding on our Court, we find these out-of-state cases instructive. In the present case, N.C.G.S. § 57C-3-02(3)(d) provides that a person ceases to be a member of a limited liability company if the person files a petition seeking "for him any . . . dissolution." Mr. Crouse did not seek dissolution "for him[self]." Rather, by filing the petition for dissolution with the Secretary of State of North Carolina, Mr. Crouse sought the dissolution of Mineo & Crouse, PLLC. Moreover, as we discussed above, the term "person" includes both natural persons and business entities. As the term "person" is used in N.C.G.S. § 57C-3-02(3)(d), however, the term refers to a member who is a business entity because a natural person cannot seek "reorganization, arrangement, composition, readjustment, liquidation, [or] dissolution," for himself or herself. Our decision is also supported by N.C. Gen. Stat. § 57C-3-02(7)-(8) (2007), which are statutory provisions that contemplate other acts of withdrawal by members who are business entities:

> (7) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member that is a domestic or foreign partnership, a domestic or foreign limited partnership, or another domestic or foreign limited liability company, the dissolution and commencement of winding up of the partnership, limited partnership, or limited liability company;
>
> (8) Unless otherwise provided in the articles of organization or a written operating agreement or with the consent of all other members, in the case of a member that is a domestic or foreign

> corporation, the dissolution of the corporation or the revocation of its charter[.]

We hold that Mr. Crouse was a member of Mineo & Crouse, PLLC at the time he filed this action.

We must also examine whether, under N.C.G.S. § 57C-8-01(b), Mr. Crouse alleged with particularity the efforts he made to obtain the desired action, and the reason for his failure to obtain that action. We first recognize that the record on appeal reflects that Mr. Crouse intended to cause the LLC to sue in its own right and did not intend to file a derivative action. In Plaintiffs' "motion to amend judgment pursuant to Rules 52(b) & 59(b) or in the alternative, for relief from judgment pursuant to Rule 60(b)(1) and 60(b)(6)," Plaintiffs stated that "[t]here can be little doubt that if [Mr. Crouse] had made a minority owner's derivative demand upon [Defendant], [Defendant] would have refused to return the legal fees earned by his law firm. [Defendant] rejected two demand letters sent prior to suit." Also, in Plaintiffs' "brief in support of Plaintiffs' motion[] for appointment of [Mr.] Crouse to wind up affairs of Mineo & Crouse, PLLC and motion to amend complaint to reflect this appointment . . . and motion to amend judgment," Plaintiffs stated: "It is true that Plaintiff failed to plead demand upon [Defendant], the other manager, because Plaintiffs[] believed Mr. Crouse had authority to authorize a direct action."

However, despite these statements, we hold that Plaintiffs did sufficiently plead the efforts undertaken to obtain the desired action, and the reason for Mr. Crouse's failure to obtain that action. Plaintiffs alleged in their complaint that "[Defendant] acknowledged to Mr. Crouse that they were supposed to divide profits between them and that [Defendant] had in fact agreed to do so, but that [Defendant] was under no circumstances going to share the proceeds from the firm's King wrongful death proceeds." Plaintiffs also alleged the following:

> After [Defendant] continued to fail to share or account for fees he received in cases retained through Mineo & Crouse, Mr. Crouse caused a letter outlining his losses resulting from [Defendant's] wrongful conduct to be hand delivered to [Defendant] on July 8, 2004. Mr. Crouse then caused his counsel to call [Defendant] and leave two voice mail messages on his voice mail requesting a response to the July 8, 2004 letter. On September 14, 2004, yet another letter to [Defendant] requesting that he address the

> issues raised in this complaint was hand delivered to [Defendant's] office.

These allegations demonstrate the particular efforts undertaken by Mr. Crouse to obtain the action Mr. Crouse demanded from Defendant. Mr. Crouse clearly alleged that he demanded that Defendant share the proceeds from the cases retained through Mineo & Crouse, PLLC, and that Defendant refused to share such proceeds. For the reasons stated above, we hold that Mr. Crouse had standing to bring a derivative action on behalf of Mineo & Crouse, PLLC, and that Plaintiffs sufficiently alleged such a claim. Therefore, we reverse the trial court and remand for proceedings consistent with this opinion.

C.

[4] Mr. Crouse also argues the trial court erred by dismissing his alternative, individual claims for *quantum meruit* and unfair or deceptive trade practices. Defendant counters that pursuant to N.C. Gen. Stat. § 57C-3-30(b), Mr. Crouse lacked standing "as an individual to bring a suit related to his rights under the PLLC against an outside party." N.C. Gen. Stat. § 57C-3-30(b) (2007) provides: "A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or liability to the limited liability company."

We begin with Mr. Crouse's individual claim for *quantum meruit*. Mr. Crouse alleged this claim in the alternative to the claims of Mineo & Crouse, PLLC. We hold that N.C.G.S. § 57C-3-30(b) is inapplicable to Mr. Crouse's individual claim for *quantum meruit*. While Mr. Crouse would not be a proper party to a proceeding by Mineo & Crouse, PLLC, the *quantum meruit* claim was brought to recover for injuries caused to Mr. Crouse individually.

"To recover in *quantum meruit*, [a] plaintiff must show: (1) services were rendered to [the] defendant[]; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985). An attorney who performed significant services for a client under a contingency fee relationship may recover in *quantum meruit* from the settling attorney. *Pryor v. Merten*, 127 N.C. App. 483, 487, 490 S.E.2d 590, 592-93 (1997), *disc. review denied*, 347 N.C. 578, 502 S.E.2d 597 (1998).

In the present case, Mr. Crouse alleged the following:

> 16. Mr. Crouse lent money to [Defendant] to assist him with certain personal obligations during the prosecution of the Harrisburg Jet case and the King wrongful death case.
>
> 17. Mr. Crouse lent money to Mineo & Crouse to finance certain litigation of Mineo & Crouse originated by [Defendant] including the Harrisburg Jet case and the King wrongful death case.
>
> 18. On information and belief, [Defendant] has collected in excess of $2,480,000.00 for cases conducted through Mineo & Crouse including the Harrisburg Jet case and the King wrongful death case. [Defendant] has wrongfully refused to . . . share any of the profits of these cases with his partner/co-member, Mr. Crouse. . . .
>
> 19. Mr. Crouse provided assistance to [Defendant] in both the Harrisburg Jet case and the King wrongful death case, but in no way was compensated for his time, effort, risk capital or membership in the firm during the prosecution of these two cases.

Taking these allegations as true, they demonstrate that Mr. Crouse provided services to Defendant and that Defendant accepted these services. Moreover, Mr. Crouse alleges that Defendant wrongfully refused to share the profits from the Harrisburg Jet and King cases, which demonstrates that Mr. Crouse did not perform his services gratuitously. Accordingly, we hold that Mr. Crouse stated a claim for *quantum meruit*. *See Environmental Landscape Design*, 75 N.C. App. at 306, 330 S.E.2d at 628.

[5] We must also determine whether Mr. Crouse stated a claim for an unfair or deceptive trade practice (UDTP claim). "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to [the] plaintiff[]." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000).

Defendant argues that

> an individual lacks standing to sue for perceived rights of a PLLC. Even if the UFD [statute] could somehow be invoked, the claim regarding UFD would exist between Mineo and the PLLC and could . . . only be invoked by the company, not by an indi-

vidual who admits in pleadings his only claim is his rights under the company.

With regard to Mr. Crouse's UDTP claim, we agree with Defendant. Mr. Crouse alleged that "Defendant's breach of fiduciary duty and anticipatory breaches of fiduciary duty constitute unfair or deceptive acts or practices[.]" Moreover, Mr. Crouse alleged that he and Defendant had a "special relationship of trust and confidence that constituted a fiduciary relationship[]" by virtue of "their partnership, co-membership in Mineo & Crouse, PLLC and otherwise[.]" All of the allegations alleging breach of fiduciary duty, and consequently a UDTP claim, relate to the parties' relationship through Mineo & Crouse, PLLC. Therefore, we hold that Mr. Crouse did not state an individual claim for UDTP against Defendant.

II.

[6] Plaintiffs argue the trial court abused its discretion by denying their motion to amend the order dismissing their complaint. Plaintiffs appear to argue the trial court should have dismissed their complaint without prejudice to allow them to re-file the complaint as a derivative action. However, given that we hold that Plaintiffs did not lack standing to file a derivative action and we remand as to this claim, this issue is moot. *See Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (holding that "[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

III.

[7] Plaintiffs also argue the trial court erred by denying their motion to appoint Mr. Crouse to wind up the affairs of Mineo & Crouse, PLLC. Plaintiffs cite no case law or authority in support of their argument as directed by N.C.R. App. P. 28(b)(6) and we decline to consider this issue. We do note that Plaintiffs cite N.C. Gen. Stat. § 57C-6-04(a), which provides: "Except as otherwise provided in this Chapter, the articles of organization, or a written operating agreement, the managers shall wind up the limited liability company's affairs following its dissolution." N.C. Gen. Stat. § 57C-6-04(a) (2007). However, in the present case, Mr. Crouse petitioned the trial court for the appointment of a person to wind up the affairs of Mineo & Crouse, PLLC. N.C.G.S. § 57C-6-04(a) further provides as follows: "The court *may* wind up the limited liability company's affairs, or appoint a person to wind up its affairs, on application of any member, his legal rep-

resentative, or assignee." *Id.* (emphasis added). The use of the term "may" connotes discretion on the part of the trial court to wind up the affairs itself, appoint a person to do so, or do neither. *See Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 198, 250, 652 S.E.2d 713, 717 (2007) (recognizing that "[t]he use of the word 'may' has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one"); *Campbell v. Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (stating that "the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act."). Under the unique circumstances existing at the time the trial court denied the motion and with Plaintiffs' complaint having been dismissed in its entirety, we cannot say that the trial court abused its discretion by denying Plaintiffs' motion to appoint Mr. Crouse to wind up the affairs of Mineo & Crouse, PLLC.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. MICKEY VONRICE ROLLINS

No. COA07-380

(Filed 18 March 2008)

1. Evidence— marital privilege—prison visit

The trial court erred by denying defendant's motion to suppress statements he made to his wife in a prison visiting room which were both recorded and related by her. The marital privilege is not defeated simply because the conversation took place in a prison visiting area.

2. Confessions and Incriminating Statements— Correction officer transporting defendant—steering topic to incrimination subject

The trial court erred by denying defendant's motion to suppress an incriminating statement made by defendant to a Correction officer who was transporting him to another facility. The officer steered the conversation to a topic likely to elicit an incriminating response without Miranda warnings.

STATE v. ROLLINS

[189 N.C. App. 248 (2008)]

Appeal by Defendant from order on Defendant's motions to suppress entered 19 August 2005 by Judge William C. Griffin, Jr. and from judgment dated 6 October 2006 by Judge Jack W. Jenkins in Superior Court, Martin County. Heard in the Court of Appeals 14 November 2007.

Attorney General Roy Cooper, by Special Attorney General Robert C. Montgomery, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant-Appellant.

McGEE, Judge.

Mickey Vonrice Rollins (Defendant) appeals from the denial of his motions to suppress and from judgment convicting him of first-degree murder. For the reasons set forth below, we reverse the denial of Defendant's motions to suppress and remand the case for a new trial.

Defendant was indicted on charges of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and breaking or entering on 2 February 2004. Defendant filed a motion to suppress on 13 September 2004, and filed an affidavit in support of that motion on 15 September 2004. Defendant sought to suppress all statements he had made to his wife, Tolvi Rollins (Mrs. Rollins), on several grounds, including "on the grounds that the statements . . . constitute confidential marital communications under N.C. Gen. Stat. § 8-57(c)." Defendant filed a separate motion to suppress and an affidavit in support of that motion on 20 June 2005. By that motion, Defendant sought to suppress any statements he had made to Officer Timothy Troball (Officer Troball) while Defendant was in custody.

The trial court entered an order denying Defendant's motions to suppress on 19 August 2005. The trial court made the following uncontested findings of fact:

> 1. On June 11, 2002, Harriet Brown Roberson Highsmith was murdered in her home in Robersonville, Martin County, North Carolina. A number of suspects were initially identified, including . . . [D]efendant. On February 2, 2004, [D]efendant was indicted by the grand jury in Martin County on the charges of Murder, 1[st] Degree Kidnapping, Robbery with a Dangerous Weapon, and Felony Breaking and Entering.

2. [Mrs.] Rollins and [D]efendant were married on June 25, 2001, in Martin County. On the day prior to the murder, [Mrs.] Rollins and [D]efendant argued. As a result, [D]efendant spent the night in a truck at his aunt's house in Robersonville, which was located across the street from the home of Mrs. Highsmith.

3. In March, 2003, [Mrs.] Rollins and [D]efendant were spending the night at the home of [Mrs.] Rollins' grandmother. While in bed, [D]efendant told his wife he had something very important to tell her, and he would kill her or someone close to her if she ever told anyone. . . . [D]efendant then proceeded to admit to his wife that he had killed Mrs. Highsmith, and provided specific details of same.

4. In June, 2003, [D]efendant began serving a sentence in the North Carolina Department of Correction for a robbery conviction. On or about October 13, 2003, [Mrs.] Rollins disclosed to Robersonville Chief of Police Daryl Knox that her husband, . . . [D]efendant, had confessed to her that he had killed Mrs. Highsmith. The following day, [Mrs.] Rollins relayed this information to Special Agent Walter Brown of the North Carolina State Bureau of Investigation (SBI).

5. On or about October 19, 2003, [Mrs.] Rollins visited [D]efendant at Franklin Correctional facility with the aid of a recording device provided by the SBI. However, poor acoustics made the tape inaudible. On the other hand, [Mrs.] Rollins indicated that . . . [D]efendant again discussed details of the Highsmith murder, and [Mrs.] Rollins relayed this information to the SBI following her visit on October 19, 2003.

6. [Mrs.] Rollins again visited . . . [D]efendant at Dan River Correctional on November 2 and 9, 2003. No recording device was used.

7. On November 23 and 30, 2003, [Mrs.] Rollins visited . . . [D]efendant at Carteret Correctional facility with the aid of a recording device. These recordings are audible. During these two visits, [Mrs.] Rollins and . . . [D]efendant discussed the Highsmith murder, and . . . [D]efendant made admissions as to committing the murder.

8. During these visits at the prison, [Mrs.] Rollins and . . . [D]efendant met in the visiting areas, where other inmates and visitors were located.

> 9. On or about December 15, 2003, Department of Correction officer Timothy Troball along with fellow officer Gary Conley transported [D]efendant from Carteret Correctional to Pamlico Correctional because [D]efendant's custody level had been elevated. [Officer] Troball had not received any formal law enforcement training as to interrogation or investigative techniques. [Officer] Troball had worked with the "road crew" at the prison for approximately five years, and had never issued "Miranda" warnings to anyone. [Officer] Troball was not a certified law enforcement officer.
>
> 10. On said date, during the drive to Pamlico Correctional, [D]efendant began asking questions about North Carolina law. In making conversation, [Officer] Troball asked . . . [D]efendant whatever happened to the other person that was supposedly with him during the Highsmith murder, at which . . . [D]efendant responded that he was killed mafia style, or something to that effect.

Based upon the findings of fact, the trial court made the following conclusions of law:

> 1. . . . [D]efendant's statements to his wife, [Mrs.] Rollins, while . . . [D]efendant was incarcerated within the North Carolina Department of Correction, lack the requisite expectation of confidentiality, and therefore are not considered confidential marital communications under N.C.G.S. 8-57. See U.S. v. Madoch, 149 F.[3d] 596 (7[th] Cir. 1998); [United States] v. Harrelson, 754 F.2d [1153] (5[th] Cir. 1985).
>
> 2. . . . [O]fficer Troball engaged in conversation with [D]efendant while transporting him to another correctional facility, and thus, did not formally interrogate . . . [D]efendant.
>
> 3. As to the communications between . . . [D]efendant and [Mrs.] Rollins while in bed in March, 2003, the Court defers this ruling to the trial judge, who may treat [D]efendant's motion to suppress those statements as a Motion in Limine.

Defendant subsequently entered an *Alford* plea to the charge of first-degree murder, reserving his right to appeal the denial of his motions to suppress under N.C. Gen. Stat. § 15A-979(b). Pursuant to the plea arrangement, the State dismissed the charges of first-degree kidnapping, robbery with a dangerous weapon, and breaking or enter-

ing. The trial court sentenced Defendant to a term of life in prison without the possibility of parole. Defendant appeals.

I.

[1] Defendant argues the trial court erred by denying his motion to suppress statements made to his wife, Mrs. Rollins. Specifically, Defendant argues the trial court erred by concluding that Defendant's statements to Mrs. Rollins, made while Defendant was incarcerated, lacked the requisite expectation of privacy and were not confidential marital communications. Defendant argues that the challenged statements should have been excluded under N.C. Gen. Stat. § 8-57(c), which provides: "No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." N.C. Gen. Stat. § 8-57(c) (2007).

> 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).

Defendant argues the trial court "failed to make any factual findings as to the circumstances in which these conversations occurred." However, where a trial court makes insufficient findings of fact to support its conclusions of law, we may review testimony produced at the hearing that is not refuted to determine whether the conclusions of law were supported. *See State v. Tate*, 58 N.C. App. 494, 499, 294 S.E.2d 16, 19, *disc. review denied*, 306 N.C. 750, 295 S.E.2d 763 (1982), *aff'd per curiam*, 307 N.C. 464, 298 S.E.2d 386 (1983). In *Tate*, the defendant argued that the trial court made insufficient findings of fact to support its conclusions of law in the order denying the defendant's motion to suppress. *Id.* Our Court recognized:

> "If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making spe-

> cific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. (Citations omitted.) In that event, the necessary findings are implied from the admission of the challenged evidence. (Citation omitted.)"

Id. (quoting *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980)). In *Tate*, the defendants failed to refute the detective's testimony, and our Court held that the detective's un-refuted testimony supported the trial court's conclusion of law. *Id.* Accordingly, our Court held that the trial court did not err by denying the defendant's motion to suppress. *Id.* Likewise, in the present case, we may review the un-refuted testimony presented at the hearing to determine whether the trial court's conclusions of law were supported.

"[O]ur Supreme Court has interpreted section 8-57 to mean that . . . 'spouses shall be incompetent to testify against one another in a criminal proceeding *only if the substance of the testimony concerns a* "confidential communication" between the marriage partners made during the duration of their marriage[.]' " *State v. Hammonds*, 141 N.C. App. 152, 169-70, 541 S.E.2d 166, 179 (2000) (quoting *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981)), *disc. review denied*, 353 N.C. 529, 549 S.E.2d 860, *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002).

> This holding allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving "confidential communications" within the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice.

Freeman, 302 N.C. at 596, 276 S.E.2d at 453-54. "[T]he determination of whether a communication is 'confidential' within the meaning of the statute depends on whether the communication 'was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.' " *Hammonds*, 141 N.C. App. at 170, 541 S.E.2d at 179 (quoting *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454 (citations omitted)).

In the present case, it is uncontested that Defendant and Mrs. Rollins were married at all relevant times. Mrs. Rollins testified that

when she visited Defendant at the Franklin Correctional facility, she was affectionate toward him, kissed him, and brought him food. Mrs. Rollins testified that Defendant trusted her and that she let him know that she trusted him. She also testified that she encouraged Defendant to confide in her and promised to return and see him regularly. Mrs. Rollins testified that when she visited Defendant at the Dan River Correctional facility on 2 November 2003, she "loved on him," promised Defendant that she would be there for him when he got out of prison, and promised she would never tell anyone about what Defendant confided in her regarding the death of Ms. Highsmith. Mrs. Rollins further testified that when she visited Defendant on 19 November 2003, she "loved on [Defendant]" again, and brought Defendant a pecan pie. Mrs. Rollins also testified that when she visited Defendant at the Carteret County Correctional facility, she told him she would be there for him and that she was going to have children with him when he got out of prison. Accordingly, it is clear that the statements Defendant made to Mrs. Rollins during these visits were " 'induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.' " *Hammonds*, 141 N.C. App. at 170, 541 S.E.2d at 179 (quoting *Freeman*, 302 N.C. at 598, 276 S.E.2d at 454 (citations omitted)).

Nevertheless, the State contends, and the trial court concluded, that because the conversations took place in prison, the conversations lacked the requisite expectation of confidentiality. The State argues that "the spousal privilege is destroyed by the mere possibility that a conversation may be overheard due to the public setting in which the statements are made." We disagree.

Our Court recently recognized that "[b]ecause of the requirement of confidentiality, it is well established that the marital privilege does not apply to communications made within the known hearing of a third party." *State v. Kirby*, 187 N.C. App. 367, 372, 653 S.E.2d 174, 178 (2007). In support of that proposition, our Court cited the following cases: *State v. Gladden*, 168 N.C. App. 548, 608 S.E.2d 93, *disc. review denied*, 359 N.C. 638, 614 S.E.2d 312 (2005); *State v. Carter*, 156 N.C. App. 446, 577 S.E.2d 640 (2003), *cert. denied*, 358 N.C. 547 (2004), *cert. denied*, 543 U.S. 1058, 160 L. Ed. 2d 784 (2005); and *State v. Setzer*, 42 N.C. App. 98, 256 S.E.2d 485, *disc. review denied*, 298 N.C. 571, 261 S.E.2d 127 (1979). However, for the reasons that follow, *Kirby*, *Gladden*, *Carter*, and *Setzer* are distinguishable from the present case.

In *Kirby*, the defendant's wife testified that she was in her bedroom while the defendant and two other men were in the adjacent living room. *Id.* at 369, 653 S.E.2d at 176. The defendant " 'flung' open the bedroom door and, standing just inside the opened door, 'yell[ed]' to [his wife], 'Get up, I think I've killed him.' " *Id.* at 369, 653 S.E.2d at 176. The defendant argued the trial court erred by admitting his statement to his wife in violation of the marital privilege. *Id.* at 369, 653 S.E.2d at 177. However, the defendant's wife testified that the defendant spoke in a loud voice and could have been heard by someone in the living room. *Id.* at 372-73, 653 S.E.2d at 178. Moreover, another person was in the living room at the time, and that person was in a position to have heard the defendant's statement. *Id.* at 372-73, 653 S.E.2d at 178. Our Court held:

> Although [the] defendant states that "it is clear that [he] intended to speak to his wife in confidence," we find this assertion untenable in light of the evidence that [the] defendant "yell[ed]" or "hollered" the statement while standing in the bedroom's open doorway right next to the living room. [The] [d]efendant's volume in conjunction with his undisputed knowledge that [a third person] was within easy hearing distance establishes a lack of confidentiality that supports the trial court's determination that the communication was not privileged.

Id. at 372-73, 653 S.E.2d at 178.

In contrast, in the present case, Mrs. Rollins testified during cross-examination regarding her conversation with Defendant at the Franklin Correctional facility on 19 October 2003 as follows:

> Q. When you discussed those details [of Ms. Highsmith's murder] with [Defendant], it was done in confidence between you and him; there wasn't anybody else listening as far as you knew. Isn't that right?
>
> A. Correct.

Mrs. Rollins also testified as follows:

> Q. And, when [Defendant] confided details to you at Dan River on November the 2nd, 2003, that was done in confidence, wasn't it?
>
> A. Yes.

> Q. And there was nobody else listening. When he talked to you, it was done in direct conversation with you with an effort to not let anybody else hear.
>
> A. Correct.

Mrs. Rollins further testified:

> Q. And, when [Defendant] spoke to you on the 23rd [of November, 2003] at Carteret County Correctional, he spoke to you in confidence, didn't he?
>
> A. Yes, he did.
>
> Q. Nobody else could hear; isn't that right?
>
> A. (Nods affirmatively.)
>
> . . .
>
> Q. The conversation[s] between you and [Defendant] on November the 30th at the Carteret Correctional Institute, they were done in confidence; nobody else heard them; they were done exclusively so that only you and [Defendant] could hear the conversation.
>
> A. Yes.

Examining all of the circumstances surrounding Defendant's statements to Mrs. Rollins, it is clear that Defendant and Mrs. Rollins intended to keep their conversations private. In fact, they succeeded in keeping their conversations private. Moreover, Mrs. Rollins' disclosure of Defendant's confidential communications cannot destroy Defendant's right to assert the marital privilege. In *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967), a husband surreptitiously made a tape recording of a conversation between him and his wife in the basement of their home and in the presence of their eight-year-old child, and the trial court admitted the evidence. *Id.* at 205, 155 S.E.2d at 800. Our Supreme Court held that the presence of the child did not destroy the confidentiality of the conversation and that the trial court erred by admitting the evidence, recognizing that the husband could not unilaterally destroy the wife's privilege to exclude the evidence. *Id.* at 205-08, 155 S.E.2d at 800-02. Likewise, the marital privilege in the present case was not defeated when Mrs. Rollins revealed the confidential communications by making tape recordings of such communications and providing them to law enforcement. *See id.*; *see also McCoy v. Justice*, 199 N.C. 602, 155 S.E. 452 (1930) (holding that one

spouse cannot defeat the other spouse's privilege to exclude evidence by disclosing a confidential marital communication to a third party).

Gladden is equally distinguishable from the present case. In *Gladden*, the defendant argued the trial court erred by admitting a transcript and tape recording of a phone conversation "between [the] defendant, his wife, and his step-daughter[]" while the defendant was in jail. *Gladden*, 168 N.C. App. at 550-52, 608 S.E.2d at 95-96. Our Court held that the marital privilege was defeated by the step-daughter's active participation in the conversation. *Id.* at 552-53, 608 S.E.2d at 96. We also held: "[The] defendant was informed prior to making the phone call that all calls made to outside parties were subject to recording and monitoring. Under these circumstances, the conversation between [the] defendant and his wife was not confidential." *Id.* at 553, 608 S.E.2d at 96.

In the present case, no third person was involved in the conversations between Defendant and Mrs. Rollins. Moreover, the conversations between Defendant and Mrs. Rollins were not intercepted by the recording devices of the correctional facilities in which Defendant was housed. Unlike in *Gladden*, Defendant's statements were intercepted by a recording device worn by Mrs. Rollins and Defendant was certainly never warned about the possible recording or monitoring of his conversations with his wife.

In *Carter*, our Court recognized that " '[t]he [marital] privilege is waived in criminal cases where the conversation is overheard by a third person.' " *Carter*, 156 N.C. App. at 457-58, 577 S.E.2d at 647 (quoting *State v. Harvell*, 45 N.C. App. 243, 249, 262 S.E.2d 850, 854, *disc. review denied*, 300 N.C. 200, 269 S.E.2d 626 (1980)). In *Setzer*, the defendant argued the trial court erred by admitting an officer's testimony regarding a statement he heard the defendant make to the defendant's wife. *Setzer*, 42 N.C. App. at 104, 256 S.E.2d at 489. However, our Court held that the "communication . . . was not confidential, since it was made within the hearing of a third party[.]" *Id.* In the present case, unlike in *Carter* and *Setzer*, it is uncontested that Defendant's statements were not overheard by a third person. In fact, the State concedes in its brief that "[t]here was no evidence presented that any person actually overheard [D]efendant's statements to his wife while in the visiting areas."

In support of its conclusion of law in the present case, the trial court cited *U.S. v. Madoch*, 149 F.3d 596 (7th Cir. 1998), and *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985), *reh'g*

denied, 766 F.2d 186 (5th Cir. 1985), *cert. denied*, 474 U.S. 908, 88 L. Ed. 2d 241, *cert. denied*, 474 U.S. 1034, 88 L. Ed. 2d 578 (1985). However, these cases are also distinguishable. In *Madoch*, the defendant was convicted of conspiracy to defraud the government; of making false, fictitious or fraudulent claims; and of concealment of assets. *Madoch*, 149 F.3d at 598. The defendant argued the trial court erred by admitting a tape recording of a telephone conversation between the defendant and her husband while her husband was in jail. *Id.* at 602. However, the defendant knew her husband was in jail when she spoke with him. *Id.* The Seventh Circuit held as to the telephone conversation:

> Thus, because the marital communications privilege protects only communications made in confidence, . . . under the unusual circumstances where the spouse seeking to invoke the communications privilege knows that the other spouse is incarcerated, and bearing in mind the well-known need for correctional institutions to monitor inmate conversations, we agree with the district court that any privilege [the defendant] and [her husband] might ordinarily have enjoyed did not apply.

Id.

Madoch is similar to *Gladden*, where the defendant, who was in prison, was informed prior to making a telephone call that telephone calls from prison were subject to recording and monitoring. *Gladden*, 168 N.C. App. at 553, 608 S.E.2d at 96. Both cases recognize the legitimate need for prisons to monitor the communications of their inmates. *See also Lanza v. New York*, 370 U.S. 139, 143, 8 L. Ed. 2d 384, 388 (1962) (recognizing: "In prison, official surveillance has traditionally been the order of the day."). However, the conversations at issue in the present case were not intercepted by the correctional facilities' own surveillance systems; rather, the conversations were intercepted only because outside law enforcement placed a recording device on Defendant's wife. While an inmate should know that his conversations in prison might be overheard by recording devices placed on the walls or in the telephones, an inmate cannot reasonably expect a spouse, who acts as such, as Mrs. Rollins did in the present case, to be wearing a recording device. Moreover, because the surveillance in the present case was entirely unrelated to the traditional need for surveillance in prisons, the interception of the communication by law enforcement cannot defeat the marital privilege where Defendant and Mrs. Rollins attempted to keep their communications from being overheard by third parties, and succeeded in doing so.

In *Harrelson*, the defendants, who were married, argued the trial court erred by admitting a tape recording of their conversation made while one of them was visiting the other in jail. *Harrelson*, 754 F.2d at 1169. Their conversation was recorded by an inmate in the next cell who used a tape recorder provided by the Federal Bureau of Investigation. *Id.* The defendants argued the conversation was inadmissible under a statute that prohibited the interception of oral communications under certain circumstances. *Id.* However, the government countered that the defendants' conversation was not an "oral communication" within the meaning of the statute. *Id.* In order to determine whether the challenged conversation constituted an oral communication, the Fifth Circuit had to determine whether the defendants had a reasonable expectation of privacy as they spoke to one another in jail. *Id.* The Fifth Circuit held:

> The answer must be that they did not. It is unnecessary to consult the case law to conclude that one who expects privacy under the circumstances of prison visiting is, if not actually foolish, exceptionally naive; Harrelson, highly intelligent and no neophyte at prison life, was neither. The evidence indicates as much; the precautions taken to prevent eavesdropping show the Harrelsons to have been aware of the possibility of it.

Id.

In the present case, unlike in *Harrelson*, the conversations between Defendant and Mrs. Rollins were not overheard by a third person. We fully recognize that inmates generally have a lessened expectation of privacy; however, we do not agree with the State's contention in this case that an inmate cannot have a private conversation with his or her spouse simply because the inmate is in prison. As we recognized above, the lessened expectation of privacy in prison is a necessary result of the need for prison security. As a result, inmates are aware that there may be listening devices in the telephones or on the walls and that conversations may be overheard by other inmates. However, in the present case, the conversations between Defendant and Mrs. Rollins were not overheard by a third party and were only obtained through Mrs. Rollins' participation.

In *Taylor v. State*, 855 So.2d 1 (Fla. 2003), *cert. denied*, 541 U.S. 905, 158 L. Ed. 2d 248 (2004), the Florida Supreme Court rejected an argument similar to the one the State makes in the present case, noting the following:

> The State also argues that Taylor waived the marital privilege because the conversation in question took place at the jail and therefore Taylor did not have a reasonable expectation of privacy. *See, e.g.*, *Proffitt v. State*, 315 So.2d 461, 465 (Fla. 1975), *aff'd*, 428 U.S. 242, . . . 49 L. Ed. 2d 913 (1976); *Johnson v. State*, 730 So.2d 368, 370 (Fla. 5th DCA 1999). However, the cases cited by the State in support of this proposition involve situations where otherwise privileged conversations were taped or overheard by third parties. As a general rule, when third party eavesdroppers hear otherwise privileged communications, the communications are not privileged unless the communicating parties had a reasonable expectation of privacy. *See* § 90.507 Fla. Stat. (1999); *see also* Charles W. Ehrhardt, *Florida Evidence* § 507.2 (2001 ed.). In the instant case, however, there was no third party involved, no one overheard the conversation, and the trial court required Mrs. Taylor to directly testify as to the privileged conversation.

Id. at 27 n.30.

In the present case, as in *Taylor*, no third party was involved and no one overheard the conversations between Defendant and Mrs. Rollins. Similar to *Taylor*, the State obtained the tape recordings in the present case only by the direct participation of Mrs. Rollins.

For the reasons stated above, we hold that where, as a result of the marital relationship, one spouse induces the other to make statements and the parties attempt to keep their conversation private, and the conversation is not in fact overheard, the marital privilege is not defeated simply because the conversation took place in a prison visiting area. The trial court's conclusion of law was thus erroneous and was not supported by the evidence or the findings of fact. We hold that the trial court erred by denying Defendant's motion to suppress and therefore Defendant must be granted a new trial.

Because we hold the trial court erred by denying Defendant's motion to suppress on the ground of marital privilege, we need not address Defendant's argument that the admission of these statements violated Defendant's right to due process of law.

II.

[2] Defendant also argues the trial court erred by denying his motion to suppress statements Defendant made to Officer Troball. Defendant argues the statements were obtained in violation of his

Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. "In *Miranda*[,] . . . the United States Supreme Court determined that the prohibition against self-incrimination requires that prior to a custodial interrogation, the alleged defendant must be advised that he has the right to remain silent and the right to the presence of an attorney." *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440 (citing *Miranda*, 384 U.S. at 479, 16 L. Ed. 2d at 726), *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). "It is well established that *Miranda* warnings are required only when a [criminal] defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (citation omitted), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001).

In the present case, it is undisputed that Defendant was in custody at the time he made the challenged statement and that Officer Troball did not advise Defendant of his *Miranda* rights. We must therefore determine whether Defendant was "interrogated" within the accepted meaning of that term. In support of its denial of Defendant's motion to suppress, the trial court concluded: "[O]fficer Troball engaged in conversation with [D]efendant while transporting him to another correctional facility, and thus, did not formally interrogate . . . [D]efendant." However, by concluding that simply because Officer Troball engaged in conversation with Defendant and therefore did not "formally interrogate" Defendant, the trial court misapprehended the definition of the term "interrogation."

> The term "interrogation" is not limited to express questioning by law enforcement officers, but also includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

State v. Golphin, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Our Supreme Court further explained:

> The focus of the definition is on the suspect's perceptions, rather than on the intent of the law enforcement officer, because

> *Miranda* protects suspects from police coercion regardless of the intent of police officers. *See Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308. However, because "the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 301-02, 64 L. Ed. 2d at 308.

Id.

In the present case, Officer Troball testified that prior to transporting Defendant on 15 December 2003, he "had heard through several inmates talking, not to [him] but just talking, that [Defendant] supposedly had murdered a woman." Officer Troball testified that he and Defendant were engaged in conversation and that Defendant asked him some questions about state law and about DNA. However, Officer Troball also testified that he asked Defendant what happened to the other man who was with Defendant at the murder. Officer Troball testified that he initiated questioning related to the murder and that before he asked the question regarding the other person involved in the murder, he and Defendant had not talked about Defendant being charged with murder. Officer Troball also testified that he asked the question regarding the other person involved in the murder because he had "heard inmates talking that the young man hung himself or killed himself in some sort of way[.]"

Based upon the findings of fact and Officer Troball's testimony, it is clear that Officer Troball had heard that Defendant had murdered a woman. Officer Troball had also heard that another person was involved in the murder and had "hung himself or killed himself in some sort of way." Although Defendant and Officer Troball were engaged in conversation, Officer Troball initiated the questioning regarding the murder. By doing so, Office Troball steered the conversation to a topic which, if discussed by Defendant, was likely to elicit an incriminating statement. We hold that under these circumstances, Officer Troball's question was reasonably likely to elicit an incriminating response from Defendant. *See Golphin*, 352 N.C. at 406, 533 S.E.2d at 199. In *Innis*, the United States Supreme Court noted: "By 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Innis*, 446 U.S. at 301 n.5, 64 L. Ed. 2d at 308 n.5. In the present case, even though the State's theory of the case was that Defendant acted alone, it appears that the State sought to introduce Defendant's

statement to Officer Troball at trial. Accordingly, Defendant's response to Officer Troball's question was an incriminating response. We hold the trial court erred by denying Defendant's motion to suppress Defendant's statement to Officer Troball.

New trial.

Judges BRYANT and GEER concur.

MISSION HOSPITALS, INC., PETITIONER, AND NORTH CAROLINA RADIATION THERAPY MANAGEMENT SERVICES, INC. D/B/A 21ST CENTURY ONCOLOGY, PETITIONER-INTERVENOR v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND ASHEVILLE HEMATOLOGY AND ONCOLOGY ASSOCIATES P.A., RESPONDENT-INTERVENOR

No. COA06-1642

(Filed 18 March 2008)

1. Administrative Law— certificates of need—ex parte communications—new hearing

The director of the Department of Health and Human Services, Division of Facility Services violated the provision of N.C.G.S. § 150B-35 prohibiting ex parte communications in contested cases between the agency decision maker and any party in connection with any issue of fact or question of law when, on two occasions prior to reversing the recommended decision of an ALJ that an oncology treatment center was not required to obtain certificates of need (CONs) in order to relocate its offices and acquire radiation therapy equipment, the director requested cost information from counsel of a hospital opposing the oncology treatment center without notice to other parties or affording an opportunity for the other parties to participate; the information provided by the hospital in response to those requests pertained to the pivitol issue as to whether the treatment center's costs were above or below the statutory threshold for CONSs; and the ex parte communications thus involved both issues of fact and questions of law. Therefore, the agency decision is reversed and remanded for a new hearing to be held by a person other than the director who engaged in the improper ex parte communications.

2. Administrative Law— certificates of need—rejection of ALJ's recommended decision—reasons for not adopting ALJ's findings

The Department of Health and Human Services, Division of Facility Services violated N.C.G.S. § 150B-34(c) and prejudiced an oncology treatment center's right to appellate review by failing to set forth specific reasons for not adopting certain findings of fact by an ALJ when it rejected the ALJ's recommended decision that the treatment center was not required to obtain certificates of need in order to relocate its offices and to acquire radiation therapy equipment. On remand, all findings in the ALJ's recommended decision should be addressed in any final agency decision that declines to adopt the ALJ's recommendation.

Appeal by respondent-intervenor Asheville Hematology and Oncology Associates, P.A., from a Final Agency Decision entered 7 August 2006 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 20 September 2007.

Smith Moore, LLP, by Maureen Demarest Murray, William W. Stewart, Jr., and Allyson Jones Labban, for petitioner-appellee, Mission Hospitals, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Susan H. Hargrove, Sean A. Timmons, and Courtney H. Mischen, for petitioner-intervenor-appellee, North Carolina Radiation Therapy Management Services, Inc. d/b/a 21st Century Oncology.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for respondent-appellee N.C. Department of Health and Human Services, Division of Facility Services.

Bode, Call & Stroupe, LLP, by S. Todd Hemphill, Diana Evans Ricketts and Matthew A. Fisher, for respondent-intervenor-appellant Asheville Hematology and Oncology Associates, P.A.

Nelson, Mullins, Riley & Scarborough LLP, by Wallace C. Hollowell, III, on behalf of Alliance Imaging, Inc., amicus curiae.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Lee M. Whittman, and Sarah M. Johnson on behalf of Bio-Medical Applications of North Carolina, Inc., amicus curiae.

STEELMAN, Judge.

The North Carolina Department of Health and Human Services, Division of Facility Services erred by engaging in *ex parte* communications with one party without notice to the other parties or affording an opportunity to all parties to be heard. Because the *ex parte* communications were prejudicial to appellant's substantial right to a fair and impartial process, the Final Agency Decision is vacated. Upon remand, the Agency shall address all unadopted findings of the Administrative Law Judge ("ALJ") in its Final Agency Decision as required by N.C. Gen. Stat. § 150B-34(c).

I. Factual and Procedural History

On 1 February 2005, Asheville Hematology ("AHO" or appellant), an oncology treatment center, sought a "no-review" determination from the Certificate of Need ("CON") Section of the North Carolina Department of Health and Human Services, Division of Facility Services ("Agency"), for a proposed relocation of its offices and acquisition of medical equipment that would allow AHO to provide radiation therapy. AHO presented four proposals: acquisition of a linear accelerator ("LINAC"), acquisition of a CT scanner, acquisition of treatment planning equipment, and relocation of their oncology treatment center. AHO sought a ruling that its proposals "do not require certificate of need review and are not new institutional health services, within the meaning of the CON law."

In determining the allocable costs for the CT scanner and LINAC projects, AHO applied upfitting costs to accommodate the CT scanner and LINAC and did not allocate general office construction costs, which were instead attributed to the base costs of the developer. AHO clearly specified in its letter which costs were attributed to each project and which costs were attributed to the developer's base costs. The submitted costs for the four projects, and associated thresholds against which AHO analyzed each of the proposals as a new institutional health service under the statute, were as follows:

Project	AHO's Cost Projection	Statutory Threshold for "No Review"
CT Scanner	$ 488,547	$ 500,000[1]
LINAC	$ 746,416	$ 750,000[2]
Treatment Planning	$ 381,135	$ 750,000[3]
Relocation	$ 1,985,278	$ 2,000,000[4]

On 2 August 2005, the CON Section issued four "no-review" letters, reviewing each proposal separately and confirming that none required a Certificate of Need. Each letter stated that "this determination is binding only for the facts represented by you." Shortly thereafter, the General Assembly amended N.C. Gen. Stat. § 131E-176(16) to require a CON for the acquisition of linear accelerators, regardless of cost, as a new institutional health service. (2005 Sess. Laws ch. 325, § 1). The relevant portion of the amendment became effective on 26 August 2005.

On 1 September 2005, Mission Hospitals, Inc. ("Mission" or "petitioner"), a nonprofit hospital in Asheville, North Carolina, filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH"), challenging each of the No-Review Determinations. North Carolina Radiation Therapy Management Services, Inc. d/b/a 21st Century Oncology ("21st Century" and, with Mission, "petitioners"), an oncology treatment center in Asheville, North Carolina, intervened in the proceeding, also contesting the No-Review Determinations. AHO intervened in support of the CON Section's No-Review Determinations.

On 26 May 2006, the ALJ entered a 65-page Recommended Decision affirming the No-Review Determinations. The ALJ agreed with the CON Section that the relocation of the existing oncology treatment center and the acquisition of equipment as proposed by AHO and addressed in the August 2005 No-Review determinations did not require Certificates of Need. The ALJ recommended that no CON was necessary because neither the relocation nor the acquisition projects "constitute[d] a 'new institutional health service' as defined by N.C.

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1. *See* N.C. Gen. Stat. § 131E-176(7a) (2003) (governing diagnostic centers).

2. *See* N.C. Gen. Stat. § 131E-176(14f) (2003) (governing acquisition of major medical equipment).

3. *Id.*

4. *See* N.C. Gen. Stat. § 131E-176(16) (2003) (governing capital expenditures).

Gen. Stat. § 131E-176 at the time that [AHO] acquired vested rights to develop these services."

OAH filed the official record with the Agency on 8 June 2006, requiring the Agency to make its final decision by 7 July 2006. *See* N.C. Gen. Stat. § 131E-188(a)(5) (2005). On 27 June 2006, the Director of the Agency's Division of Facility Services ("Director") granted the Attorney General's request that the Agency extend the filing deadline for exceptions and written arguments, to 17 July 2006, and the decision deadline, to 7 August 2006.

Petitioners filed joint exceptions to the ALJ's Recommended Decision. Petitioners also filed written argument and a 64-page proposed Final Agency Decision on 17 July 2006 ("original proposed FAD"). The Director heard argument from all parties on 24 July 2006. The key issue was AHO's allocation methodology for construction costs under a proposed lease arrangement.

Near the conclusion of the 24 July 2006 hearing, the Director stated:

> MR. FITZGERALD: Okay. (INCOMPREHENSIBLE FOR 1 SECOND). Let's see, I don't, it is possible that after I review some of this material, I might schedule another conference call (INCOMPREHENSIBLE FOR 2 SECONDS) a lot of time before the decision (INCOMPREHENSIBLE FOR 1 SECOND) sooner rather than later.

There was no statement by the Director to indicate that he had reached any decision at the conclusion of the 24 July 2006 hearing.

There is nothing in the 3,088-page record in this matter as to what may have transpired between Monday, 24 July 2006, and Friday, 4 August 2006, three days prior to the Agency's deadline for issuance of the Final Agency Decision.

On Friday morning, 4 August 2006, counsel for petitioner e-mailed a 73-page proposed Final Agency Decision to the Director, with a copy to all parties. The e-mail stated "Pursuant to your instructions, attached please find a revised decision." The record, however, is devoid of any communication from the Director which may have triggered this submission. The record falls silent, until Sunday afternoon, 6 August 2006.

On Sunday, the Director e-mailed petitioner's counsel, asking whether counsel had a "table" of actual costs. Petitioner's counsel was the sole recipient of this e-mail.

On Monday morning, 7 August 2006, petitioner's counsel responded with two electronic documents, stating in a cover e-mail: "[Attached] is the material that we understand you have requested." One attachment, AHO's exhibit from the contested case hearing, showed totals for each project *under* the statutory thresholds. The other attachment contained a modified page from the AHO exhibit which showed totals that *exceeded* the statutory thresholds for the LINAC, the CT scanner, and the oncology treatment center. The e-mail and the two attached documents were copied to all parties. Within ten minutes, the Director again e-mailed petitioner's counsel, again without copying any other party. An hour later, petitioner's counsel sent a modified version of AHO's exhibit with footnotes and calculations, accompanied by a further explanation.

On Monday, 7 August 2006, the Agency entered a Final Agency Decision reversing the Recommended Decision of the ALJ, rejecting the ALJ's conclusion that AHO had vested rights, classifying the previously-described relocation as a "proposed expansion," and ruling that AHO's proposed expansion, acquisition of a LINAC, and acquisition of the CT scanner each required a CON because the costs as computed in the Final Agency Decision exceeded the statutory thresholds.

The Final Agency Decision vacated and stayed all four No-Review Determinations and included a cease and desist order that stated, in relevant part:

> . . . Ashville [sic] Hematology and U.S. Oncology must immediately cease and desist the installation, use of, operation of the linear accelerator, and/or billing for services provided on the linear accelerator;
>
> . . . Ashville [sic] Hematology and U.S. Oncology must immediately cease and desist the installation, use of, operation of the CT scanner/simulator, and/or billing for services provided on the CT scanner/simulator;
>
> . . . Asheville Hematology and U.S. Oncology must immediately cease and desist the use of, operation of, or billing for any facility services related to radiation therapy, including but not limited

to linear accelerator services, CT simulator services and treatment planning services[.]

AHO appeals.

II. Standard of Review

This matter is before us pursuant to N.C. Gen. Stat. § 131E-188 (2005), which affords appellant an appeal to this Court for review of the Final Agency Decision entered 7 August 2006. Since the 2001 amendments to N.C.G.S. § 150B-34(c) of the North Carolina Administrative Procedure Act, the scope of review of a final agency decision arising under the CON statute continues to be governed by the 1999 Administrative Procedure Act rather than the amended provisions of N.C. Gen. Stat. § 150B-51. *See Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 737-39, 615 S.E.2d 81, 83-84 (2005) (detailing the interplay of the CON statutes with the 1999 Administrative Procedure Act).

While the scope of review of an Agency decision involving a "no review" determination for a certificate of need is governed by statute, the substantive nature of each assignment of error dictates the appropriate standard of review. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004). Errors of law are reviewed *de novo*. *Id.*

III. Analysis

A. Ex parte Communications

[1] In its first argument, appellant contends that the Agency erred in engaging in *ex parte* communications with petitioner's counsel prior to issuing the Final Agency Decision, and, because the violation compromised its due process rights to a fair and impartial hearing, the Final Agency Decision must be reversed. We agree.

The Final Agency Decision was entered on 7 August 2006, the statutory deadline. *See* N.C. Gen. Stat. § 131E-188(a)(5). Absent a decision that did not adopt the ALJ's recommended decision, the ALJ's recommendation could become *de facto* effective thereafter. *See HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990) (concluding that applicable time limits established in the CON law are jurisdictional in nature).

(1) Statutory Prohibition on Ex Parte Communications

N.C. Gen. Stat. § 150B-35 states:

> Unless required for disposition of an ex parte matter authorized by law, neither the administrative law judge assigned to a contested case nor a member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

N.C. Gen. Stat. § 150B-135 (2005).

(2) The Director's E-mails

On Sunday, 6 August 2006, before the Director had announced his decision, the Director e-mailed petitioner's counsel:

> Do you have a table of what the actual costs of the development of this project was [sic] using the cost of the equipment, the cost of the construction associated with the space occupied by the oncology treatment center, and the upfit required to accomodate [sic] the equipment compared to the threshold amounts for the various components? Incidently [sic], if the cost of the space is included in the total there is no reason to include the HVAC cost as it would already be part of the total. Bob

No other party was copied on this e-mail.

On Monday morning, 7 August 2006, the Director again e-mailed petitioner's counsel:

> It appears there must be at least two pages to the Word Document labeled Mission-Chart. I only received the last page with your e-mail.

Again, no other party was copied on the e-mail.

(3) § 150B-35 and the Director's Conduct

Under the broad language of N.C. Gen. Stat. § 150B-35, no "member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate." *Id.* (2005).

At a time when no decision had been made on the record, the Director corresponded on at least two occasions with one party's counsel without notice to the other parties or affording an opportunity for other parties to participate. In response, petitioner's counsel e-mailed documents that were not before the Agency at the 24 July 2006 hearing. Petitioner's counsel, unlike the Director, copied all parties on the e-mail communications. Nonetheless, these actions afforded appellant no opportunity to participate.

Neither petitioners nor the Agency suggest that the *ex parte* communications were "required for disposition of an ex parte matter authorized by law," which is the sole exception to the prohibition against *ex parte* communications under the statute. N.C. Gen. Stat. § 150B-35. Consequently, the communications are subject to the statute if they were made "in connection with any issue of fact or question of law." *Id.*

(a) Content of the Communications

On 17 July 2006, petitioner filed a 64-page proposed Final Agency Decision, containing 107 findings of fact and 47 conclusions of law. On Friday, 4 August 2006, with a cover stating "Pursuant to your instructions, attached please find a revised decision[,]" petitioner e-mailed a 73-page document containing 145 findings of fact and 53 conclusions of law. Two days later, following the Director's *ex parte* inquiry regarding a table of "actual costs" and a second *ex parte* e-mail, petitioner made modifications to one of AHO's exhibits and submitted the revised exhibit to the Director.

The pivotal issue before the Agency was whether appellant's costs for each of four projects was below or above the applicable statutory thresholds. If the costs of any particular project were above the statutory threshold, a CON would be required; if below, the project would remain exempt from CON requirements. When *ex parte* communications involve an exhibit demonstrating totals for each project based upon costs *below* the statutory thresholds that is modified to reflect costs *above* the statutory thresholds, on the basis of statutorily-governed cost allocation methodologies, we hold that those communications involve both "an issue of fact" and a "question of law" before the Agency. N.C. Gen. Stat. § 150B-35.

(b) Conduct of Agency Controlled by APA

Appellees argue that it was appropriate for the Director to solicit assistance from petitioner's counsel in the preparation of the order

since trial judges in North Carolina routinely direct counsel to prepare orders for them.

Proceedings pursuant to the Administrative Procedure Act (Chapter 150B of the General Statute) are not proceedings in the General Court of Justice of North Carolina. Nor are Administrative Law Judges and Agency decision-makers judges under Article IV of the Constitution of North Carolina. Administrative agencies and departments exist pursuant to Section 11 of Article III of the Constitution of North Carolina, and as such are part of the Executive Branch of our State's government. While the Administrative Procedure Act adopts many concepts from the North Carolina Rules of Civil Procedure (N.C. Gen. Stat. § 150B-33) and the North Carolina Rules of Evidence (N.C. Gen. Stat. § 150B-29), the Act does not adopt the Code of Judicial Conduct, which governs General Court proceedings and communications among the parties.

The Director's conduct is thus governed exclusively by N.C. Gen. Stat. § 150B-35 and its plain meaning, and not by analogy to what is appropriate conduct for Article IV trial judges.

(c) Result is an Error of Law

We acknowledge that cases involving Certificates of Need are highly complex, and that the Agency was placed in a very tight statutory time frame within which to render a decision. However, this cannot excuse the Director's clear violation of the provisions of N.C. Gen. Stat. § 150B-35, which prohibits such *ex parte* communications. We hold that the Director's *ex parte* communication with petitioner's counsel in the preparation of the Final Agency Decision violated the plain language of N.C. Gen. Stat. § 150B-135 and that this violation constitutes an error of law under N.C. Gen. Stat. § 150B-51(b) (1999), as discussed in (4) below.

(4) Ramifications of Violation

Under the provisions of N.C. Gen. Stat. § 150B-34(c) and *Total Renal Care*, 171 N.C. App. 734, 737-39, 615 S.E.2d 81, 83-84, this Court may reverse or modify an agency decision if:

> [T]he substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1999). Thus, we must determine whether appellant may have been prejudiced by the error of law.

(a) Parties' Rights under N.C. Gen. Stat. § 150B-25 *et seq.*

N.C. Gen. Stat. § 150B-25 governs the conduct of contested case hearings. In relevant part, this statute affords parties the opportunity to "cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence." *Id.* (2005).

N.C. Gen. Stat. § 150B-29 provides rules of evidence for agency proceedings. In relevant part, it states:

> Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30.

N.C. Gen. Stat. § 150B-29(b) (2005). The referenced exception in N.C. Gen. Stat. § 150B-30 allows for official notice of certain facts provided that:

> The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

N.C. Gen. Stat. § 150B-30 (2005).

(b) Prejudice Analysis

In determining whether AHO's rights were prejudiced, we consider the content of the proscribed communications, the extent of the

revisions to petitioner's original proposed FAD, and AHO's opportunity to respond.

The documents submitted by petitioner's counsel *ex parte* incorporated cost allocations that were not part of the ALJ's recommended decision. Moreover, the Final Agency Decision contains numerous findings of fact and conclusions of law from the proposed FAD submitted on 4 August 2006 that not only were not in the proposed FAD submitted on 17 July 2006, but also applied the cost allocation method referenced in the *ex parte* communications. At least 43 new findings of fact were not before the Agency at the 24 July 2006 hearing but were incorporated at petitioner's suggestion three days before the Final Agency Decision was due. A careful review of the two proposed FADs reveal that many of the revisions incorporate cost allocation concepts that were the subject of the proscribed communications.

The timing of the proscribed communications, the Director's failure to include all parties, and the statutory timeframe for issuing a Final Decision not only violated AHO's right to notice under the APA but also effectively precluded any opportunity to respond.

We hold that the Agency exceeded its statutory authority and that AHO's substantial right to notice and a genuine opportunity to be heard was prejudiced by the process through which the Agency issued its final decision.

(5) Remedy for Violation

Appellant argues that the appropriate remedy is to adopt the decision of the ALJ. We decline to impose such a drastic remedy. Rather we hold that the decision of the Agency is reversed and vacated, and we remand the matter to the Agency for a new hearing upon a Final Agency Decision. Since Director Robert Fitzgerald engaged in the improper *ex parte* communications, he is prohibited from conducting the new hearing. The Agency shall designate another person to conduct the hearing. All parties shall have a full and equal opportunity to be heard, and there shall be no *ex parte* communications.

(B) Compliance with N.C. Gen. Stat. § 150B-34(c)

[2] In its second argument, appellant contends that the Agency's failure to recite and address all of the facts set forth in the recommended decision, as required by N.C. Gen. Stat. § 150B-34(c), violated its right to meaningful appellate review. We agree in part and disagree in part.

Appellant contends that the Agency's failure to reference over sixty numbered findings of fact from the recommended decision implicitly rejects those findings "without stating the specific reason based on substantial, admissible evidence as required by the APA." Appellant asserts that the omitted findings eliminated evidence in conflict with the Agency's "desired outcome" and enabled the Agency to write a decision that "may appear facially plausible but in fact is insupportable on the record."

We address this issue because it is otherwise likely to recur upon remand. The relevant provision of N.C. Gen. Stat. § 150B-34(c) states:

> A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address *all* of the facts set forth in the recommended decision. For *each* finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31.

N.C. Gen. Stat. § 150B-34(c) (2005) (emphasis added). First, we note that appellant mistakenly conjoins the principles of the last sentence. The statute does not require that specific reasons be supported by substantial, admissible evidence. Instead, it requires that: (1) for *each* finding of fact not adopted by the Agency, the Agency state the specific reason, based upon the evidence, for not adopting the findings, and (2) the Agency's findings (not its reasons) be supported by substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31.

Nonetheless, the Agency did not comply with the statute insofar as it failed to state "the specific reason" for not adopting certain findings of facts, or omitting certain findings from itemized lists of related findings. The decision gives no reason why certain findings are itemized and others are omitted. Moreover, the Agency declined to adopt a large number of findings and conclusions of law simply as "immaterial" and "irrelevant" to substantive issues without reference to its findings, conclusions, or decision regarding those issues. We agree that this approach does not comport with the dual intent of the statute to safeguard against arbitrary decisions and facilitate meaningful appellate review.

We hold that the Agency's failure to comply with the statutory mandate of N.C. Gen. Stat. § 150B-34(c) prejudiced appellant's right to meaningful appellate review to the limited extent that appellant was not afforded the opportunity to address the Agency's reasoning for rejecting material and essential findings by the ALJ, including findings[5] related to the initial agency determination and its consistency with earlier no-review determinations. On remand, all findings in the ALJ's recommended decision should be addressed in any Final Agency Decision that declines to adopt the ALJ's recommendation.

IV. Conclusion

We hold that the Agency violated the provisions of N.C. Gen. Stat. § 150B-35 by engaging in *ex parte* communications with counsel for the petitioner to the exclusion of other parties. We further hold that the substantial rights of appellant were prejudiced by this conduct. The Agency's decision is hereby vacated.

We remand this matter to the Agency for proceedings consistent with this opinion. The Agency may adopt the ALJ's recommended decision or it may conduct a new hearing in accordance with Article III of the Administrative Procedure Act. Any hearing shall be conducted by a person other than Director Fitzgerald.

A decision that fails to adopt the recommended decision must state its specific reason, based on the evidence, for not adopting each material or essential finding of fact that it declines to adopt, in accordance with N.C. Gen. Stat. § 150B-34(c), and its own findings shall be supported by substantial evidence admissible under N.C. Gen. Stat. §§ 150B-29(a), 150B-30, or 150B-31.

Because of these holdings, we need not address appellant's remaining arguments.

VACATED and REMANDED.

Judges BRYANT and GEER concur.

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5. Specifically Findings of Fact 1-3, 31-33, 36, 38, and 60 in the Administrative Law Judge's Recommended Decision.

TIMOTHY RAPER, EMPLOYEE, PLAINTIFF v. MANSFIELD SYSTEMS, INC. AND FEDERATED MUTUAL INSURANCE COMPANY, EMPLOYER/CARRIER, DEFENDANTS

No. COA07-681

(Filed 18 March 2008)

1. Workers' Compensation— carpal tunnel syndrome—evidence of causation—sufficiency

The Industrial Commission did not err in a workers' compensation case by awarding benefits for plaintiff's carpal tunnel syndrome where the evidence was that the syndrome, even if preexisting, was aggravated by his work-related injury.

2. Workers' Compensation— initial injury—not an injury by accident

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff did not suffer a compensable shoulder injury where, as the driver of a gasoline tanker, he felt a snap in his shoulder as he lifted a hose used for filling a storage tank in the usual way and then threw the hose into a trough instead of placing it. While there were other injuries, there was no evidence that lifting the hose in the normal manner caused or aggravated plaintiff's shoulder injury.

3. Workers' Compensation— continuing disability—ability to do some work—findings not sufficient

The Industrial Commission did not make sufficient findings in a workers' compensation case when denying disability benefits after the date that plaintiff was capable of some work. The matter was remanded for findings about whether plaintiff had made a reasonable effort to obtain employment or that any effort to obtain employment would have been futile because of preexisting conditions.

4. Workers' Compensation— attorney fees denied—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by not awarding plaintiff attorney fees. The Commission found that defendants did not engage in stubborn, unfounded litigiousness and plaintiff did not cite any authority supporting his contention that defendants' defense was unreasonable or that the Commission abused its discretion.

Appeal by defendants and cross-appeal by plaintiff from Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 2 February 2007 by Commissioner Dianne C. Sellers. Heard in the Court of Appeals 29 November 2007.

Anderson Law Firm by Michael J. Anderson, for plaintiff-appellant/appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Tonya D. Davis, for defendants-appellants/appellees.

JACKSON, Judge.

Timothy Raper ("plaintiff") and Mansfield Systems, Inc. ("defendant-employer"), along with its insurance carrier, Federated Mutual Insurance Co. (collectively, "defendants"), appeal from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission ("Full Commission") filed 2 February 2007. For the following reasons, we affirm in part and remand in part.

Plaintiff was employed by defendant-employer as a driver of gasoline tankers. On 28 May 2003, after filling a gasoline storage tank in his usual manner, plaintiff reached down to pick up the hose and, when he was approximately fifty percent upright, experienced a snapping sensation in his right shoulder area. Upon feeling the snapping sensation, instead of placing the hose in the trough in his usual manner, plaintiff threw the hose onto the trough to avoid dropping it and the possibility of not being able to pick it up again. Plaintiff described the trough as being higher than his shoulders.

Thereafter, plaintiff reported the incident to defendant-employer, and was instructed to seek treatment at Smithfield Urgent Care ("the Urgent Care"). At the time, plaintiff's symptoms included pain extending from the right side of his neck down into his right shoulder and hand. Plaintiff also experienced numbness and tingling of the second, third, and fourth digits on his right hand as well as weakness in his right arm. Previously, plaintiff had presented to the Urgent Care, but plaintiff's medical records from the Urgent Care disclosed no prior pain in his neck, right shoulder, or right hand and no prior numbness or tingling in the fingers on his right hand.

On 29 May 2003, plaintiff presented to the Urgent Care, and medical records from that date describe plaintiff's symptoms in his right trapezius muscle and cervical spine, with the right side being worse

than the left. The medical records also indicate that plaintiff was able to rotate his neck and head only half as much as normal. On 2 June 2003, plaintiff returned to the Urgent Care, and was diagnosed as having sustained a cervical sprain and injury to his trapezius muscle. On 9 June 2003, plaintiff again presented to the Urgent Care, and was diagnosed as having cervical radiculopathy.

On 26 September 2003, plaintiff presented to Dr. Carol B. Siegel ("Dr. Siegel") at Raleigh Orthopaedic Clinic, who noted that plaintiff was experiencing numbness and tingling in the fingers on his right hand. Dr. Siegel conducted numerous diagnostic tests, including an electromyography and nerve conduction studies of plaintiff's right upper extremity, and diagnosed plaintiff as having right carpal tunnel syndrome. Dr. Siegel recorded that because plaintiff denied having hand and finger symptoms prior to 28 May 2003, she could attribute his carpal tunnel syndrome only to the injury occurring on that date.

On 3 May 2004, plaintiff presented to Dr. Josephus T. Bloem ("Dr. Bloem"), stating that he was experiencing constant discomfort in his right shoulder and pain in his right wrist. Following his examination, Dr. Bloem diagnosed plaintiff as having right carpal tunnel syndrome and a likely rotator cuff tear. Dr. Bloem stated that there was no manner available to determine the extent of any rotator cuff tear without performing surgery, but with respect to plaintiff's carpal tunnel syndrome, Dr. Bloem recommended that plaintiff attempt conservative therapies before considering surgery. Dr. Bloem opined that plaintiff's right carpal tunnel syndrome was likely the result of a wrist sprain that occurred when plaintiff threw the tanker hose onto the trough on 28 May 2003. Additionally, while acknowledging that plaintiff has diabetes, and the potential relationship between diabetes and carpal tunnel syndrome, Dr. Bloem opined that the trauma of 28 May 2003 was a more likely cause given that plaintiff had symptoms only in his right hand.

Dr. Bloem opined that performing the duties associated with plaintiff's position with defendant-employer would be problematic for plaintiff. He assigned plaintiff restrictions on the use of his right arm, including limitations on over-head work, lifting, pushing, and pulling. Dr. Bloem ultimately assigned plaintiff a ten percent permanent partial impairment rating to his right arm due to the shoulder injury and carpal tunnel syndrome, and he opined that plaintiff has reached maximum medical improvement.

Plaintiff originally filed his claim for the 28 May 2003 injury against Mansfield Oil Co. ("Mansfield Oil") and St. Paul Travelers Insurance Co. ("Travelers"). Travelers initially paid indemnity and medical compensation through 1 October 2003, but on 12 November 2003, Travelers denied compensability of plaintiff's claim on the grounds that plaintiff was not an employee of Mansfield Oil at the time of the accident but instead was an employee of defendant-employer. Plaintiff amended his request for hearing, properly identifying defendants as parties. Defendants filed a response, admitting the employment relationship but denying plaintiff's claim, contending that because Travelers had accepted plaintiff's claim, Travelers was estopped from denying further responsibility for plaintiff's injury. After defendants' response but prior to the hearing, plaintiff reached a settlement with Mansfield Oil and Travelers in the amount of $8,000.00, and this settlement was approved by Deputy Commissioner Bradley W. Houser ("Deputy Commissioner Houser") on 17 August 2005.

A hearing was held before Deputy Commissioner Houser on 28 October 2005, and Deputy Commissioner Houser entered an Opinion and Award in plaintiff's favor on 6 February 2006. Defendants filed notice of appeal to the Full Commission. By Opinion and Award entered 2 February 2007, the Full Commission affirmed with modifications Deputy Commissioner Houser's Opinion and Award; Commissioner Thomas J. Bolch dissented without written opinion. In its Opinion and Award, the Full Commission found that on 28 May 2003, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer in the form of a specific traumatic incident to his cervical spine. The Full Commission also found that plaintiff sustained a compensable injury when he threw the hose and sprained his wrist, resulting in carpal tunnel syndrome. With respect to plaintiff's shoulder injury, however, the Full Commission found that (1) the medical evidence failed to show that plaintiff's right shoulder injury was related to the injury by accident or the specific traumatic incident that occurred on 28 May 2003; and (2) the shoulder injury was not the result of an injury by accident arising out of and in the course of his employment. Thereafter, both plaintiff and defendants filed timely notice of appeal.

On appeal, defendants contend that the Full Commission erred by concluding that plaintiff's right carpel tunnel syndrome is compensable, and plaintiff contends that the Full Commission erred by (1) finding that plaintiff did not suffer a shoulder injury as a result of the

28 May 2003 incident; (2) denying plaintiff disability benefits after 3 May 2004; and (3) failing to award plaintiff attorneys' fees as a result of defendants' unreasonable defense of his claim.

"[A]ppellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). "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 the Commission may reject entirely any testimony which it disbelieves." *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. rev. denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). "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. rev. denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). "This Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. 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). Additionally, "failure to assign error to the Commission's findings of fact renders them binding on appellate review." *Estate of Gainey v. S. Flooring & Acoustical Co., Inc.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). "This Court reviews the Commission's conclusions of law *de novo*." *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 681, 648 S.E.2d 917, 920 (2007).

[1] In their sole argument on appeal, defendants contend that Dr. Siegel's and Dr. Bloem's opinions as to the causation of plaintiff's right carpal tunnel syndrome constituted incompetent evidence and that the Full Commission, therefore, erred in awarding workers' compensation benefits for plaintiff's right carpal tunnel syndrome. We disagree.

"A claimant in a workers' compensation case bears the burden of proving, by a preponderance of the evidence, a causal relationship between the injury and the claimant's employment." *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 455, 640 S.E.2d 744, 756 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 177, 658 S.E.2d 273 (2008). When the causation of a particular " 'injury in-

volves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' " *Id.* (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). Expert testimony based upon speculation and conjecture "is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Therefore,

> the Supreme Court has allowed "could" or "might" expert testimony as probative and competent evidence to prove causation. However, "could" or "might" expert testimony is insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation. An expert witness' testimony is insufficient to establish causation where the expert witness is unable to express an opinion to any degree of medical certainty as to the cause of an illness. Likewise, where an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation.

Adams v. Metals USA, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 (internal quotation marks, citations, and alterations omitted), *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005) (per curiam).

In the instant case, defendants contend that Dr. Bloem's testimony as to causation was incompetent on the grounds that it was based upon (1) the maxim *post hoc ergo propter hoc* and (2) facts not in evidence, specifically, the existence of a wrist sprain suffered by plaintiff when he threw the tanker hose onto the trough.

In formulating his opinion, Dr. Bloem considered electrodiagnostic tests performed by Dr. Siegel as well as plaintiff's description of the symptoms and mechanism of the injury. As this Court has stated previously, "[a] physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." *Jenkins v. Pub. Serv. Co.*, 134 N.C. App. 405, 410, 518 S.E.2d 6, 9 (1999), *rev'd in part on other grounds and disc. rev. improvidently allowed in part*, 351 N.C. 341, 524 S.E.2d 805 (2000) (per curiam). Based upon the tests and plaintiff's accounts, Dr. Bloem confirmed Dr. Siegel's diagnosis of carpal tunnel syndrome, and on appeal, defendants have disputed only the issue of causation, not the diagnosis itself.

In discussing the issue of causation, Dr. Bloem noted that plaintiff *may* have suffered a sprain, and that such a sprain, more than likely, would have caused plaintiff's carpal tunnel syndrome. The Full Commission found that plaintiff was injured when he "sprained his wrist, resulting in carpal tunnel syndrome," but as defendants correctly argue, the record contains no evidence that plaintiff, in fact, experienced a wrist sprain. Dr. Bloem also acknowledged that plaintiff's carpal tunnel syndrome *could* have been caused by his diabetes or by the repetitive vibrations he experienced while driving trucks. Ultimately, the record fails to contain evidence that precisely identifies the initial cause of plaintiff's carpal tunnel syndrome.

Nevertheless, the record does contain evidence that, even if plaintiff's carpal tunnel syndrome was a pre-existing condition, the carpal tunnel syndrome was aggravated by the 28 May 2003 injury. Dr. Bloem testified that plaintiff may have "had silent carpal tunnel surgery [sic] based on his diabetes, maybe. Well, maybe, but if so then *it was aggravated by the injury and you're still back at the injury that's doing it*." (Emphasis added). It is well-established that "[a]ggravation of a pre-existing condition caused by a work-related injury is compensable under the Workers' Compensation Act." *Moore v. Fed. Express*, 162 N.C. App. 292, 297, 590 S.E.2d 461, 465 (2004).[1] Dr. Bloem did not base his opinion solely upon facts not in evidence or the maxim *post hoc ergo propter hoc*. Whether caused by a wrist sprain, diabetes, or vibrations experienced while driving trucks, competent evidence supports the Full Commission's award of workers' compensation benefits for plaintiff's carpal tunnel syndrome.

Because we hold that Dr. Bloem's testimony constituted competent evidence to support the Full Commission's finding that plaintiff's 28 May 2003 injury caused his carpal tunnel syndrome, we need not reach plaintiff's arguments concerning the competency of Dr. Siegel's opinions as to causation. *See Gore v. Myrtle/Mueller*, 362 N.C. 27, 42, 653 S.E.2d 400, 410 (2007) ("Since appellate courts are 'limited to reviewing whether any competent evidence supports the Com-

1. Our Supreme Court recently held that " 'evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation' " and an employee still must " 'establish[] that the employment placed him at a greater risk for contracting the condition than the general public.' " *Chambers v. Transit Mgmt.*, 360 N.C. 609, 613, 636 S.E.2d 553, 556 (2006) (quoting *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 460, 566 S.E.2d 181, 184 (2002), *aff'd*, 357 N.C. 158, 579 S.E.2d 269 (2003) (per curiam)), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). As noted *supra*, however, defendants have confined their argument to the issue of causation, and therefore, we limit our analysis accordingly.

mission's findings of fact and whether the findings of fact support the Commission's conclusions of law,' our review must stop there." (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000))). Accordingly, defendants' assignments of error are overruled.

[2] With respect to plaintiff's appeal, plaintiff first contends that the Full Commission erred by finding that plaintiff did not suffer a shoulder injury as a result of the incident of 28 May 2003. We disagree.

Pursuant to North Carolina General Statutes, section 97-2(6), a compensable injury "shall mean only injury by accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6) (2005). It is well-established that

> [a]n accident is an unlooked for event and implies a result produced by a fortuitous cause. If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident. However, if an interruption of the work routine occurs introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred.

Lineback v. Wake County Bd. of Comm'rs, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254-55 (1997) (internal quotation marks and citations omitted). As this Court has explained,

> "[a]n 'accident' is not established by the mere fact of injury but is to be considered as a separate event preceding and causing the injury. No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident."

Renfro v. Richardson Sports Ltd. Partners, 172 N.C. App. 176, 180, 616 S.E.2d 317, 322 (2005) (quoting *Searsey v. Perry M. Alexander Constr. Co.*, 35 N.C. App. 78, 79-80, 239 S.E.2d 847, 849 (1978)), *disc. rev. denied*, 360 N.C. 535, 633 S.E.2d 821 (2006).

Section 97-2(6) provides a different test for back injuries:

> [W]here injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6) (2005). Therefore, the "statute provides two theories on which a back injury claimant can proceed: (1) that claimant was injured by accident; or (2) that the injury arose from a specific traumatic incident." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 707, 449 S.E.2d 233, 237 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). "[T]o prove a 'specific traumatic incident,' a worker must only show that the injury occurred at a 'judicially cognizable' point in time." *Zimmerman v. Eagle Elec. Mfg. Co.*, 147 N.C. App. 748, 754, 556 S.E.2d 678, 681 (2001), *disc. rev. improvidently allowed*, 356 N.C. 425, 571 S.E.2d 587 (2002) (per curiam). As this Court observed, by providing the separate definition of "injury by accident," "the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the [back] injury." *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E.2d 52, 53 (1985).

In the case *sub judice*, Dr. Bloem testified and plaintiff's medical records demonstrate that plaintiff experienced, *inter alia*, a trapezius strain and a cervical strain. Defendants concede that plaintiff's injury to his cervical spine was a back injury and, therefore, compensable as an injury "arising out of and causally related to [a specific traumatic] incident." N.C. Gen. Stat. § 97-2(6) (2005); *see also Zimmerman*, 147 N.C. App. at 753-54, 556 S.E.2d at 681 (discussing similar symptoms in terms of a back injury compensable upon a showing of a causal relation to a specific traumatic incident). Plaintiff's trapezius strain, however, was a "neck injury and/or shoulder injury," as the trapezius "is the muscle between the neck and the shoulder that makes the flare of the neck." Although plaintiff argues in his brief that "[t]he *only* medical evidence of record demonstrates that Plaintiff's shoulder injury is, indeed, related to the specific traumatic incident of May 28, 2003," (emphasis in original), the "specific traumatic incident" test only applies to back injuries, not to shoulder injuries. Therefore, plaintiff was required to show that his trapezius strain was caused by an accident and not "an event that involves both an employee's normal work routine and normal working conditions." *Renfro*, 172 N.C. App. at 180, 616 S.E.2d at 322 (internal quotation marks and citation omitted).

Here, the evidence demonstrated that plaintiff's trapezius strain was caused by his shoulder injury and that his shoulder injury, in turn, occurred while performing his normal work routine under normal working conditions. Specifically, plaintiff, while lifting a hose in a standard fashion after unloading gasoline, felt a snapping sen-

sation in his shoulder, which Dr. Bloem explained resulted in irritation of plaintiff's labrum and, likely, a rotator cuff tear. Only after feeling the snapping sensation did plaintiff throw the hose in an unusual manner. Although Dr. Bloem testified that plaintiff's "having to throw [the hose] back on the trough in an unusual manner" more likely than not caused plaintiff's carpal tunnel syndrome, there is no evidence that this caused or aggravated plaintiff's shoulder injury. Instead, the shoulder injury appears to have occurred while plaintiff was lifting the hose in a normal manner, and therefore, the Full Commission's finding that plaintiff's shoulder injury was not the result of an "injury by accident" as defined in section 97-2(6) is supported by competent evidence. This finding, in turn, supports the conclusion that plaintiff did not sustain a compensable injury to his shoulder. *See, e.g.*, *Harrison v. Lucent Techs.*, 156 N.C. App. 147, 153, 575 S.E.2d 825, 829, *disc. rev. denied*, 357 N.C. 164, 580 S.E.2d 365 (2003). Accordingly, plaintiff's assignment of error is overruled.

[3] Plaintiff next contends that the Full Commission erred by denying plaintiff disability benefits after 3 May 2004. We hold that the Full Commission failed to make sufficient findings on this issue, and therefore, we remand for additional findings of fact.

" '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 a disability as well as the extent of the disability lies with the employee seeking compensation under the Act. *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 disability, whether temporary or permanent, under the 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. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). "If an employee presents substantial evidence he or she is incapable of earning wages, the employer must then '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.' " *Barber v. Going W. Transp. Inc.*, 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999) (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)).

In the case *sub judice*, plaintiff has confined his argument to the second and third prongs of the *Russell* test. Dr. Bloem testified that plaintiff's "cervical spine injury . . . had resolved by the time [he] examined [plaintiff] on May 3rd, 2004," and that "there was no permanent impairment associated with that cervical spine injury." Although Dr. Bloem assigned plaintiff certain work restrictions, the record demonstrates that plaintiff was capable of at least some work after 3 May 2004. Therefore, for plaintiff to demonstrate disability beyond 3 May 2004, plaintiff must have satisfied his burden under the balance of the second and third prongs of the *Russell* test—specifically, plaintiff must have demonstrated either that (1) he made a reasonable effort to obtain employment but was unsuccessful, or (2) any effort to obtain employment would have been futile because of preexisting conditions. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. In its Opinion and Award, however, "the Commission made no findings regarding either of these two factors. Plaintiff argues he presented evidence that he sought employment, but was unsuccessful in obtaining a job. The Commission entered no findings of fact on this evidence." *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 490, 613 S.E.2d 243, 250 (2005). Accordingly, we must remand to the Full Commission to make findings concerning plain-

tiff's disability, pursuant to the second and third prongs of the *Russell* test, for the period following 3 May 2004. *See Britt*, 185 N.C. App. at 685, 648 S.E.2d at 922.

[4] Finally, plaintiff contends that the Full Commission erred by failing to award plaintiff attorneys' fees as a result of defendants' unreasonable defense of his claim. We disagree.

Pursuant to North Carolina General Statutes, section 97-88.1, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2005). "The purpose of this section is to prevent 'stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees.' " *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995) (quoting *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990)), *disc. rev. denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). "The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason." *Thompson v. Fed. Express Ground*, 175 N.C. App. 564, 570, 623 S.E.2d 811, 815 (2006).

In the instant case, the deputy commissioner found that defendants' defense of the claim was unreasonable and awarded attorneys' fees pursuant to section 97-88.1. The Full Commission, however, is not bound by a deputy commissioner's findings and award, *see Strezinski v. City of Greensboro*, 187 N.C. App. 703, 709, 654 S.E.2d 263, 267 (2007), and here, the Full Commission disagreed with the deputy commissioner and found that defendants did "not engage[] in stubborn, unfounded litigiousness during the course of defending this claim." The Full Commission, therefore, properly concluded that "defendants are not subject to sanctions in the form of attorney's fees." On appeal, plaintiff has failed to cite any authority supporting his contention that defendants' defense was unreasonable or that the Commission's decision was an abuse of discretion, *see* N.C. R. App. P. 28(b)(6) (2006), and "[o]ur review of the record fails to disclose an abuse of discretion" on the issue of attorneys' fees pursuant to section 97-88.1. *Thompson*, 175 N.C. App. at 570, 623 S.E.2d at 815; *accord Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 344, 299 S.E.2d

436, 439, *disc. rev. denied*, 308 N.C. 190, 302 S.E.2d 243 (1983). Therefore, this assignment of error is overruled.

Accordingly, we remand the instant matter to the Full Commission for findings and conclusions as to the second and third prongs of the *Russell* test with respect to plaintiff's alleged disability following 3 May 2004, and we affirm the remainder of the Full Commission's Opinion and Award.

Affirmed in part; Remanded in part.

Judges TYSON and ARROWOOD concur.

ROBERT H. JONES AND EMILY J. JONES, PLAINTIFFS-APPELLANTS v. MARY LEE MILES, DEFENDANT-APPELLEE

No. COA07-109

(Filed 18 March 2008)

Adverse Possession— continuous possession—hostile use not re-established

The trial court correctly granted summary judgment for defendant in an adverse possession action in which plaintiffs did not possess the disputed tract in a hostile manner for a continuous twenty-year period. Plaintiffs' possession was hostile for eleven years, the then-owners gave plaintiffs permission to use the property when approached about a sale, and there is no indication that plaintiffs expressly rejected the grant of permission or put the owners on notice that they intended to continue a hostile possession.

Judge TYSON dissenting.

Appeal by Plaintiffs from order entered 16 August 2006 by Judge Zoro J. Guice, Jr. in Superior Court, Henderson County. Heard in the Court of Appeals 10 October 2007.

Dungan & Associates, P.A., by Robert Dungan, for Plaintiffs-Appellants.

Roberts & Stevens, P.A., by F. Lachicotte Zemp, Jr. and Ann-Patton Nelson, for Defendant-Appellee.

McGEE, Judge.

Roy Donald Morgan (Mr. Morgan) built a house on a tract of land (the Jones tract) in Henderson County in 1965. When Mr. Morgan built the house, he also installed a driveway and decorative shrubbery near what he believed was the western border of the property. Mr. Morgan believed the driveway and shrubbery were on his property based on a land survey prepared around 1964 or 1965. While living on the Jones tract, Mr. Morgan maintained the shrubbery by mulching and fertilizing the area. Mr. Morgan sold the property in 1973 to his brother, Charlie Morgan, Jr. (Charlie Morgan). Robert H. Jones (Mr. Jones) and Emily J. Jones (Mrs. Jones) (together, Plaintiffs) purchased the Jones tract from Charlie Morgan in 1981 and rented the house to various tenants until 1988. Since 1988, Plaintiffs have resided in the house continuously. Plaintiffs have maintained and used the driveway and have also maintained the shrubbery on a regular basis since purchasing the Jones tract. In addition, Plaintiffs paved the driveway in 1987.

Plaintiffs had the Jones tract surveyed in April 1992. The survey revealed that Plaintiffs' driveway and shrubbery actually extended outside the Jones tract and encroached onto an adjacent tract of land (the Thomas property) owned by James Thomas (Mr. Thomas) and Bernice Thomas (Mrs. Thomas) (together, the Thomases). After discovering the encroachment, Mr. Jones mistakenly believed that he and Mrs. Jones had acquired title to that portion of the Thomas property through adverse possession.[1] Nonetheless, Plaintiffs decided to "do the right thing" by offering to purchase from the Thomases the one-tenth-of-an-acre portion of the Thomas property containing Plaintiffs' driveway and shrubbery (the disputed tract).

In April 1992, Plaintiffs approached the Thomases and showed them a copy of the survey. Plaintiffs told the Thomases that even though they believed they owned the disputed tract through adverse possession, they would purchase the disputed tract to resolve the situation. According to Mr. Jones, the Thomases declined Plaintiffs' offer, stating that their property "had been a gift from God and . . . they had promised that they would never sell any part of it, even the [disputed tract], unless they sold it all." The Thomases also told Plaintiffs to "just enjoy the land" and "don't worry about it." Plaintiffs and the Thomases never had another discussion regarding the en-

1. Mr. Jones' belief was based on a misapprehension of the statutory period required for adverse possession.

croachment. However, even after their April 1992 conversation with the Thomases, Plaintiffs continued to believe that they owned the disputed tract through adverse possession.

Mr. Thomas died in 1998, and Mrs. Thomas decided to sell the Thomas property in 2003. Mrs. Thomas acknowledged at the time that the encroachment on the Thomas property was an "unsettled" issue. Around July 2004, Mr. Jones erected a fence around the disputed tract in order to demarcate the portion of the Thomas property that Plaintiffs were claiming by adverse possession. Mr. Jones also placed a "No Trespass" sign on the fence. Mrs. Thomas' attorney sent Plaintiffs a letter in August 2004 requesting that Plaintiffs remove the fence. The letter stated, in part:

> Since [April 1992], Mr. and Mrs. Thomas have permitted the encroachment on their property as described in the survey your surveyor prepared. The encroachment of your driveway has been permissive, and to date has not been a basis of dispute between Mr. and Mrs. Thomas and you.
>
> . . . .
>
> At this time, Mrs. Thomas insists that you immediately remove the fence to the extent it encroaches on her property. Mrs. Thomas reserves all rights with regard to the driveway encroachment. Any attempt by you to claim an interest in Mrs. Thomas' property is not acceptable. If you disagree that the driveway encroachment is not permissive and believe that the driveway encroachment is an open and hostile use by you adverse to the title of Mrs. Thomas, then you should inform me of that and prepare to remove the driveway encroachment as well.

Plaintiffs refused to remove the fence and told Mrs. Thomas' attorney that they believed they owned the disputed tract.

Mrs. Thomas sold the Thomas property in August 2004 to two families named Cashman and Dillon. Shortly thereafter, the Cashmans and Dillons put the property back on the market. They eventually sold thirteen acres of the original Thomas property to Suzanne West, and they sold the remaining portion (the Miles tract) containing the disputed tract to Mary Lee Miles (Defendant) in August 2005.

Plaintiffs filed a verified complaint in Henderson County Superior Court on 17 October 2005 alleging that they had acquired ownership

of the disputed tract through adverse possession. Defendant filed a motion for summary judgment on 17 July 2006, claiming that Plaintiffs' use of the disputed tract had been permissive since April 1992, thus interrupting the running of the twenty-year statutory period for adverse possession. *See* N.C. Gen. Stat. § 1-40 (2007). The trial court issued an order on 16 August 2006 granting Defendant's motion for summary judgment. Plaintiffs appeal.

A trial court should grant a motion for summary judgment if, when taken in the light most favorable to the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We review a trial court's grant of a motion for summary judgment *de novo*. *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

In North Carolina, "[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period . . . under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). Plaintiffs argue that the trial court erred by granting Defendant's motion for summary judgment because genuine issues of material fact existed with respect to all elements of Plaintiffs' claim for adverse possession.

We first address whether Plaintiffs' possession of the disputed tract was hostile to the interests of the record owners. The hostility requirement "does not import ill will or animosity but only that the one in possession of the lands claims the exclusive right thereto." *State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969). " 'A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.' " *Daniel v. Wray*, 158 N.C. App. 161, 172, 580 S.E.2d 711, 719 (2003) (quoting *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966)). The hostility element may be satisfied by a showing that "a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto[.]" *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985). However, the hostility requirement is not met if the possessor's use of the dis-

puted land is permissive. *See*, *e.g.*, *New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004) (finding hostility requirement not satisfied because the possessor's use of the disputed property was permissive); *McManus v. Kluttz*, 165 N.C. App. 564, 573-74, 599 S.E.2d 438, 446 (2004) (finding hostility requirement satisfied because the possessor's use of the disputed property was not permissive).

Plaintiffs contend that their possession of the disputed tract was hostile under *Walls* because they took possession of the disputed tract under a mistake as to the true boundary of their property and claimed the disputed tract as their own. Further, Plaintiffs note that when they approached the Thomases in April 1992, Plaintiffs believed they owned the disputed tract by adverse possession, and specifically told the Thomases the same. In addition, even after Plaintiffs spoke with the Thomases in 1992, Plaintiffs continued to believe that they owned the disputed tract by adverse possession. Plaintiffs argue that even if the Thomases granted Plaintiffs permission to continue to use the driveway as of April 1992, such permission was not sufficient to change Plaintiffs' use of the disputed tract from a hostile use to a permissive use. To support their argument, Plaintiffs cite the following statement from a North Carolina real estate treatise in its discussion of prescriptive easements: "Permission given *after* the hostile use has begun does not destroy the hostility."[2] James A. Webster, Jr. et al., *Webster's Real Estate Law in North Carolina* § 15-18(a) (5th ed. 1999). We disagree with Plaintiffs' contentions.

Plaintiffs correctly note that for possession to be hostile, the possessor must intend to claim title to the property at issue. However, a possessor's intent to claim title cannot support a claim of adverse possession where the true owner is never put on actual or constructive notice of the possessor's hostile intent. *See*, *e.g.*, *Bowers v. Mitchell*, 258 N.C. 80, 83, 128 S.E.2d 6, 9 (1962) (stating that a claim of adverse possession requires that "possession . . . be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim."). This notice concept is manifested in multiple elements of an adverse possession claim. *See*, *e.g.*, *McManus*, 165 N.C. App. at 573, 599 S.E.2d at 445 (stating that "[p]ossession is open and notorious if it places the true owner on notice of an adverse claim"); *Daniel*, 158 N.C. App. at 172, 580 S.E.2d at 719 (stating that to meet the hostility requirement, the

2. Defendant correctly notes, however, that *Webster's* cites no case law in support of this proposition.

possessor's use of the property must be " 'of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right' " (quoting *Dulin*, 266 N.C. at 261, 145 S.E.2d at 875)). It therefore follows that if the possessor uses the land with the true owner's permission, yet secretly intends to claim title to the land, such possession is not hostile for purposes of establishing an adverse possession claim. The true owner's grant of permission negates the hostile nature of the possession, and the possessor has not "manifest[ed] and give[n] notice that the use is being made under claim of right." *Id.*

Plaintiffs contend, however, that pursuant to the above-quoted statement in the *Webster's* treatise, the Thomases' grant of permission to Plaintiffs in April 1992 could not destroy the hostile nature of Plaintiff's possession of the disputed tract. According to Plaintiffs, because their possession had been hostile until April 1992, the subsequent grant of permission from the true owners of the disputed tract could not negate Plaintiffs' hostile use. We disagree. While the statement in the *Webster's* treatise may be accurate in some cases, it is not accurate in all cases. It is true that once possession becomes hostile, a grant of permission from the true owner will not defeat such hostility *if* the possessor either rejects the grant of permission or otherwise takes some affirmative step to put the true owner on notice that the possessor's use of the land remains hostile. However, a true owner's grant of permission *will* defeat a possessor's hostile use if the possessor takes no further action to reassert his claim over the land. In such cases, the possessor has not put the true owner on notice that the possessor still intends to claim the disputed land as his own. *Accord McKenzie v. Pope*, 33 P.3d 1277, 1280 (Colo. Ct. App. 2001) (agreeing that after possession becomes hostile, the true owner's "grant of permission to the [possessor] to use the disputed property, and subsequent inaction by the [possessor], would be sufficient to interrupt the running of the statutory period of adverse possession"); *Zivic v. Place*, 451 A.2d 960, 962-63 (N.H. 1982) (holding that where the possessor's use of disputed land had been hostile for the first nineteen years of the twenty-year statutory period, and the true owner then gave the possessor temporary permission to continue using the disputed land, the possessor had no claim for adverse possession because the possessor "fail[ed] to take positive action alerting [the true owner] that [the possessor] intended to use the land against [the true owner's] wishes").

In the current case, the parties do not dispute that Plaintiffs' possession of the disputed tract was hostile during the eleven years between Plaintiffs' purchase of the Jones tract in 1981 and their conversation with the Thomases in April 1992. Further, neither party disputes that in April 1992, the Thomases gave Plaintiffs permission to continue to use the disputed tract. According to Mrs. Thomas' affidavit, when Plaintiffs approached the Thomases regarding a possible purchase of the disputed property, the Thomases gave Plaintiffs "temporary permission to use the small portion of the property on which the driveway encroached." The Thomases did so by telling Plaintiffs that they "could keep using the part of the driveway that encroached onto our land 'for now.' " Mr. Jones recalls that during this conversation, the Thomases told Plaintiffs to "just enjoy the land" and "don't worry about it." Likewise, during his deposition, Mr. Jones was asked whether he had "any sense that [Plaintiffs] didn't have permission to continue using the driveway" following the April 1992 conversation. Mr. Jones responded "no," indicating that he understood that he and Mrs. Jones had the Thomases' permission to continue to use the disputed tract. Mrs. Jones testified in her deposition that her husband's characterization of their conversation with the Thomases was accurate and complete.

Mr. Jones maintains that even after the April 1992 conversation, Plaintiffs believed that they still adversely possessed the disputed tract. However, Mr. Jones admitted in his deposition that between April 1992 and 2004, he never had any further conversations with the Thomases regarding the driveway encroachment, and never took any action or steps to indicate that he still wanted to acquire title to the disputed tract. Mrs. Jones likewise stated in her deposition that after April 1992, she had no further discussions with the Thomases regarding the encroachment. We therefore find that after April 1992, Plaintiffs' use of the disputed tract was permissive. There is no indication that Plaintiffs expressly rejected the Thomases' grant of permission, or otherwise took affirmative steps to put the Thomases back on actual or constructive notice that Plaintiffs intended to continue to possess the disputed tract in a manner hostile to the interests of the Thomases. Plaintiffs first manifested their hostile intent around July 2004 when they erected a fence around the disputed tract.

We find that Plaintiffs did not possess the disputed tract in a hostile manner for a continuous twenty-year period. Thus, Plaintiffs cannot establish a claim for adverse possession. The trial court therefore did not err in granting Defendant's motion for summary judgment.

In light of the foregoing, we do not address Plaintiffs' remaining arguments.

Affirmed.

Judge ELMORE concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion affirms the trial court's grant of summary judgment for defendants and holds that plaintiffs failed to possess the disputed tract in a hostile manner for a continuous twenty-year period to establish a claim for adverse possession. I disagree and vote to reverse and remand the trial court's order. Genuine issues of material fact exist regarding whether defendants were placed on notice of plaintiffs' hostile intent to claim ownership of the disputed tract after the parties' discussion in 1992. I respectfully dissent.

I. 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) (alteration original) (internal citation and quotation omitted).

II. Adverse Possession

In order to prevail on an adverse possession claim, a claimant must establish possession of the disputed property was "continuous, adverse, hostile, under known and visible lines and boundaries, and exclusive during the statutory period under a claim of title to the land occupied." *State v. Johnson*, 278 N.C. 126, 152, 179 S.E.2d 371, 388 (1971) (citation omitted). The only issue briefed in defendant's motion for summary judgment and addressed in the majority's opin-

ion concerns whether plaintiffs' possession of the disputed tract was hostile to the true owners.

Hostile use is generally defined as "simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). Where claim of title is founded upon a mistake our Supreme Court has held:

> when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, *his possession and claim of title is adverse.* If such adverse possession meets all other requirements and continues for the requisite statutory period, *the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.*

Walls v. Grohman, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985) (emphasis supplied). It is undisputed that plaintiffs mistakenly believed the disputed tract was part of their property from 1981 until 1992, when plaintiffs conducted a survey to ascertain the boundaries of their property.

Upon discovering plaintiffs' possession and use encroached upon defendants' property, plaintiffs asserted to defendants they "had a legal right to the disputed tract by adverse possession." Plaintiffs offered to purchase the disputed tract from defendants in order to avoid the time and expense of litigation. In response to plaintiffs' offer, defendants told plaintiffs they could continue to utilize the tract and advised them to "enjoy the land" but they were not willing to sell plaintiffs the property.

Plaintiffs argue defendant's permission to use the disputed tract of land did not toll the running of the twenty-year statute of limitations required to adversely possess the property pursuant to N.C. Gen. Stat. § 1-40 (2005). I agree.

"Permission given *after* the hostile use has begun does not destroy hostility." 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 15-18(a), at 722 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. (1999)) (emphasis original). The majority's opinion states, "[w]hile the statement in the *Webster's* treatise may be accurate in some cases, it is not accurate in all cases." The majority's opinion further states, "a true owner's grant of permission will defeat a possessor's hostile use if the possessor takes no further

action to reassert his claim over the land." In support of this proposition the majority's opinion cites several cases from other jurisdictions. The holdings in these cases have not been adopted and are not controlling in North Carolina. Further, adjoining jurisdictions have held contrary to the majority's assertion in analogous cases reviewing the subsequent creation of life estates. *See Kubiszyn v. Bradley*, 292 Ala. 570, 298 So.2d 9 (1974) (holding that once the statutory period for adverse possession commences to run against a landowner, the running of the statutory period is not suspended by the subsequent creation of a life estate); *Miller v. Leaird*, 307 S.C. 56, 62-63, 413 S.E.2d 841, 844-45 (S.C. 1992) ("[O]nce the statutory period for adverse possession is activated the subsequent creation of a life estate will not suspend the running of such period.").

North Carolina has adopted this reasoning in other contexts. Our Supreme Court has stated:

> There is a well recognized rule that *when the statute of limitations has begun to run no subsequent disability will interfere with it.* Where the statute of limitations begins to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, their disability of infancy *does not affect the operation of the statute*, since the disability is subsequent to the commencement of the running of the statute.

Battle v. Battle, 235 N.C. 499, 502, 70 S.E.2d 492, 494 (1952) (internal citations and quotations omitted) (emphasis supplied); *see also Nicholas v. Furniture Co.*, 248 N.C. 462, 471, 103 S.E.2d 837, 844 (1958) ("It is well recognized law in this jurisdiction from the earliest times that when the Statute of Limitations has begun to run, no subsequent disability will stop it."). The reasoning in the preceding cases is applicable when a party has adversely possessed property for a substantial amount of the requisite statutory time period and the true owner attempts to thwart hostility simply by solely giving the party permission to use his property. Once adverse possession has begun and the owner is on notice, the burden shifts to the record owner to take physical or legal action to interrupt the running of the twenty year statutory period. After being notified of plaintiffs' claim, defendants failed to take any affirmative action to toll the running of the statute.

Presuming *arguendo* the majority's opinion articulates the correct legal position, genuine issues of material fact exist regarding whether defendants were placed on notice of plaintiffs' hostile intent

to claim the disputed tract as their own after the parties' discussion in 1992. Following the 1992 conversation, plaintiffs continued to use the driveway and maintained the shrubbery located on the disputed tract to the exclusion of defendants. Plaintiffs allege they continually asserted a legal right to the disputed tract by adverse possession. In 2004, plaintiffs erected a fence along the boundary line plaintiffs believed they had a right to claim. Defendants took no action to defeat plaintiffs exclusive possession of the disputed property.

III. Conclusion

Defendants took no action, after notice of plaintiffs' claims, to defeat their open, continuous, exclusive, actual and notorious possession of defendants' property. Viewed in the light most favorable to plaintiffs, genuine issues of material fact exist regarding whether plaintiffs held possession of the disputed tract for the requisite statutory twenty-year period. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249. The trial court's order granting defendants' motion for summary judgment should be reversed and remanded for trial. I respectfully dissent.

SYLVIA DIANE RHUE, PLAINTIFF v. DOY RAY RHUE, DEFENDANT

No. COA07-453

(Filed 18 March 2008)

Unjust Enrichment; Trusts— cohabiting parties—parcels purchased in defendant's name—unjust enrichment—constructive trust

The evidence was sufficient to support the jury's finding that the female plaintiff who cohabited with the male defendant has a constructive trust in two parcels of land acquired in defendant's name during their relationship on the basis of unjust enrichment where the evidence tended to show that defendant told plaintiff that they would grow old together and that he was purchasing properties for their retirement; plaintiff helped to build a home on one parcel, assisted defendant in improving a garage where he worked as a mechanic, and worked alongside him in his construction business; plaintiff paid expenses for defendant's business for labor and materials from her personal account; plaintiff

raised defendant's son and grandson and managed the household expenses; the promises defendant made to plaintiff were in the context of services provided by defendant for defendant's business and daily maintenance, and sexual services were not the consideration for defendant's promises; and the parties conducted their lives as a partnership so that a confidential relationship existed between them.

Appeal by defendant from judgment entered 28 June 2006 and order entered 3 November 2006 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 31 October 2007.

Williams Mullen Maupin Taylor, by Kevin W. Benedict, for plaintiff-appellee.

Bailey & Way, by John E. Way, Jr., for defendant-appellant.

CALABRIA, Judge.

Doy Ray Rhue ("defendant") appeals a judgment entered upon a jury verdict finding a portion of defendant's real property subject to a constructive trust and an order denying his motion for judgment notwithstanding the verdict. We affirm.

Sylvia Diane Rhue ("plaintiff") and defendant (collectively "the parties") were married on 17 July 1976, separated in December 1976, and divorced on 23 March 1978. In June 1978, the parties reconciled and plaintiff moved into defendant's residence. Although the parties never remarried, they continued to live together until March 2003 when defendant asked plaintiff to leave. On 24 March 2004, plaintiff filed a complaint asserting claims for unjust enrichment, resulting and/or constructive trust, an equitable lien, and partnership. The Honorable Benjamin G. Alford ("Judge Alford") presided over a jury trial in Carteret County Superior Court held on 22 May 2006.

The parties' relationship lasted more than twenty-six years. Shortly after June 1978, plaintiff became the primary caregiver for defendant's son from a prior marriage, Doy Ray Rhue, Jr. ("Junior"). Junior had a son named Michael Ryan Rhue ("Michael"). When Junior passed away, Michael's mother asked plaintiff and defendant to take care of Michael. Later, plaintiff and defendant were granted legal custody of Michael. After the parties' relationship ended, plaintiff remained Michael's primary caregiver.

Defendant acquired thirteen different parcels of land which he told plaintiff were acquired to help provide for them in their retirement. All but one of those parcels was titled in defendant's name only. The parties personally built a home together on a lot that was one of five parcels of property known as the Ware Creek Property in Beaufort, North Carolina. The five parcels have been designated as parcels "A, B, C, D, & E" ("Ware Creek properties"). Two of the five parcels, parcels C and D, were acquired before the parties resumed their relationship in June 1978. Defendant acquired parcels A, B, and E after June 1978. The parties built a home on parcel C of the Ware Creek properties ("Parcel C home").

Plaintiff first assisted in the demolition and then the construction of the Parcel C home. Specifically, she helped tear down boards, take out nails, and dig the foundation. The construction lasted four years to enable the parties to pay the expenses in stages. Plaintiff continued to build the Parcel C home even when she worked outside the home in order to obtain health insurance for herself, defendant and Junior. Plaintiff also made the payments for a life insurance policy which, over time, totaled $17,509.58. Plaintiff assisted in paying the household expenses, $6,986.62 for defendant's medical bills when he became ill, and paid child care expenses for Michael.

Defendant was self-employed as a mechanic and worked on automobiles in the shed located behind their trailer. Plaintiff helped defendant build a better garage for his mechanic's business. When defendant began a small construction business known as Doy Ray Rhue Construction, plaintiff assisted in the business by helping to lay drainage pipes and rake gravel over the pipes. Plaintiff made payments from her personal checking account for the benefit of the construction business, including payments to workers for their labor and payments for materials and parts. Carl Rancer testified he observed plaintiff paying defendant's workers "many times" and "on a fairly regular basis."

Plaintiff testified that the parties' joint funds earned during the course of their relationship were used to buy the Ware Creek properties, along with eight other properties. Plaintiff presented exhibits indicating she paid $1,883.25 in "land payments." Plaintiff also testified that "[defendant] said it was always part mine. That's all I can tell you. He did and he promised." She added that "[o]ver the course of 25 years we done things together and he always told me it was part mine. And me taking care of his young'un, taking care of him and our house-

hold and everything else . . . ." She stated at trial that the money collected from rents on the properties was their money.

Defendant testified he told plaintiff that as long as he had a roof over his head, she would also always have one. Defendant also testified that he borrowed the money and paid for the properties at issue and plaintiff only contributed financially to payment of the McDaniel Road property which is titled in her name. Defendant further testified that plaintiff was not a partner in his business because she was employed outside the home.

Patricia Beck, a friend of the parties, testified that plaintiff and defendant worked side by side as a team. Patricia Beck also testified that defendant "always referred to [the property they owned] as our property . . . Diana and I purchased this." James Beckwith testified that plaintiff worked in defendant's construction business on a regular basis. Joan Beckwith testified the parties talked in general about buying different properties so they could grow old together and have property accumulated together. Mary Rancer testified she heard defendant say he would take care of plaintiff and illustrated her testimony with an example. When defendant was in the hospital preparing for open heart surgery, he was concerned about how to protect plaintiff. Mary Rancer also testified that defendant told her he would provide for plaintiff for as long as he lived and after he died. Defendant also told her of the plan to buy properties in order to bring in income.

At the close of the plaintiff's evidence, the court denied defendant's motion to dismiss the constructive trust claim. At the close of all the evidence, defendant renewed his motions to dismiss. The court did not rule on defendant's motions at the close of all the evidence but allowed arguments to address the instructions to the jury. The following day, after hearing further arguments, the trial court overruled defendant's objections to the constructive trust charge.

The trial court submitted ten issues to the jury. Although there were thirteen disputed parcels, some of the issues related to more than one tract of land. For example, issue 1 relates to parcels "C & D" and issue 2 relates to parcels "A, B, D, & E" of the Ware Creek properties. The jury found the parcels in issues 1 and 2 subject to a constructive trust in favor of the plaintiff, that the conduct of defendant deprived plaintiff of a beneficial interest in all five parcels and that plaintiff was entitled to a one hundred percent beneficial interest in all five parcels. The jury found that plaintiff was not entitled to a constructive trust on the remaining eight parcels of property.

On 28 June 2006, Judge Alford entered judgment on the jury verdicts. Defendant filed a motion for judgment notwithstanding the verdict as to the first issue on 6 July 2006. Judge Alford denied defendant's motion on 3 November 2006. Defendant timely filed his notice of appeal from the judgment and the order denying his motion for judgment notwithstanding the verdict on 21 November 2006.

A. Motion for Judgment Notwithstanding the Verdict

Defendant alleges the trial court erred in denying his motion for a directed verdict at the end of the plaintiff's evidence, denying his motion for a directed verdict at the close of all the evidence, and denying his motion for judgment notwithstanding the verdict. Defendant argued four issues: (1) the parcels were acquired "prior to any allegation of constructive trust"; (2) no evidence supports the proposition that defendant used the plaintiff's money when he purchased the property in question; (3) plaintiff attempted to use a common law marriage theory to establish a constructive trust; and (4) there is insufficient evidence to establish a constructive trust.

We note that defendant's motions at the close of the plaintiff's evidence and at the close of all the evidence were motions to dismiss for insufficient evidence and not motions for a directed verdict as he erroneously states in his brief. "[I]n a jury trial, the proper motion to dismiss is one for directed verdict pursuant to Rule 50(a)." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 799-800 (1999) (citation omitted). Despite this error, we exercise our discretion to address the merits of defendant's argument. *Wheeler v. Denton*, 9 N.C. App. 167, 168, 175 S.E.2d 769, 770 (1970) ("[T]he name of the motion is not as important as the substance.").

B. Standard of Review

"When reviewing motions for directed verdict and judgment notwithstanding the verdict, the trial court must determine whether the evidence, considered in the light most favorable to the nonmoving party, is sufficient to present the case to the jury." *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 47, 524 S.E.2d 53, 58 (1999) (citation omitted). "The evidence is sufficient to go to the jury when there is more than a scintilla of evidence to support each element of the claim." *Guilford County v. Kane*, 114 N.C. App. 243, 245, 441 S.E.2d 556, 557 (1994).

C. Unjust Enrichment

"The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circum-

stances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984). "No contract, oral or written, enforceable or not, is necessary to support a recovery based upon unjust enrichment." *Parslow v. Parslow*, 47 N.C. App. 84, 88-89, 266 S.E.2d 746, 749 (1980) (citation omitted). Recovery in unjust enrichment "may arise where one's property is improved or paid for in reliance upon the owner's unenforceable promise to convey the land or some interest in it to the contributor." *Thomas v. Thomas*, 102 N.C. App. 124, 127, 401 S.E.2d 396, 398 (1991) (quoting *Collins*, 68 N.C. App. at 591, 315 S.E.2d at 761). "But the contributor must prove the promise." *Id.* (citing *Wright v. Wright*, 305 N.C. 345, 289 S.E.2d 347 (1982)).

D. Constructive Trust

Defendant argues the trial court erred in denying his motion for a directed verdict because he acquired title to parcels C and D prior to any allegation of constructive trust. Defendant cites *Patterson v. Strickland* in support of this argument. In *Patterson v. Strickland*, 133 N.C. App. 510, 519, 515 S.E.2d 915, 920 (1999), this Court addressed the issue of whether a purchase money resulting trust arose between the parties. Defendant cites the rule from *Patterson* that a trust is created in the same transaction in which legal title passes. Since the rule as stated in defendant's brief relates to a purchase money resulting trust and not a constructive trust which is an issue in this case, we overrule any error on these grounds.

Next defendant argues that there is a lack of evidence to support several findings: first, that defendant used plaintiff's money to purchase parcels C and D; and second, a lack of evidence that either a fiduciary or confidential relationship existed to support a constructive trust on parcels A, B, and E. Defendant waived his argument as to parcels A, B, and E in his motion for judgment notwithstanding the verdict. N.C. Rules of Civil Procedure Rule 50(b) provides, "[n]ot later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . ." Defendant asked the court in his motion for judgment notwithstanding the verdict to set aside the verdict as to issue no. 1 and enter judgment in accordance with his "previous motion for [a] directed verdict as to Issue No. 1." Issue No. 1 addressed parcels C and D only. Therefore, we do not consider his argument as to parcels A, B, and E.

Defendant contends that because plaintiff received proceeds from another property purchased by the parties which was later sold, and because plaintiff became a one-half undivided owner in another tract, any property owned solely by the defendant was not intended to be jointly owned.

Our Supreme Court defined constructive trusts in *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970):

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Id. (citations omitted). Plaintiff's basis for a constructive trust claim is the latter, "some other circumstance." *Id.* In this case, plaintiff alleged unjust enrichment since defendant promised her the properties they bought and renovated together were to be used for their retirement and also promised that he would provide for her. Plaintiff testified at trial that defendant told her they would "grow old together" and defendant told her he was "buying pieces of property, that [they]'ll have when [they] retire." In addition, he told her that,

> I will never have to worry about anything, that I'd always be taken care of and when we grow old, we would have something to live on. We had our burial plots and everything paid for. We had our insurance and everything made out to one another. . . . We were going to live the rest of our lives out together and have something to fall back on. Sell properties so that we'd have something to live on when we got old, exactly what he said.

Plaintiff testified that she did not know the property defendant bought for them was not in her name until after "he had already done it" and then "he said it didn't matter because it was part mine anyway."

Besides promises defendant made, plaintiff provided numerous benefits to defendant. She improved his property by helping to build the Parcel C home. She also assisted defendant in improving his garage. She worked alongside defendant in his business, kept up his home, and raised Junior and Michael. During the time plaintiff conferred these benefits, plaintiff relied on defendant's promise that she would share in the results of their mutual efforts in the business and

property ownership. At the time of trial, the value of the Ware Creek properties was $1.2 million and the remaining eight properties were valued collectively at $1.245 million. It would be inequitable for the defendant to benefit from plaintiff's reliance on his promise that the property was to be used for their mutual benefit. *Collins*, 68 N.C. App. at 591, 315 S.E.2d 759 at 761. Viewed in the light most favorable to the plaintiff, we find sufficient evidence of such a promise and her reliance on that promise to survive a motion for a directed verdict. *Summey*, 283 N.C. at 647, 197 S.E.2d at 554; *Weatherford v. Keenan*, 128 N.C. App. 178, 180, 493 S.E.2d 812, 814 (1997) (a constructive trust may be imposed to prevent unjust enrichment to holder of legal title).

Defendant also contends that by allowing the jury to render a verdict on the first issue, the trial court "establish[es] a basis for common law marriage to be recognized in North Carolina." We disagree.

A similar argument was made in *Wike v. Wike*, where the parties reconciled after a divorce and participated in a landscaping business together, 115 N.C. App. 139, 140, 445 S.E.2d 406, 407 (1994). The plaintiff asserted a claim for money owed from her efforts in the partnership. *Id.* The defendant argued her claim was barred by public policy because their illicit relationship was the basis for their agreement. *Id.*, 115 N.C. App. at 141-42, 445 S.E.2d at 408. This Court disagreed because no evidence was presented that the illicit relationship formed part of the consideration of a binding contract. *Id.*, 115 N.C. App. at 142, 445 S.E.2d at 408.

"[A]greements regarding the finances and property of an unmarried but cohabitating couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements." *Suggs v. Norris*, 88 N.C. App. 539, 542-43, 364 S.E.2d 159, 162 (1988). Furthermore "where appropriate, the equitable remedies of constructive and resulting trusts should be available. . . ." *Id.*, 88 N.C. App. at 543, 364 S.E.2d at 162.

Viewing the evidence in the light most favorable to the plaintiff, the facts as presented at trial are sufficient to bring the issue of a constructive trust on parcels C and D to the jury. *See Guilford Co.*, 114 N.C. App. at 345, 441 S.E.2d at 557 (if there is more than a scintilla of evidence to support each element, then the evidence is sufficient to go to the jury). The constructive trust issue was supported by the

unjust enrichment claim. *See Weatherford*, 128 N.C. App. at 180, 493 S.E.2d at 814 ("A constructive trust may be imposed to prevent the unjust enrichment of the holder of legal title to property."). The promises defendant made to the plaintiff were in the context of services the plaintiff provided for defendant's business and daily maintenance. There is no evidence that sexual services formed the consideration for defendant's promise. This Court has consistently held that equitable relief for such relationship interests is permissible, as long as the promises are not based on sexual services. *Suggs*, 88 N.C. App. at 542-43, 364 S.E.2d at 162; *Wike*, 115 N.C. App. at 141, 445 S.E.2d at 407; *Thomas*, 102 N.C. App. at 126, 401 S.E.2d at 398 (plaintiff who cohabitated with defendant did not have valid quasi-contract claim but holding did not bar an unjust enrichment claim); *Collins*, 68 N.C. App. at 592, 315 S.E.2d at 762.

Defendant cites the content of a jury note to the trial court as evidence that the jury wanted to give the plaintiff relief but yet "knew the defendant did not act in any manner to create a trust . . . ." We disagree.

The note in question reads: "We want to know the definition of deprive. Does it mean that he was dishonest? We are having [a] problem with issue B. If we answer that she has [an] interest[,] do we have to say he deprived her?" The language of the jury verdict issue 1, part B reads, "Did the conduct of the Defendant deprive the Plaintiff of a beneficial interest in Parcels . . . of the Ware Creek Property on Plaintiff's Exhibit No. 2?"

Defendant's argument appears to rely on the erroneous assumption that a finding of dishonesty on the part of the defendant is necessary to establish a constructive trust. A constructive trust is appropriate "to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Wilson*, 276 N.C. at 211, 171 S.E.2d at 882. Evidence of fraud is one way to establish an unjust enrichment claim but it may not be necessary. Evidence of fraud is unnecessary if the plaintiff establishes a "breach of duty" or "some other circumstance making it inequitable" for the defendant to retain his property interest. *Id.*

Here, the evidence showed defendant acquired Ware Creek tracts A, B, and E during his relationship with the plaintiff, while the plaintiff assisted defendant in the day-to-day living, expenses, care of his

grandson, and the operation of his business. In addition, he promised plaintiff the property he acquired was for their mutual benefit. As a result of plaintiff's efforts, Ware Creek tract C was improved. After twenty-six years, defendant ended the relationship and the jury concluded that it was inequitable for him to retain the Ware Creek properties. No finding of fraud or dishonesty was necessary for the jury verdict. Therefore, this assignment of error is overruled.

E. Partnership

Defendant denies a confidential relationship was established. He believes the lack of agreement between the parties and the fact that he did not use plaintiff's money to purchase the property was evidence that no confidential relationship was established. We disagree.

"An unmarried couple may, by words and conduct, create an implied-in-fact agreement regarding the disposition of their mutual properties and money as well as an implied agreement of partnership or joint venture." *Suggs*, 88 N.C. App. at 542, 364 S.E.2d at 161 (citation omitted). "To prove existence of a partnership, an express agreement is not required; the intent of the parties can be inferred by their conduct and an examination of all the circumstances." *Wike*, 115 N.C. App. at 141, 445 S.E.2d at 407 (citing *Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275 (1985)).

> A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.

Zickgraf Hardwood Co. v. Seay, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982).

Plaintiff presented sufficient evidence to infer that the parties conducted their daily lives as a partnership. Plaintiff testified she assisted in defendant's business by paying for expenses such as labor and materials from her personal account. She also participated in manual labor for both defendant's business and personal projects including building the home on Parcel C. Plaintiff not only managed the household expenses, and child care, but also paid other expenses such as life insurance payments. All this was done with the understanding that she would be taken care of by the defendant, and that he purchased properties for their retirement. The lack of a formal

agreement between the parties is not dispositive of whether a partnership existed. *Wike*, 115 N.C. App. at 141, 445 S.E.2d at 407.

Defendant next argues the evidence was not clear, strong and convincing. We disagree. Plaintiff presented testimony from several witnesses as well as records of receipts she kept for the last twenty-four years. This evidence established her contributions to their properties and their household, as well as her contributions to maintain defendant's business, and care for defendant's grandson.

Defendant finally argues that the lack of evidence of "actual or presumptive fraud or breach of a confidential relationship" warranted a directed verdict in his favor. Because fraud is not necessary to establish a legal basis for a constructive trust, and plaintiff presented ample evidence for the jury to infer that a confidential relationship, both personal and business, existed between the parties, this assignment of error is overruled. We affirm.

Affirmed.

Judges STEPHENS and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JBARRE JEQUIZ HOPE

No. COA07-702

(Filed 18 March 2008)

1. Evidence— prior crimes or bad acts—victim's history of involvement with drugs

The trial court did not err in a first-degree murder case by admitting the testimony of the victim's mother relating to the victim's history of involvement with drugs because: (1) the testimony relating to the victim's involvement with drugs bolstered the prosecution's theory that the victim's murder was drug-related and was relevant to show motive; (2) the victim's drug use was a threshold matter in the chain of events that ultimately led to his murder, including showing the victim's connection with defendant; (3) omission of testimony concerning the victim's drug use would have given the jury an incomplete understanding of the circumstances and connections among the players that led

to the murder; and (4) even if the evidence was inadmissible, the testimony was not unduly prejudicial when it was offered to show proof of motive.

2. Evidence— photographs—illustrative purposes—victim's appearance and health before death

The trial court did not err in a first-degree murder case by admitting a photograph of the victim because: (1) photographs used to illustrate a witness's testimony about a victim-relative's appearance and health prior to death have been held admissible, and the purpose of the photograph was to illustrate the testimony of the victim's mother about her son's appearance before he got involved with drugs; (2) contrary to defendant's contention, the trial court was not required to conduct a voir dire hearing as part of the N.C.G.S. § 8C-1, Rule 403 balancing test; and (3) although defendant contends the trial court abused its discretion by overruling defendant's objections in a summary manner and failing to conduct a voir dire hearing to determine admissibility, defendant failed to cite any support for this argument and cannot show the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.

3. Evidence— cross-examination—gang activity—relevancy

The trial court did not commit prejudicial error in a first-degree murder case by admitting during the cross-examination of defendant testimony relating to gang activity including questions about whether tattoos and burn marks on defendant's body indicated any connection to gang activity, because although the line of questioning was irrelevant when the State presented no evidence that gang activity was responsible for the victim's death, the State presented overwhelming undisputed evidence of defendant's guilt including: (1) eyewitness testimony placing defendant at the scene of the murder armed with a handgun as well as additional testimony that defendant and the second intruder were picked up by a taxi driver and driven from Raleigh to Durham less than an hour after the murder; (2) testimony by a co-conspirator providing the link between the second intruder and the victim, and the fact the second intruder's fingerprints were found inside the victim's bedroom; and (3) circumstantial evidence derived from extensive cell phone records documenting a series of calls between the second intruder and a phone identified as having been used by defendant as well as indicating de-

fendant's whereabouts before and after the crime. There was no reasonable possibility that the jury would have reached a different result had the State not presented this irrelevant evidence.

4. Evidence— opinion testimony—pictures from cell phone were defendant

The trial court did not err in a first-degree murder case by allowing a State's witness to state that pictures taken from a cell phone were of defendant rather than that they "appeared to be" defendant because: (1) defendant waived this argument since the basis for objection claimed at trial differed from the basis for objection claimed on appeal; (2) even if the objection to admissibility was properly before the Court of Appeals, it was not unduly prejudicial when the jury had the opportunity to examine and make its own determination as to the probative value of the cell phone pictures; and (3) defendant has not and cannot show a reasonable possibility that a different result would have been reached at trial had the objections to the testimony been sustained.

5. Criminal Law— instruction—flight

The trial court did not err in a first-degree murder case by instructing the jury on flight, even though defendant contends there was insufficient evidence that he took steps to avoid apprehension, because: (1) although defendant claims law enforcement knew he had family in the Grifton area and had no trouble locating him at his aunt's house, law enforcement testimony indicated that despite continuous search efforts it took thirty-four days to locate defendant at a relative's home in Grifton; (2) trial testimony established that defendant and his accomplice sped off immediately after the murder and that less than an hour later they arranged for a taxi to pick them up at a Raleigh hotel across town from the crime scene and take them to Durham; (3) phone calls made less than eight hours after the crime on a cell phone linked to defendant originated in Greenville (near Grifton), indicating that he had left Durham soon after arriving; (4) defendant's conduct did not seem to be a part of his normal pattern of behavior and could be viewed as steps to avoid apprehension; (5) regardless of whether defendant's home was his girlfriend's or relative's home, he returned to neither immediately after leaving the scene of the crime; (6) the fact that defendant argues another reasonable explanation for his conduct does not, in itself, render a flight instruction improper; and (7) even if improper, it was not unduly

prejudicial in light of the overwhelming evidence of defendant's guilt, and there was no reasonable possibility that a different result would have been reached absent the error.

Appeal by defendant from judgment entered 18 May 2006 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 27 November 2007.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Brian Michael Aus, for defendant.

ELMORE, Judge.

On 18 May 2006, J'Barr'e Jequiz Hope (defendant) was convicted by a jury of first degree murder and sentenced to life imprisonment without parole. Defendant now appeals.

Kyle James Parrish was shot and killed at his home on 12 December 2004. Parrish shared the home with his girlfriend and a roommate, Chris Pennick. At the time of his murder, Parrish was selling drugs and addicted to heroin.

Pennick testified that Parrish left the house to buy cigarettes on 12 December 2004. Shortly thereafter, Pennick heard a knock at the door. The man at the door, later identified as defendant, asked to use Pennick's phone, explaining that his car had broken down. As Pennick turned around to retrieve his cell phone, defendant struck him with a pistol and he fell to the ground. Pennick was then restrained with a vacuum cleaner cord and defendant threatened to kill him if he moved. Defendant asked Pennick where Parrish and the money were located. Pennick testified that another man wearing an orange mask and carrying a gun entered the house.

When Parrish returned two men pulled him into the house and asked him for his money. Pennick heard the two men hitting Parrish and demanding money. Eventually, Pennick heard screaming, gunshots, and the sound of a window breaking. Pennick heard the two men leave, and then broke free from the vacuum cleaner cord to search for Parrish. Pennick found Parrish in the middle of the road where he cradled him in his arms until he was pronounced dead by the paramedics. Expert testimony established that Parrish suffered fatal gunshot wounds to the chest and lower back, together with multiple blunt force injuries and various sharp force injuries.

Pursuant to a plea agreement, Chad Aikens testified that he and Parrish used to buy heroin from Jamal Stokes. Aikens indicated that Stokes had seen Parrish with a bag of money at Aikens' house one night. Stokes later indicated his intent to break in Parrish's home and take the money. Aikens did not participate in the actual commission of the robbery, but he expected to get some money from the robbery proceeds for his assistance.

Chevella McNeil testified that she purchased a cell phone for defendant. Cell phone records and expert testimony indicated numerous calls on the day of the shooting between Stokes' phone and Aikens' phone and between Stokes' phone and defendant's phone. Records placed Stokes' phone at the scene of the crime and then at a Raleigh hotel. Eyewitness testimony established that a taxi driver picked up Stokes and defendant from a Raleigh hotel shortly after the time of the shooting and drove them to Durham. Records showed calls from Aikens' phone to the taxi company that picked up Stokes and defendant. Records also placed defendant's phone at the Raleigh hotel shortly after the shooting, in Durham that afternoon, and in the Greenville area shortly after midnight the next day. Authorities located defendant about a month later in a residential trailer in Grifton, near Greenville. Defendant was in the bedroom and his cell phone was within reach when he was arrested. Police obtained photographs from the cell phone.

[1] Defendant first argues that the trial court erred by admitting testimony by Parrish's mother relating to Parrish's history of involvement with drugs and a photograph of the victim. We disagree and overrule these assignments of error.

At trial, Lisa Parrish, Kyle Parrish's mother, testified that she had noticed changes in her son during the period between high school graduation and college. Ms. Parrish testified, "He'd been an honor roll student his first year of college. His sophomore year in February of 2003, I got a call from his counselor at school . . . ." She testified that Parrish admitted that he had started using drugs. She said, "He had gone from a[n] honor roll student to failing everything in a matter of about six weeks. Lost his scholarships and dropped out of Barton College." Ms. Parrish testified that she thought that he was getting better after taking him to counseling at Holly Hill Hospital in July of 2004. "His roommate, Chris Pennick[,] spent the whole night there with me when he was in with the counselors, and we left the next morning when the sun was coming up, and I thought he was getting some help after that." The State then admitted into evidence a photo-

graph of Parrish that was taken "before he got himself involved in all this mess[.]"

Defendant objected at trial to Ms. Parrish's testimony on grounds that "[w]e've heard some information about drug use and all that, and this man is deceased and we don't have to go through it again." Defendant objected to the admission of the photograph on relevancy and Rule 403 grounds. The trial judge overruled both objections. Defendant argued in his brief that the "information was irrelevant and only served to elicit sympathy for the victim with the jury and enrage it against Mr. Hope."

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). Generally, all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2005). Our Supreme Court has "said that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Hill*, 347 N.C. 275, 294, 493 S.E.2d 264, 274 (1997) (citation and quotations omitted). Our Supreme Court

> has also said that it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

Id. (citations, quotations, and alterations omitted). Furthermore, "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted . . . [if it] is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation and quotations omitted).

Thus, the relevancy of evidence is not limited, as defendant contends, to whether defendant was involved in Parrish's murder, nor is the inquiry limited simply to establishing any element of the crime. Here, Ms. Parrish's testimony related to her son's involvement with drugs. This involvement bolstered the prosecution's theory that Parrish's murder was drug-related. As such, Ms. Parrish's testimony was relevant to show motive, and was therefore admissible. Furthermore, Parrish's drug use was the threshold matter in the chain of events that ultimately led to his murder; drug use explained the

relationship between Parrish and Aikens, which was necessary to put in context the ultimate connection between Parrish and defendant. Omission of testimony concerning the victim's drug use would have given the jury an incomplete understanding of the circumstances and connections among the players that led to his murder.

Moreover, even were we to hold that the evidence was inadmissible, the testimony was not unduly prejudicial. Defendant urges that the evidence was unduly prejudicial in that the only purpose of the evidence was to "warp the judgment of the jury" by exciting sympathy for the victim and prejudice against defendant. We disagree.

"To establish prejudicial error, a defendant must show there was a reasonable possibility that a different result would have been reached had the evidence been excluded." *State v. Morgan*, 359 N.C. 131, 158, 604 S.E.2d 886, 903 (2004) (citing N.C. Gen. Stat. § 15A-1443(a)). "[W]here at least one of the [other] purposes for which the prior act evidence was admitted was [proper,] there is no prejudicial error." *Id.* (citations and quotations omitted) (alterations in original). One such proper purpose is to show proof of motive. *Id.* Though defendant contends that the testimony was calculated to prejudice one of the parties and prevent a fair and impartial trial, the State offered Ms. Parrish's testimony to show proof of motive. Accordingly, the trial court did not err by admitting it.

[2] Photographic evidence in particular is admissible in certain circumstances. Our Supreme Court has held that "it is not error to admit the photograph of a victim when alive." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citations omitted). Furthermore, "[p]hotographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words." *State v. Goode*, 341 N.C. 513, 539, 461 S.E.2d 631, 646 (1995) (citations and quotations omitted). Specifically, photographs used to illustrate a witness's testimony about a victim-relative's appearance and health prior to death have been held admissible. *See Goode*, 350 N.C. at 258, 512 S.E.2d at 421 (holding that a photograph introduced during the examination of the victim's daughter to illustrate her testimony about her parents' appearance and health prior to their deaths was admissible). Here, the purpose of the photograph was to illustrate Ms. Parrish's testimony about her son's appearance before he got involved with drugs.

Defendant also argues that even should this Court find the evidence relevant, the trial court should nevertheless have excluded it

because any probative value was substantially outweighed by the danger of unfair prejudice to defendant. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Defendant argues that the trial court should have been required to conduct a *voir dire* hearing as part of a Rule 403 balancing test. Contrary to defendant's urging, *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976), does not stand for such a proposition. *See id.* at 324, 226 at 638 (clarifying that when a defendant challenges the admissibility of identification testimony, "[f]ailure to conduct the voir dire [sic] . . . does not necessarily render such evidence incompetent").

Defendant contends that the trial judge abused his discretion by overruling defendant's objections in a summary manner and failing to conduct a *voir dire* hearing to determine admissibility. However, defendant cites no support for this argument and cannot show how the trial judge's ruling was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 179 N.C. App. 437, 463, 634 S.E.2d 594, 614 (2006) (citation and quotations omitted), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007). For these reasons, we overrule these assignments of error.

[3] Defendant next argues that the trial court erred in allowing the admission of testimony relating to gang activity gained through cross-examination of defendant because it was irrelevant and unduly prejudicial. Specifically, the prosecution cross-examined defendant about tattoos and burn marks on defendant's body to determine if they indicated any connection to gang activity. Defendant objected multiple times to this series of questions and was overruled. Defendant denied any connection to gang activity and explained that the tattoos and burn marks on his body did not symbolize any connections to gangs. We agree with defendant that the testimony was irrelevant, but disagree that it was unduly prejudicial.

We note that the State raises no argument that the line of questioning was relevant. The line of questions was irrelevant because the State presented no evidence that gang activity was responsible for Parrish's death. Rather, the State's evidence tended to show that Parrish was killed as a result of a plan by defendant and two accomplices to steal his money.

The question then remains whether the improperly admitted evidence was unduly prejudicial. Even when a trial court admits evidence in error, a

> defendant has the burden to show not only that it was error to admit this evidence, but also that the error was prejudicial: A defendant must show that, but for the error, a different result would likely have been reached. Where there exists overwhelming evidence of defendant's guilt, defendant cannot make such a showing; this Court has so held in cases where the trial court improperly admitted evidence relating to defendant's membership in a gang.

State v. Gayton, 185 N.C. App. 122, 125-26, 648 S.E.2d 275, 278 (2007) (citations, quotations, and alterations omitted).

The State presented overwhelming, undisputed evidence of defendant's guilt. *See id.*, 185 N.C. App. at 126, 648 S.E.2d at 279 ("Thus, even had all the evidence as to gangs been excluded, the State presented enough evidence—unchallenged to this Court—that the [crime was committed]."). This evidence included eyewitness testimony placing defendant at the scene of the murder armed with a handgun as well as additional testimony that defendant and the second intruder were picked up by a taxi driver and driven from Raleigh to Durham less than an hour after the murder. Testimony by a co-conspirator provided the link between the second intruder and the victim, and the second intruder's fingerprints were found inside the victim's bedroom. Additional circumstantial evidence derived from extensive cell phone records documented a series of calls between the second intruder and a phone identified as having been used by defendant as well as indicating defendant's whereabouts before and after the crime.

On this evidence, we cannot find a reasonable possibility that the jury would have reached a different result had the State had not presented evidence relating to gang affiliation. *See* N.C. Gen. Stat. § 15A-1443(a) (2005). Because the testimony on any matters relating to defendant's alleged gang affiliation, though irrelevant, was not unduly prejudicial, we overrule these assignments of error.[1]

[4] Defendant next argues that the trial court erred in permitting the State's witness to give his opinion that pictures taken from a cell phone were of defendant. We overrule this assignment of error.

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1. Though the State raises a colorable argument that defendant is barred from challenging this line of questioning on appeal due to failure to object to an earlier line of questioning. Even assuming *arguendo* that defendant failed to properly object in the first instance, the questioning is not unduly prejudicial for the reasons already stated.

At trial, defendant objected to the witness's statement that the picture "is" defendant, rather than saying it "appears to be" defendant. Defendant argued at trial, "My only objection would be that it appears to be rather than saying that it is [defendant]." The trial judge overruled the objection and allowed the issue to be addressed on cross-examination. In his brief, defendant argues that the State's witness's testimony as to the identity of the person in the photograph was improper opinion that should not have been admitted.

In objecting at trial to how the witness phrased his answer, defendant objected not to admissibility but to the weight of the testimony. That the trial judge allowed cross-examination on the matter indicates that it recognized that defendant's stated basis for the objection went to weight and not to admissibility. Because defendant objected only to the form of the witness's answer, we do not consider the question of whether the trial court erred in permitting the witness to give his opinion as to identification, as that question is not properly before this Court. As is often stated, "[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 [on appeal].' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) (additional citations omitted); *see also* N.C.R. App. P. 10(b)(1) (2007). Because the basis for objection claimed at trial differs from the basis for objection claimed on appeal, defendant waives his claim.

Moreover, even were we to hold that the objection to admissibility was properly before us, and even if we found error, such error was not unduly prejudicial. During deliberations, the jury requested and was permitted to examine both the cell phone and the printed copies of pictures stored on the phone. Thus, the jury had the opportunity to make its own determination as to the probative value of the cell phone pictures. Defendant argues that in the absence of the witness's opinion, there was a reasonable possibility that the jury would have concluded that the pictures were of his brother, who defendant argues is easily mistaken for him, and would have therefore concluded that his brother, and not defendant, was involved in the murder. This argument is unconvincing. Defendant has not and cannot show a reasonable possibility that a different result would have been reached at trial had the objections to the testimony been sustained. *See* N.C. Gen. Stat. § 15A-1443(a) (2005). We overrule this assignment of error.

[5] Finally, defendant argues that the trial court improperly gave the jury an instruction on flight because there was no evidence that defendant took steps to avoid apprehension. We disagree and overrule this assignment of error.

"A flight instruction is appropriate where 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]' " *State v. Kornegay*, 149 N.C. App. 390, 397, 562 S.E.2d 541, 546 (2002) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)) (alteration in original). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *Irick*, 291 N.C. at 494, 231 S.E.2d at 842. "[T]he relevant inquiry [is] whether there is evidence that defendant left the scene of the [crime] and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

In *State v. Shelly*, 181 N.C. App. 196, 638 S.E.2d 516, *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007), this Court held that a jury instruction on flight was proper when the defendant left the scene of the crime and stayed overnight at his cousin's girlfriend's house, "an action that was not part of Defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension." *Id.* at 209, 638 S.E.2d at 526. In contrast, our Supreme Court, in *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 393 (1991), held that there was insufficient evidence to support an instruction on flight. The defendant, a military serviceman, left the scene of the crime and went to the military base where he was stationed, essentially "return[ing] to a place where, if necessary, law enforcement officers could find him." *Shelly*, 181 N.C. App. at 209, 638 S.E.2d at 525. He "essentially . . . returned home." *Id.*, 638 S.E.2d at 526.

Defendant argues that he essentially went home when he went to stay with his family in Grifton over the Christmas holiday. He said that Grifton, where he was taken into custody, was where his extended family resided and was, in effect, home when he was not living at his girlfriend's house in Durham.

Despite defendant's contention, there is sufficient evidence that he took steps to avoid apprehension. Though defendant claims that law enforcement knew he had family in the Grifton area and had no trouble locating him at his aunt's house, testimony by law enforcement indicated that, despite continuous search efforts, it took thirty-four days to locate defendant at a relative's home in Grifton. Addi-

tionally, trial testimony established that before heading to Grifton, defendant and his accomplice "sped off" immediately after the murder and that less than an hour later they arranged for a taxi to pick them up at a Raleigh hotel across town from the crime scene and take them to Durham. Phone calls made less than eight hours after the crime on a cell phone linked to defendant originated in Greenville (near Grifton), indicating that he had left Durham soon after arriving.

Defendant's conduct did not seem to be a part of his normal pattern of behavior and could be viewed as steps to avoid apprehension. Moreover, regardless of whether defendant's home can be regarded as his girlfriend's or his relative's home, he returned to neither immediately after leaving the scene of the crime. This evidence provides a sufficient basis for finding that defendant made efforts to avoid apprehension after leaving the scene of the crime. That defendant argues another reasonable explanation for his conduct does not, in itself, render a flight instruction improper.

Even if improper, it was not unduly prejudicial so as to amount to reversible error. In light of the overwhelming evidence against defendant, which we have already noted, we find no reasonable possibility that a different result would have been reached had the error been excluded. *See* N.C. Gen. Stat. § 15A-1443(a) (2005). We therefore overrule this assignment of error.

Having conducted a thorough review of the record and briefs, we find no prejudicial error.

No prejudicial error.

Judges WYNN and BRYANT concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. WILLIE D. GILBERT, II, DEFENDANT

No. COA07-74

(Filed 18 March 2008)

1. Conversion— attorney—client funds

The trial court correctly concluded that an attorney committed the tort of conversion where defendant used funds clients believed were for expenses for personal expenses.

2. Conversion— attorney using client funds—statute of limitations defense—estoppel

The trial court correctly concluded that an attorney was equitably estopped from asserting the statute of limitations as a defense to conversion. Defendant used his clients' funds without their consent and may not unjustly benefit from the clients' delayed discovery.

3. Fraud— attorney use of client funds—recast from conversion

The trial court did not err by failing to dismiss plaintiff's action because it was recast by the trial court from conversion to fraud. Although defendant argues that fraud must be pled with particularity, plaintiff alleged wrongful conversion of client funds and statutory fraud, with double damages pursuant to N.C.G.S. § 84-13.

4. Fraud— attorney—conversion of funds—fraudulent

A claim for statutory fraud pursuant to N.C.G.S. § 84-13 against an attorney was adequately supported by his misconduct. His conversion of funds and breach of fiduciary duty are presumed to be fraudulent.

5. Fraud— attorney—conversion of client funds—compensatory damages

The trial court did not err by awarding compensatory damages against an attorney who committed statutory fraud. Defendant breached his fiduciary duty to his clients and converted their funds, which caused them a loss, and entitled them to double damages under N.C.G.S. § 84-13.

6. Fraud— attorney—conversion of client funds—statute of limitations

The trial court did not err by failing to dismiss the State Bar's action against an attorney for fraud for violation of the statute of limitations. There was a rational basis for the trial court's finding that the clients could not have discovered the fraud until defendant's deposition, when defendant admitted not paying for items listed in an expense summary furnished to the clients.

7. Accord and Satisfaction— attorney use of client funds—settlement agreement not performed

The trial court did not err by failing to dismiss the State Bar's action against an attorney as barred by the doctrine of accord and

satisfaction. There was no accord and satisfaction because defendant did not perform.

8. Collateral Estoppel and Res Judicata— actions by State Bar—DHC and Client Security Fund—independent operations

The State Bar's action against an attorney was not barred by res judicata and collateral estoppel where the parties were not the same as in the first action; while both actions were brought by the State Bar, the first was by the DHC, and the second by the Client Security Fund, which operate independently with distinctly different functions. Moreover, the Fund is a subrogee to the clients to the extent of reimbursement, and they were not a party to the first proceeding. Defendant made no argument supporting collateral estoppel.

9. Estoppel— judicial—no identity of parties

The State Bar's action against an attorney was not barred by judicial estoppel because the parties were not the same as in the earlier action, and thus there has been no change in position by plaintiff.

10. Laches— State Bar action against attorney—knowledge of claim

The trial court did not err by failing to dismiss the State Bar's action against an attorney where defendant contended that it was barred by the doctrine of laches. Defendant introduced no evidence that defendant's clients knew of the claim until it was uncovered in a deposition.

11. Subrogation— attorney abuse of clients' funds—Client Security Fund

The trial court did not err by finding that the State Bar had a valid right of subrogation in an action against an attorney. The Client Security Fund has a right of subrogation upon reimbursement to an injured client; defendant did not cite any rules that the Fund violated. No additional action is necessary to establish a subrogation interest.

12. Damages— punitive—interest

The trial court erred by awarding interest on punitive damages in an action by the State Bar against an attorney. The parties agree that interest is allowed only for compensatory damages, but plaintiff argued that the error was not preserved for appeal.

However, plaintiff would not be substantially prejudiced, review of the error would not violate the integrity of the Rules of Appellate Procedure, and it is in keeping with public policy to avoid an undeserved windfall.

13. Pleadings— State Bar action against attorney—sanctions denied

The trial court did not abuse its discretion by denying defendant's motion for Rule 11 sanctions in an action by the State Bar against an attorney. Defendant failed to present evidence supporting his motion for sanctions.

Appeal by defendant from judgment entered 18 July 2006 by Judge Jane P. Gray in Wake County District Court. Heard in the Court of Appeals 15 October 2007.

The North Carolina State Bar, by Deputy Counsel A. Root Edmonson, for plaintiff appellee.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendant appellant.

McCULLOUGH, Judge.

This case returns to us on appeal from an 18 July 2006 order finding that Willie D. Gilbert, II, ("defendant") engaged in fraudulent conduct and conversion while serving in his capacity as attorney for Michelle and Sanjay Munavalli ("Munavallis"). A summary of the facts of this case can be found in our unpublished 7 March 2006 opinion, in which we affirmed in part and vacated and remanded in part to the district court for additional findings of fact. *See N.C. State Bar v. Gilbert*, 176 N.C. App. 408, 626 S.E.2d 877 (2006).

We also note that the North Carolina State Bar ("the State Bar") has filed two separate actions against defendant. The State Bar's first action against defendant was a disciplinary action brought before the North Carolina State Bar Disciplinary Hearing Commission ("DHC"). *See N.C. State Bar v. Gilbert*, 151 N.C. App. 299, 566 S.E.2d 685 (2002), *aff'd*, 357 N.C. 502, 586 S.E.2d 89 (2003) (first action referred to as "*Gilbert I*"). Here, in its second action against defendant, the State Bar has filed its claims on behalf of the Client Security Fund ("the Fund"), seeking reimbursement for funds paid to the Munavallis as compensation for damages caused by defendant's conduct (second action referred to as "*Gilbert II*").

Wrongful Conversion

[1] In defendant's first argument, he contends the trial court erred in finding that he committed the tort of conversion. We disagree.

Whether a conclusion of law is supported by the findings of fact is a question of law which we review *de novo*. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

The tort of conversion requires (1) an unauthorized assumption and exercise of right of ownership over property belonging to another and (2) a wrongful deprivation of it by the owner, regardless of the subsequent application of the converted property. *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 57, 571 S.E.2d 836, 844 (2002), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 100 (2003). Defendant argues there was no conversion because (1) the Munavallis did not intend to earmark any part of the $6,800 expense payment for the CD-ROMs; (2) defendant did not use the funds for any purposes unauthorized by the Munavallis; and (3) defendant's receipt of the $4,627.43 at issue in this case was authorized. Defendant's arguments fail because the itemized statement of expenses he sent to the Munavallis included $4,627.43 for the CD-ROMs, which served as justification for retaining part of the Munavalli's funds; thus, the Munavallis were led to believe that the $6,800 was paid for expenses which included the CD-ROMs. Defendant's use of the $6,800 for personal expenses was an unauthorized assumption and exercise of right of ownership of the Munavallis' property. Accordingly, we affirm the trial court's conclusion that defendant committed the tort of conversion.

Equitable Estoppel

[2] In defendant's second argument, he contends the trial court erred by concluding that defendant is equitably estopped from asserting the statute of limitations as a defense to conversion. We disagree.

Under the doctrine of implied consent, plaintiff's failure to plead an affirmative defense does not result in waiver where some evidence is introduced at trial pertinent to the elements of the affirmative defense. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). On remand, the trial court found that, although plaintiff did not expressly plead this defense, there was sufficient evidence introduced at trial to support all elements of equitable estoppel.

Equitable estoppel prohibits a party "from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct . . . ." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (quoting *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998)), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). In this case, defendant used his clients' funds without their knowledge or consent, in violation of Revised Rules of N.C. Prof'l Conduct R. 1.15-2(h) (1997), and may not unjustly benefit from the Munavallis' delayed discovery. Accordingly, we affirm the trial court's ruling that defendant is equitably estopped from asserting the statute of limitations for conversion.

Fraud

[3] In defendant's third argument, he contends the trial court erred in failing to dismiss plaintiff's action because it was improperly recast as fraud. We disagree.

Defendant argues that N.C. R. Civ. P. 9(b) (2007) requires fraud to be pled with particularity, and that the lower court improperly recast the conversion lawsuit into a fraud lawsuit. "When an attorney breaches the duty owed to his client, there is a presumption of fraud." *Booher v. Frue*, 98 N.C. App. 570, 584, 394 S.E.2d 816, 823, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). Because plaintiff alleged wrongful conversion of client funds and statutory fraud in the complaint, this argument is meritless. In the complaint, plaintiff requested double damages pursuant to N.C. Gen. Stat. § 84-13 (2007), which provides:

> If any attorney commits any *fraudulent practice*, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Id. (emphasis added). No further specificity is required for a claim of statutory fraud pursuant to N.C. Gen. Stat. § 84-13. Thus, plaintiff's original complaint asserted a claim for fraud. Accordingly, defendant's argument is meritless.

In defendant's fourth argument, he contends the trial court erred in finding that he committed fraud. We disagree.

[4] As stated earlier, plaintiff's claim for statutory fraud pursuant to N.C. Gen. Stat. § 84-13 was adequately supported by defendant's misconduct. Defendant's conversion and breach of fiduciary duty are

presumed to be fraudulent. Accordingly, we affirm the trial court's conclusion that defendant violated N.C. Gen. Stat. § 84-13.

Compensatory Damages

[5] In defendant's fifth argument, he contends the trial court erred in awarding plaintiff compensatory damages. We disagree.

Defendant argues that the trial court lacked sufficient competent evidence to establish that the Munavallis suffered a loss. According to defendant, the Munavallis were not eligible for a reimbursement by the Fund because legal liability for the unpaid CD-ROMs is on defendant, not the Munavallis. Defendant argues that since the Munavallis are not liable for the CD-ROMs, they suffered no loss, are not eligible for compensatory damages, and cannot recover double damages under N.C. Gen. Stat. § 84-13. Defendant's argument is meritless. As stated earlier, defendant breached his fiduciary duty to the Munavallis and converted their funds, which caused a loss to the Munavallis, who were then entitled to double damages under N.C. Gen. Stat. § 84-13. Accordingly, we affirm the trial court's award of compensatory damages.

Statute of Limitations for Fraud

[6] In defendant's sixth argument, he contends the trial court erred in failing to dismiss plaintiff's action for fraud because it is barred by the statute of limitations. We disagree.

Defendant argues that the discovery provision of N.C. Gen. Stat. § 1-52(9) (2007)[1] does not apply in this case because plaintiff failed to present any testimony from the Munavallis on this point. According to defendant, the statute of limitations for fraud expired either on 20 April 2001, three years after the disputed list of expenses was given to the Munavallis, or on 2 June 2001, three years after defendant emptied the Munavallis' client fund account. When deposed on 20 April 2000, defendant admitted he had not paid for the CD-ROMs listed in the expense summary. The trial court found that the Munavallis had no way of knowing that defendant failed to pay for the CD-ROMs until defendant's deposition. The record contains a rational basis for this finding. Thus, we affirm the trial court's finding that the accrual date for fraud was 20 April 2000, and that the complaint, filed on 16 April 2002, was well within the statute of limitations. Accordingly, we af-

1. "(9) For relief on the ground of fraud or mistake[,] the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.*

firm the trial court's conclusion that plaintiff's claim for fraud was not barred by the statute of limitations.

Accord and Satisfaction

[7] In defendant's seventh argument, he contends the trial court erred in failing to dismiss plaintiff's action because it is barred by the doctrine of accord and satisfaction. We disagree.

> "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a 'satisfaction' is the execution or performance, of such agreement . . . ."
>
> [T]he existence of an accord and satisfaction is a question of fact[.]

Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 565, 302 S.E.2d 893, 894 (quoting *Allgood v. Wilmington Sav. & Trust Co.*, 242 N.C. 506, 515, 88 S.E.2d 825, 830-31 (1955)), *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983). " 'Not until performance, which is called *satisfaction*, however, is the original duty discharged.' " *Hassett v. Dixie Furniture Co.*, 333 N.C. 307, 313-14, 425 S.E.2d 683, 686 (1993) (quoting E. Allen Farnsworth, *Contracts* § 4.24, at 285 (1982)). Defendant argues there was accord and satisfaction when the Munavallis agreed to settle all expenses for $6,800. The trial court found that even if there was an agreement to settle all expenses for $6,800, "Gilbert failed to perform according to the terms of that agreement by failing to use any part of the $6,800 he retained to pay for the CD-ROM expenses he represented to the Munavallis as having been already actually paid or incurred." We conclude that this finding of fact is within the trial court's discretion. Accordingly, this argument is rejected.[2]

Res Judicata and Collateral Estoppel

[8] In defendant's eighth argument, he contends the trial court erred in failing to dismiss plaintiff's action because it is barred by the doctrines of *res judicata* and collateral estoppel. We disagree.

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2. Defendant also contends the trial court erred in rejecting defendant's argument that plaintiff is equitably estopped from bringing this action by the doctrine of accord and satisfaction. Because we affirm the trial court's finding that there was no accord and satisfaction, this argument fails.

Res judicata operates to bar an action if (1) the previous suit resulted in a final judgment on the merits, (2) the same cause of action is involved, and (3) the same parties (or their privies) are involved in the two actions. *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). Defendant argues that *res judicata* bars this action because (1) a final judgment was reached on the merits in *Gilbert I*, (2) it is between the same parties or their privies, and (3) it addresses issues that either were, or could have been, raised by the N.C. State Bar in the earlier disciplinary action against defendant in *Gilbert I*. The parties in *Gilbert I* and the action before us, however, are not the same. While both actions were brought by the North Carolina State Bar, the Fund has brought this action, and the DHC brought the action in *Gilbert I*. The Fund and DHC operate independently with distinctly different functions. *See* 27 N.C. Admin. Code 1D.1401-1420 (2006); N.C. Gen. Stat. §§ 84-28 to -28.1 (2007). Moreover, the Fund in this action is a subrogee to the rights of the Munavallis to the extent of the reimbursement. Because the Munavallis were not a party to the DHC proceedings in *Gilbert I*, defendant's affirmative defense of *res judicata* fails. Accordingly, we affirm the trial court's rejection of defendant's affirmative defense of *res judicata*.

In his brief, defendant fails to make any argument supporting his affirmative defense of collateral estoppel.[3] "To obtain appellate review, a question raised by an assignment of error must be presented *and argued* in the brief." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (emphasis added). Accordingly, we deem defendant's collateral estoppel argument to be abandoned.

Judicial Estoppel

[9] In defendant's ninth argument, he contends the trial court erred in failing to dismiss plaintiff's action because it is barred by the doctrine of judicial estoppel. We disagree.

Judicial estoppel requires proof of three elements: (1) the party's subsequent position is clearly inconsistent with an earlier position; (2) the earlier position was accepted by a court, thus creating the potential for judicial inconsistencies; and (3) the change in positions creates an unfair advantage or unfair detriment. *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004). De-

3. Defendant's brief references "collateral estoppel" in the heading of a section, but no substantive arguments are made supporting the affirmative defense of collateral estoppel.

fendant argues that judicial estoppel applies to bar this action because plaintiff has taken a position that is legally inconsistent with the position in *Gilbert I*. As stated above, the parties in this action and *Gilbert I* are not the same, thus defendant's judicial estoppel argument is meritless because there was no earlier position. Accordingly, we affirm the trial's conclusion that judicial estoppel does not bar plaintiff's action.

Laches

[10] In defendant's tenth argument, he contends the trial court erred in failing to dismiss plaintiff's action because it is barred by the doctrine of laches. We disagree.

Laches is an affirmative defense that requires proof of three elements: (1) the delay must result in some change in the property condition or relations of the parties, (2) the delay must be unreasonable and harmful, and (3) the claimant must not know of the existence of the grounds for the claim. *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). Defendant failed to establish the third element of this defense because he introduced no evidence that the Munavallis knew of the claim until it was uncovered in defendant's 20 May 2000 deposition. Accordingly, we affirm the trial court's rejection of this defense.

Subrogation

[11] In defendant's eleventh argument, he contends the trial court erred in finding that plaintiff had a valid right of subrogation. We disagree.

Defendant argues that there was no valid right of subrogation because the Fund violated its own rules in awarding the Munavallis a reimbursement and in obtaining a valid right of subrogation. The Fund has a right of subrogation upon reimbursement to an injured client.[4] No additional action is necessary to establish a subrogation interest. *See In re Gertzman*, 115 N.C. App. 634, 635-36, 446 S.E.2d 130, 132 (1994) ("If the Board approves payment to a claimant, the State Bar is subrogated to the rights of the claimant to the extent of any reimbursement by the Fund plus expenses."). Defendant fails to cite any rules that the Fund allegedly violated. Accordingly, we find defendant's argument to be meritless.

4. "In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney . . . ." 27 N.C. Admin. Code 1D.1419(a) (2006).

Interest Calculation

[12] In defendant's twelfth argument, he contends the trial court erred in awarding interest on punitive damages. We agree.

Defendant argues, and plaintiff concedes, that the trial court erred in awarding pre-judgment and post-judgment interest to both the compensatory damages and the punitive double damages. Both parties agree that N.C. Gen. Stat. § 24-5(b) (2007) only allows interest for compensatory damages. Plaintiff argues that defendant is barred from raising this error because the issue was not preserved for appellate review pursuant to N.C. R. App. P. 10(b)(1) (2008). However, this Court does not "treat[] violations of the Rules [of Appellate Procedure] as grounds for automatic dismissal. Instead, the Court has weighed (1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case." *Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, 15, 631 S.E.2d 1, 10, *disc. review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006). Applied to the present facts, (1) plaintiff would not be substantially prejudiced, (2) review of this error would not violate the integrity of the Rules of Appellate Procedure, and (3) it is in keeping with public policy to avoid an undeserved windfall. Accordingly, we vacate the trial court's award of interest and remand for a new calculation of interest based on N.C. Gen. Stat. § 24-5.

Rule 11 Sanctions

[13] In defendant's thirteenth argument, he contends the trial court erred in denying defendant's motion for N.C. R. Civ. P. 11 (2007) ("Rule 11") sanctions. We disagree.

The standard of review for Rule 11 sanctions is whether the trial court's decision was an abuse of discretion. *Turner v. Duke University*, 101 N.C. App. 276, 280, 399 S.E.2d 402, 405, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). Because defendant failed to present evidence supporting his motion for sanctions, the trial court did not abuse its discretion in denying sanctions. Accordingly, we affirm the trial court's denial of Rule 11 sanctions.

For the previously discussed reasons, we affirm in part and vacate and remand in part to the trial court for a new calculation of damages.

Affirmed in part, vacated and remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.

VIOLET KERR, PLAINTIFF v. FRED LONG, JR., M.D., DEFENDANT

No. COA07-916

(Filed 18 March 2008)

1. Appeal and Error— preservation of issues—failure to include transcript of deposition

Although defendant doctor in a medical negligence case devoted seven pages in his brief to discussing and quoting from a doctor's videotaped deposition played for the jury, the Court of Appeals was unable to review the contents of this testimony in determining whether the trial court properly granted defendant's motion for directed verdict because: (1) the transcript of the deposition was not included as part of the record on appeal; and (2) N.C. R. App. P. 9 provides that review is limited to the record on appeal, verbatim transcripts, and any other items properly filed with the record.

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

A de novo review revealed that the trial court did not err in a medical negligence case by granting defendant's motion for directed verdict because: (1) even if the trial court erred by excluding a doctor's testimony with respect to the applicable standard of care, the trial court's order still included a ruling that plaintiff failed to meet her burden of proof in establishing proximate cause, and plaintiff failed to challenge this alternative basis for the trial court's ruling; and (2) plaintiff failed to present an argument in her brief with respect to her assignment of error that the trial court erred in granting defendant's motion for directed verdict.

Judge HUNTER concurring in result in separate opinion.

Appeal by plaintiff from an order entered 4 January 2007 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 February 2008.

Cedric R. Perry, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by David D. Ward, Jaye E. Bingham, and Michael C. Allen, for defendant-appellee.

JACKSON, Judge.

Violet Kerr ("plaintiff") appeals from the trial court's order entered 4 January 2007 granting a directed verdict in favor of Dr. Fred Long, Jr. ("defendant"). For the following reasons, we affirm.

On 21 January 2003, plaintiff began experiencing pain in her gallbladder area and presented to the Emergency Department at WakeMed, complaining of a sharp, stabbing pain in her upper abdomen. Doctors at WakeMed performed several tests on plaintiff, noted an enlargement in her stomach area, and instructed her to seek further treatment.

On 24 January 2003, plaintiff presented to Dr. Quigless, complaining of severe abdominal pain. An ultrasound performed on 28 January 2003 indicated that plaintiff had gallstones. Dr. Quigless subsequently left the medical practice group, and defendant took over plaintiff's care with her consent.

On 31 January 2003, plaintiff presented to defendant, who explained to plaintiff the potential for gallbladder surgery. Defendant explained that although he would attempt laparoscopic cholecystectomy, the surgery could be converted to an open procedure. Plaintiff claimed that she could not remember defendant explaining to her that there could be reasons to convert the minimally-invasive laparoscopic procedure into a more invasive open procedure; however, she acknowledged that on 7 February 2003, she signed the "request for operation or other procedure," which expressly indicated that the procedure was a laparoscopic cholecystectomy, "[p]ossible open." Defendant also provided plaintiff with a pamphlet explaining the procedure and its risks, including the possibility of striking and injuring the common bile duct. At trial, plaintiff testified that she was "aware going into the procedure that one of the risks was an injury to the common bile duct."

On 8 February 2003, defendant performed gallbladder surgery on plaintiff at Wake Medical Hospital. Plaintiff testified that on 9 February 2003, defendant came into her room and stated that he had made a mistake. She also noticed at that time that there was "some kind of J bag" attached to her "to keep the poison from going into

[her] system." Plaintiff testified that defendant informed her that she would be sent to Chapel Hill. The same day, plaintiff was transferred to UNC Hospitals and seen by Dr. Behrns. Plaintiff stated that Dr. Behrns attempted to repair her bile duct by hooking a part of her small intestines to the common bile duct. Plaintiff stated that she believed she would not be at UNC Hospitals for more than one night as a result of the procedure, but she remained at UNC Hospitals for five or six days.

Plaintiff testified that in 2003, 2004, and 2005, she periodically felt tenderness at her surgical site, with a pulling, tearing pain on the right side. In 2006, plaintiff had a CT scan performed, which revealed the presence of "something kind of suspicious[,] . . . something they couldn't figure out." Plaintiff subsequently was sent to UNC Hospitals, where she presented to Dr. John Martinie ("Dr. Martinie") in February 2006. A colonoscopy performed on plaintiff was determined to be "normal." In March 2006, Dr. Martinie performed an exploratory laparoscopic procedure to identify what was revealed by the CT scan. Plaintiff acknowledged that "[t]hey couldn't find anything that they saw on the CT [scan]," and the procedure only revealed the presence of scar tissue. At a follow-up visit with Dr. Martinie, plaintiff stated that she "still had a little pull, but it wasn't as bad." Plaintiff has not returned to UNC Hospitals since that follow-up visit, and at trial, she described her current condition as a "slight pulling pain."

On 29 December 2004, plaintiff filed a complaint alleging medical negligence against defendant and his employer, Premier Surgical Associates, PLLC ("Premier"). On 22 May 2006, plaintiff took a voluntary dismissal against Premier, and plaintiff's action against defendant proceeded to trial on 2 and 3 January 2007.

At trial, plaintiff sought to present the 16 May 2006 videotaped deposition of Dr. Mitchell M. Frost ("Dr. Frost"). After hearing arguments of counsel and reviewing the record, the trial court ruled that, as a matter of law, Dr. Frost was not "a competent expert witness to testify as to the standard of care of the question of medical negligence." Counsel for plaintiff stated that he did "not wish to have the other portion of the deposition [of Dr. Frost] presented to the jury." Counsel for plaintiff declined to call defendant, and stated that he had no further evidence. By order entered 4 January 2007, the court granted defendant's motion for a directed verdict, ruling that (1) Dr. Frost did not satisfy the requirements of an expert witness in a medical malpractice case; and (2) plaintiff failed to offer competent

testimony showing that defendant was negligent and, therefore, failed to meet her burden of proof. Thereafter, plaintiff gave timely notice of appeal.

[1] As a preliminary matter, we note that defendant devotes seven pages of his brief to discussing and quoting from Dr. Martinie's videotaped deposition, which was played for the jury. The transcript of this deposition, however, was not included as part of the record on appeal. Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal, verbatim transcripts constituted in accordance with Rule 9, and any other items filed with the record in accordance with Rule 9(c) and 9(d). *See* N.C. R. App. P. 9(a) (2006). Here, the only transcripts constituted in accordance with Rule 9 and properly presented for review by this Court are those from the depositions of (1) Dr. Frost on 16 May 2006; (2) Dr. Frost on 15 December 2006; (3) Dr. Jerry Stirman, Jr. on 24 April 2006; and (4) defendant on 26 May 2005. Accordingly, we are unable to review the contents of Dr. Martinie's testimony in determining whether the trial court properly granted defendant's motion for directed verdict.

[2] "This Court reviews a trial court's grant of a motion for directed verdict *de novo*." *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005). Therefore, we must determine "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 [wa]s sufficient to be submitted to the jury." *Brookshire v. N.C. Dep't of Transp.*, 180 N.C. App. 670, 672, 637 S.E.2d 902, 904 (2006) (internal quotation marks and citation omitted). " 'When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' " *Pope v. Cumberland County Hosp. Sys., Inc.*, 171 N.C. App. 748, 750, 615 S.E.2d 715, 717 (2005) (quoting *Felts v. Liberty Emergency Serv.*, 97 N.C. App. 381, 383, 388 S.E.2d 619, 620 (1990)).

On appeal, plaintiff contends that the trial court erred in excluding Dr. Frost's testimony as to the applicable standard of care. Specifically, plaintiff contends that "Dr. Frost was competent to testify as to the skill and technique that was required of [defendant], as the evidence, viewed in the light most favorable to [plaintiff], demonstrated that [plaintiff]'s expert witness qualified to testify as an

expert in the case at bar." The trial court, however, based its order not only upon plaintiff's failure to satisfy her burden of presenting competent testimony showing that defendant breached the applicable standard of care but also that plaintiff failed to establish proximate cause.

It is well-established that "[i]f the evidence failed to show a causal connection between the alleged negligence and the injury complained of, motion for directed verdict in favor of the defendant was proper." *Hart v. Warren*, 46 N.C. App. 672, 678, 266 S.E.2d 53, 58, *disc. rev. denied*, 301 N.C. 89 (1980). Therefore, even if the trial court erred in excluding Dr. Frost's testimony with respect to the applicable standard of care, the trial court's order still includes a ruling that plaintiff failed to meet her burden of proof in establishing proximate cause. Because plaintiff failed to challenge this alternate basis for the trial court's order granting defendant's motion for directed verdict, this Court need not evaluate her claims with respect to Dr. Frost's knowledge of the applicable standard of care and his competency to serve as an expert witness. *See* N.C. R. App. P. 10(a), 10(c), 28(a) (2006).

Additionally, although plaintiff's sole assignment of error in the record on appeal states, *inter alia*, that the trial court "abused [its] discretion by . . . granting Defendant's motion for directed verdict," plaintiff has failed to present any argument in the body of her brief directly related to the trial court's order granting defendant's motion for directed verdict. The only portions of her brief in which the directed verdict order arguably is discussed are the standard of review[1] and conclusion sections. Plaintiff presented an argument in her brief with respect to her assignment of error that the trial court erred in excluding Dr. Frost's testimony, but she failed to present any argument in her brief with respect to her assignment of error that the trial court erred in granting defendant's motion for directed verdict. It is well-settled that "[a]ssignments of error . . . in support of which no *reason or argument* is stated . . . will be taken as abandoned." N.C. R. App. P 28(b)(6) (2006) (emphasis added); *see also* N.C. R. App. P.

1. Here, plaintiff stated only the *trial court's* standard for ruling on a motion for directed verdict. Although "the reviewing court is confronted with the identical task as the trial court" with respect to a directed verdict in a negligence action, *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992), it nevertheless was plaintiff's burden as the appellant to state the applicable standard of *appellate* review. *See* N.C. R. App. P. 28(b)(6) (2006) (requiring an appellant's brief to include "a concise statement of the applicable standard(s) of review for each question presented" as well as "citations of the authorities" supporting the proposed standard of appellate review).

28(a) (2006) ("Questions raised by assignments of error in appeals from trial tribunals but not then *presented and discussed* in a party's brief, are deemed abandoned." (emphasis added)); *see, e.g.*, *Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 453, 642 S.E.2d 502, 507, *disc. rev. denied*, 361 N.C. 695, 652 S.E.2d 650 (2007). Therefore, we deem plaintiff's assignment of error related to the order granting the directed verdict abandoned.[2]

Because plaintiff has failed to present an argument with respect to either the alternate basis for the trial court's order or the trial court's order itself, a resolution of defendant's argument with respect to Dr. Frost's testimony is unnecessary for a resolution of the instant appeal. Accordingly, the trial court's order granting defendant's motion for directed verdict is affirmed.

Affirmed.

Judge HUNTER concurs in the result in a separate opinion.

Judge BRYANT concur.

HUNTER, Judge, concurring in the result.

I concur with the result of the majority's opinion but would affirm the trial court's entrance of a directed verdict on the ground that Violet R. Kerr's ("plaintiff") expert's testimony was properly excluded, thereby making a directed verdict in favor of Dr. Fred L. Long, Jr. ("defendant") appropriate.

The entry of a directed verdict is reviewed *de novo*. *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005). As the majority correctly notes, upon a defendant's motion for a directed

2. Although not bound by unpublished opinions, *see State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918 (2007), we note that similar conclusions have been reached by this Court. *See, e.g., Garrison v. Holt*, No. COA06-1085, 2007 N.C. App. LEXIS 1883, at *9-10 n.4 (N.C. Ct. App. Sept. 4, 2007) ("Although Respondent assigns error to the trial court's denial of her Motion for New Trial and for Relief from Judgment and mentions Rule 59 and Rule 60 of the North Carolina Rules of Civil Procedure in the 'Standard of Review' and 'Conclusion' sections of her brief, she asserts no argument on these grounds in the body of her brief. Therefore, the assignment of error addressing Rule 59 and Rule 60 is deemed abandoned."); *Grier v. Earl Tindol Ford, Inc.*, No. COA04-815, 2005 N.C. App. LEXIS 820, at *3 (N.C. Ct. App. Apr. 19, 2005) ("Plaintiff also assigns error to the court's granting defendant's motion for directed verdict. While plaintiff cites two cases regarding the standard of review on appeal of a grant of directed verdict, he makes no argument regarding their application to his case. We deem this assignment abandoned.").

verdict in a medical malpractice case, " 'the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' " *Pope v. Cumberland Cty. Hosp. Sys., Inc.*, 171 N.C. App. 748, 750, 615 S.E.2d 715, 717 (2005) (citation omitted).

In this case, the trial court excluded the testimony of Dr. Mitchell M. Frost, plaintiff's expert. Plaintiff argues that the exclusion of such testimony was in error, thereby rendering the trial court's grant of directed verdict for defendant erroneous. I disagree.

In medical malpractice cases, to prevail, plaintiffs must establish by the greater weight of the evidence that the care of the defendant-healthcare 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." N.C. Gen. Stat. § 90-21.12 (2007). In opposing a motion for summary judgment or directed verdict, "a plaintiff must demonstrate that his expert witness is 'competent to testify as an expert witness to establish the appropriate standard of care' in the relevant community." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477-78, 624 S.E.2d 380, 384 (2006) (quoting *Billings v. Rosenstein*, 174 N.C. App. 191, 196, 619 S.E.2d 922, 925 (2005)). Simply put, a plaintiff must produce expert testimony that: (1) the expert is familiar with the community where the injury occurred or a similar community; (2) the expert was familiar with the area or similar area on the date in which the injury occurred; and (3) the expert has similar training and experience as the defendant.

In this case, plaintiff's expert testimony regarding his knowledge of Wake County, where the injury occurred, came from a website he visited in 2004. The date of the alleged injury was in 2003. Defendant therefore argues that the trial court did not err in excluding Dr. Frost's testimony. I agree.

In *Purvis*, this Court held that an expert's testimony was properly excluded where the expert's only knowledge of the locality came four years after the alleged injury. *Id.* at 480-81, 624 S.E.2d at 385. We reasoned that "N.C. Gen. Stat. § 90-21.12 . . . specifically states that the expert must be familiar with the standard of care in the same or similar community '*at the time of the alleged act giving rise to the cause of action*.' " *Id.* at 480, 624 S.E.2d at 385 (emphasis added) (quoting

N.C. Gen. Stat. § 90-21.12). Although plaintiff's expert did not wait four years before gathering information on Wake County, he still failed to comply with the statute insofar as it requires knowledge at the time of the injury.[3] Dr. Frost even testified that the time between the injury and his research on the standard of care in Wake County that he "would expect that there were some . . . changes" in the standard. *Cf. Roush v. Kennon*, 188 N.C. App. 570, 576, ––– S.E.2d. –––, ––– (No. COA07-209 filed 5 February 2008) (holding that an expert can comply with the timing requirement if an expert's research, even after his or her deposition, revealed that the standard of care in his or her community was the same or similar to the standard of care in the community in which he or she is testifying when the injury occurred). I would therefore hold that plaintiff's expert's testimony was properly excluded per *Purvis* and thus plaintiff has failed to produce sufficient expert testimony to defeat defendant's motion for a directed verdict, and I would affirm the ruling of the trial court on that ground.

CECI AUSTIN, PLAINTIFF, v. BALD II, L.L.C., DEFENDANT

No. COA07-1152

(Filed 18 March 2008)

1. Appeal and Error— appealability—denial of summary judgment—final judgment on merits

An appeal from the denial of summary judgment was not considered after a final judgment on the merits.

2. Nuisance— spite fence—evidence sufficient

The trial court did not err by denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict in a spite fence action where there was more than a scintilla of evidence supporting each element of plaintiff's claim.

3. Damages— punitive—spite fence

The trial court erred by not instructing the jury on the issue of punitive damages in a spite fence action where defendant argued that punitive damages are categorically not available in

3. The fact that plaintiff's expert relied on internet research is not a sufficient ground to exclude an expert's testimony. *See Coffman v. Roberson*, 153 N.C. App. 618, 624-25, 571 S.E.2d 255, 259 (2002) (holding that experts may rely in part on internet research).

spite fence cases, but plaintiff here tendered evidence of pecuniary loss and personal discomfort, unlike *Burris v. Creech*, 220 N.C. 302.

Appeal by Plaintiff and Defendant from judgment entered 2 April 2007 and order entered 25 April 2007 by Judge Quentin T. Sumner in Pasquotank County Superior Court. Heard in the Court of Appeals 20 February 2008.

C. Everett Thompson, II, for Plaintiff-Appellant.

Wills & Wills, P.C., by Gregory E. Wills, for Defendant-Appellant.

ARROWOOD, Judge.

Bald II, L.L.C., (Defendant), owned and operated by Dr. Francis A. Bald (Dr. Bald) appeals from judgment entered on 2 April 2007 awarding Plaintiff damages in the amount of $1.00, and ordering Defendant to remove the ten foot wooden fence and erect a new fence no higher than six feet. This judgment was based upon a jury verdict determining that Defendant erected a spite fence along Ceci Austin's (Plaintiff's) property.

On 5 April 2007 Plaintiff filed a motion for new trial on the issue of punitive damages, which the trial court denied. From the judgment and order, Plaintiff also appeals. We affirm the trial court's judgment in part and remand in part for a new trial on the issue of punitive damages.

Plaintiff owns a home in Elizabeth City in Pasquotank County, and Defendant owns the adjoining property, upon which Riverwind Apartments (Riverwind) is located. Dr. Bald's son, Steven Bald (Bald), managed Riverwind. In 2005, Defendant planned to build additional condominiums on the property next to Riverwind—a plan which Defendant abandoned. On 20 December 2005, instead of building condominiums, Defendant erected a ten foot wooden fence on Plaintiff's property line, obstructing Plaintiff's view of the Pasquotank River and restricting the sunlight into Plaintiff's yard. The fence along the southern boundary of Defendant's property, which did not adjoin Plaintiff's property, was only six feet tall. Plaintiff alleged that Defendant "erected [the] fence for no legitimate purpose [or beneficial use] and has, in fact, erected the fence for the purpose of spite[.]" Plaintiff alleged that the fence was "a private nuisance" and that

Defendant built the fence "to satisfy vengeful and malicious motive to injure the Plaintiff[.]" Plaintiff stated that the fence will "detrimental[ly] effect . . . the property value" of her home.

In an affidavit submitted 6 September 2006, Plaintiff stated that "I have lived at [this residence] for more than 11 years[,] . . . [and] I have always had a small wooden fence at or near the boundary of my property with the defendant's property, which wooden fence was approximately three feet high." Plaintiff stated that the fence "[defined] my property line and . . . fenc[ed] in my small dog." When Plaintiff wrote Defendant to "advise him" that new ten feet tall fence "was very obtrusive, blocked my view of the Pasquotank River, blocked the sunlight in my side yard and blocked any breezes that I would normally get off the Pasquotank River[,]" she received "no response" from Defendant.

In an affidavit submitted 6 September 2006, Mary McLendon (McLendon) stated that "[s]hortly before construction [of the fence] began . . . I noticed two gentlemen who worked for Riverwinds . . . measuring and marking a line along the property line of [Plaintiff][.]" When McLendon asked the men "what they were doing[,]" the men replied, "building a fence[.]" McLendon inquired why, and the men said, "we are going to show her[,]" pointing towards Plaintiff's house.

On 28 August 2006, Defendant filed a motion for summary judgment, which the court denied on 19 September 2006, concluding that "there is a genuine issue of material fact[.]" The matter was tried before a jury on 5 March 2007, and on 2 April 2007, the trial court entered judgment ordering Defendant to remove the fence and to erect a new fence no taller than six feet; the court awarded Plaintiff $1.00 in compensatory damages. From this judgment, Plaintiff and Defendant appeal.

"A spite fence is one which is of no beneficial use to the owner and which is erected and maintained solely for the purpose of annoying a neighbor." *Welsh v. Todd*, 260 N.C. 527, 528, 133 S.E.2d 171, 173 (1963). " '[A] fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's window is a nuisance.' " *Barger v. Barringer*, 151 N.C. 433, 434, 66 S.E. 439, 439 (1909) (citing 12 Am. & Eng. Enc., 1058, and cases cited in note; 1 Cyc., 789). "It may be abated, subject to the same equitable principles which govern injunctive relief generally, and damages recovered if any have been sustained." *Welsh*, 260 N.C. at 528, 133 S.E.2d at 173 (citing *Burris v. Creech*, 220 N.C. 302, 17 S.E.2d 123 (1941)).

"Courts have denied equitable relief where the walls and fences complained of screened a defendant's premises from objectionable noises, odors, and unseemly conduct on the plaintiff's property." *Welsh*, 260 N.C. at 529, 133 S.E.2d at 173 (citations omitted).

Summary Judgment

[1] In its first assignment of error, Defendant contends that the trial court erred by denying Defendant's motion for summary judgment.

This Court cannot consider an appeal from the denial of the summary judgment motion now that a final judgment on the merits has been made:

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

WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 252, 644 S.E.2d 245, 247 (2007) (citing *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)). Thus, we cannot address Defendant's first assignment of error.

Rule 50

[2] By Assignments of Error Three, Four and Five, Defendant contends that the trial court erred by denying Defendant's motions for directed verdict at the close of Plaintiff's evidence and at the close of all evidence and its motion for judgment notwithstanding the verdict under Rule 50 of the North Carolina Rules of Civil Procedure.

"[T]he questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law[.]" *In re Will of Buck*, 350

N.C. 621, 624, 516 S.E.2d 858, 860 (1999). On appeal, this Court thus reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*. *See Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003). The standard of review of a ruling entered upon a motion for directed verdict and judgment notwithstanding the 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.' " *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). "A motion for . . . [directed verdict and] judgment notwithstanding the verdict 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Denson*, 159 N.C. App. at 412, 583 S.E.2d at 320 (quoting *High Rock Realty*, 151 N.C. App. at 250, 565 S.E.2d at 252); *see also N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 362, 649 S.E.2d 14, 20 (2007).

The evidence presented by Plaintiff, viewed in a light most favorable to her, showed the following: Defendant built the fence surrounding the apartment complex six feet tall along the southern boundary of its property, but ten feet tall along Plaintiff's property. When asked the reason for building the tall fence, an employee of Defendant stated, "we're going to show her," indicating toward Plaintiff's home. Moreover, both Plaintiff and an employee of Defendant testified that no one had crossed from Plaintiff's property onto the Riverwind Apartments[.]" At trial, when asked, "[f]or the [twelve] years . . . that you've lived there, has there ever been an issue with people crossing from your property[,]" Plaintiff replied, "[n]ever, never, to my knowledge, ever." Moreover, when asked, "[h]ave you ever had anybody cross over from Ms. Austin's property, to your knowledge, onto the Riverwinds property[,]" Bald, the manager of Riverwind, responded, "[n]ot to my knowledge." Moreover, William Manning, Plaintiff's neighbor, testified that he addressed Dr. Bald, owner and operator of Defendant corporation about the "fence being high[,]" and Dr. Bald replied that "we wanted to build some apartments but the city . . . wouldn't let us." Then, immediately after the statement that the city thwarted Defendant's plans, Dr. Bald stated that Defendant decided to "build a security fence." Notably, Plaintiff served on the city council. When Manning asked Dr. Bald, "couldn't you make [the fence] smaller[?]" Dr. Bald and Manning argued briefly, and Dr. Bald asked Manning to "get off the property."

The evidence also shows that in 2005, Dr. Bald planned to build condominiums on the Riverwind Apartments property. McClendon, who lived two blocks from Riverwind Apartments testified that she was "aware . . . [that] there were . . . plans to build condominiums on [Defendant's] property[,]" because Defendant posted, in the Riverwind Health Club, "[floor] plans . . . showing . . . how the apartments would be situated[.]" Later, McClendon testified that Defendant took down the floor plans; McClendon inquired why, and an employee of Defendant stated, "Well[,] your city council took care of that[.]" Even though the evidence shows that Plaintiff was a member of the city council, she "played no role . . . in that condominium application process[.]" Defendant's fence was erected only a few months after the condominium project was abandoned, even though Dr. Bald testified in his deposition that the "security problems" had been "constant" at Riverwind "since 2003." Furthermore, the original condominium plans included a six foot fence along Plaintiff's property, but after the condominium project was abandoned, the fence grew to ten feet. Finally, the evidence shows that "the fence was still in progress when [Plaintiff] filed the lawsuit[.]"

After examining the evidence in the light most favorable to Plaintiff, and giving Plaintiff the benefit of every reasonable inference drawn therefrom, we conclude that the evidence was sufficient to be submitted to the jury. There was more than a scintilla of evidence supporting each element of Plaintiff's claim. The associated assignments of error are overruled.

Defendant does not bring forward or argue its Assignments of Error Two, Six and Seven; therefore, they are deemed abandoned. N.C.R. App. P. 28(b)(6).

Punitive Damages

[3] In her Cross-Appeal, Plaintiff contends that the trial court erred by not instructing the jury on the issue of punitive damages. We agree.

" 'When a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction.' " *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 55, 607 S.E.2d 286, 291 (2005) (quoting *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 464, 553 S.E.2d 431, 441 (2001)). "In reviewing the trial court's decision to give or not give a

jury instruction, the preliminary inquiry is whether, in the light most favorable to the proponent, the evidence presented is sufficient to support a reasonable inference of the elements of the claim asserted." *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995) (citing *Anderson v. Austin*, 115 N.C. App. 134, 443 S.E.2d 737, 739 (1994)). "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." *Worley*, 121 N.C. App. at 168, 465 S.E.2d at 18 (citing *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972)). "[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence . . . and to apply the law to the various factual situations presented by the conflicting evidence." *Faeber*, 16 N.C. App. at 430, 192 S.E.2d at 2.

Plaintiff's cause of action in the instant case is based on the following: "A spite fence is one which is of no beneficial use to the owner and which is erected and maintained solely for the purpose of annoying a neighbor." *Welsh*, 260 N.C. at 528, 133 S.E.2d at 173. "[A] fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's window is a nuisance." *Barger*, 151 N.C. at 434, 66 S.E. at 439 (internal quotation marks omitted). The jury here found Defendant culpable of erecting a "spite fence".

"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." *Scarborough v. Dillards, Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, —— (2008); *see also* N.C. Gen. Stat. § 1D-15 (2007). "The claimant must prove the existence of an aggravating factor by clear and convincing evidence." N.C. Gen. Stat. § 1D-15(b) (2007). Malice, as defined by the punitive damages statute, 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) (2007).

In *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (citations omitted), our Supreme Court held:

> The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself . . . [o]r

> it may be established by allegations sufficient to allege a tort where that tort, *by its very nature*, encompasses any of the elements of aggravation.

Id. Notably, the definition of "spite fence," requires that the " 'fence [be] erected maliciously[.]' " *Barger*, 151 N.C. at 434, 66 S.E. at 439 (citation omitted); *see also Mehovic v. Mehovic*, 133 N.C. App. 131, 514 S.E.2d 730 (1999); N.C. Gen. Stat. § 1D-15(a)(2) (2007).

Defendant cites *Burris* for the proposition that punitive damages are categorically unavailable in "spite fence" cases. However, this argument is not the correct reading of our Supreme Court's holding in *Burris*. In *Burris*, the Court held that "[i]t is not thought the case is one in which punitive damages [should be] awarded." The Court reasoned that "[t]here is no evidence [here] that the plaintiff has suffered any pecuniary loss or personal discomfort[,]" and furthermore, "[a]n abatement of the nuisance . . . alleviate[d] the damage[.]" *Burris*, 220 N.C. at 304, 17 S.E.2d at 124. Thus, the Court held that the trial court erred by allowing the issue of punitive damages, based on these facts, to go to a jury.

We conclude that the Supreme Court in *Burris* did not intend to create a categorical exception to punitive damages in "spite fence" cases, but rather, held that under the facts of that case plaintiff had not suffered any pecuniary loss or personal discomfort that would entitle him to pecuniary or punitive damages. The facts in the instant case differ from those of *Burris*. Here, Plaintiff has tendered evidence of pecuniary loss and personal discomfort. We conclude that the evidence presented by Plaintiff is sufficient to meet the elements necessary to require the submission of the punitive damages to the jury. Thus, the trial court erred by failing to do so.

Affirmed in part, and Remanded in part for a new trial on punitive damages.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. THADDIUS RAEFIELD WRIGHT, DEFENDANT

No. COA07-611

(Filed 18 March 2008)

Jury— selection—*Batson* challenge—failure to provide race-neutral explanations for each peremptory challenge used on African-Americans

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary case by finding the State had not engaged in purposeful discrimination when the State did not provide a race-neutral explanation for each African-American it removed from the jury by peremptory challenge, and defendant is granted a new trial, because: (1) defendant's counsel brought all seven of the State's peremptory challenges to the court's attention since they were all used on African-American members of the jury pool; (2) at most, the prosecutor offered a race-neutral explanation for five of the seven pertinent potential jurors; and (3) the State failed to meet its burden to offer a race-neutral explanation for each peremptory challenge at issue, and the trial court could not have made a finding of a valid excuse for each of those jurors when the prosecutor had not even offered any explanation as to two of the jurors.

Appeal by defendant from judgment entered on or about 27 October 2006 by Judge Kenneth C. Titus in Superior Court, Durham County. Heard in the Court of Appeals 28 November 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tina A. Krasner, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of assault with a deadly weapon with intent to kill inflicting serious injury and first degree burglary. Defendant appeals. The dispositive question before this Court is whether the trial court erred by finding the State had not engaged in purposeful discrimination when the State did not provide a race-neutral explanation for each African-American whom it had

removed from the jury by peremptory challenge. For the following reasons, we grant a new trial.

I. Background

The State's evidence tended to show the following: On 17 November 2004, Ruben Alvin David Garnett ("Garnett") was at home at Foxfire Apartments with his paralyzed cousin Demoris Wall ("Wall"), and his cousin's girlfriend, Akeisha Judd ("Judd"). Garnett awoke to "a kick on the door and somebody yelling 'police'." Garnett got up to open the door and was shot four to five times. Garnett went back into the room he had been in and "played dead." Garnett heard someone come in and then passed out. Judd heard gunshots at her bedroom door, and Wall called the police. When Garnett awoke he found Jigger, the dog, dead and the front door off of its hinges.

Officer Douglas Rausch ("Officer Rausch"), a police officer with the City of Durham was on his way home when he received a call for a shooting on Wyldewood. Officer Rausch

> spotted a vehicle [("suspect vehicle")] coming out of the Wyldewood area, turning right onto Stadium, which would make it come straight at [him]. And as [Officer Rausch] passed, there were three occupants in the [suspect vehicle], and they gave, in [his] terms, a million-mile stare, which meant [they] had seen [Officer Rausch].

As Officer Rausch turned around the suspect vehicle picked up speed. Officer Rausch "gave the other officers that were coming to the scene the description of the [suspect] vehicle, license plate, and told them to be on the lookout[.]" Approximately six to eight vehicles joined in the chase. Defendant and two others engaged the police in a chase which lasted approximately an hour and ended when the suspect vehicle collided with another vehicle. Three firearms were recovered—one in the front passenger seat of the suspect vehicle, one on the curb by the suspect vehicle, and one on Rowemont Street, a street on the chase route. On or about 7 March 2005, defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury (hereinafter referred to as "AWDWIKISI"), first degree burglary, three counts of possession of a firearm by a felon, felonious speeding to elude arrest, and cruelty to animals. Trial was held on 23-27 October 2007. After jury selection, defendant's counsel "offer[ed] an objection based on *Batson* [because] every single person the State dismissed from [the] jury panel happened to be of the

African-American persuasion[,] the same race as the defendant." The following dialogue took place:

> MS. BAKER-HARRELL: If we go back through it, Juror Number One that was originally in the box that was dismissed by the State was Ms. Mack. She was a black female. Juror Number Two that was dismissed by the State was a black male—sorry, had to look back through my notes. He was a black male. Juror Number Seven was a black male. That was Mr. Williams. Juror Number Nine was a black male. That was Mr. Stevenson, who got confused with—Mr. Stevens got confused with Mr. Stevenson.
>
> THE COURT: He was a white male.
>
> MS. ELLIS: He was a white male.
>
> MS. BAKER-HARRELL: Okay. Now, Mr. Stevens was the white male. All right.
>
> THE COURT: Both were white males.
>
> MS. BAKER-HARRELL: Juror Number One—
>
> THE COURT: Stevens and Stevenson were both white males.
>
> MS. BAKER-HARRELL: No, sir. I would beg to disagree with the Court.
>
> THE COURT: Ms. Baker-Harrell, you may disagree with me, but you're wrong. Both Mr. Stevens and Mr. Stevenson were both white males.
>
> MS. BAKER-HARRELL: Okay. Okay. Your Honor, I—I respectfully disagree, but I'll just point out that Juror Number Nine was the gentleman who was married, and who pointed out—
>
> THE COURT: Oh, I'm sorry. It was Mr. Johnson.
>
> MS. ELLIS: Your Honor, yes. Mr. Stevenson is a black man that has the DWI.
>
> THE COURT: That's correct.
>
> MS. BAKER-HARRELL: Yes, sir.
>
> THE COURT: Oh, I apologize to you.

MS. ELLIS: I did the same thing; I pulled up Mr. Johnson.

THE COURT: I'm sorry. That was Mr. Johnson.

MS. BAKER-HARRELL: Yes, sir. And again, sir, I wasn't trying to be rude, but I did note it—

THE COURT: Make your points.

MS. BAKER-HARRELL: —on there that he was a black male, sir.

Juror Number 12, Ms. Reeves, was excused by the State. She was a preschool teacher. She was a black female. The next person—I'm trying to find her—excused by the State was seated in Mr. Johnson's spot, which was Juror Number Ten, and she became Juror Number Ten. Her name was Ms. Miller. That was a black female, Alberta Miller.

THE COURT: That was in number nine.

MS. ELLIS: Nine.

THE COURT: Mr. Stevenson's seat.

MS. BAKER-HARRELL: Okay. I'm sorry. I switched my notes when I was—when you told me it wasn't, and I said, no, I got it. I apologize. I got them in the wrong spot. But again though, she was dismissed by the State. She was a black female, and then in going to the alternate juror that was presented to the Court, Ms. Robin Evans, she was a black female, Your Honor, and you know, if you look at—that's why I'm pointing out to the Court that everybody that's been dismissed by the State have been of African-American persuasion, which happens—so happens to be the race of my client.

THE COURT: All right.

Ms. Ellis, do you wish to respond?

MS. ELLIS: Yes, Your Honor. Going through each of them, Ms. Brown, who was also a black female, was the first to be impanelled [sic], seat number six. She was left on the panel. Ms. Mary Bass was left on the panel. The reasons why that the others were dismissed—the alternate juror had no pets. That's one of the things that we were looking for were pets, not necessarily color. Your Honor, Mr. Stevenson was dismissed. He had a DWI, 72 hours of jail time. I mean, can go on and on with each of the

jurors. There are reasons why that they were picked. It wasn't picked because of their race or anything like that.

The jurors that she stated, one of them stated that he had been pulled over several times and had bad feelings towards the police for being pulled over. One of them was a retired schoolteacher. The other one, Mr. Williams, who actually knew the officer, had spoken with the officer; and the investigator stated that he had a lot of interaction with that juror because of his son being tutored by him, and I should also like to put on the record that the investigator in this case is black.

Your Honor, the reasons why each of these jurors were eliminated were not because of their race, were not because of their—it was because of their background. Your Honor, it was because of their background that they were dismissed, not because of their race. The State has left several black persons on the list. I mean, she has basically argued a *Batson* motion when I have left many and passed many panels of jurors that had included several black people on it.

. . . .

THE COURT: The Court, in considering the Motion for a *Batson* challenge, you're not challenging the original panel, I presume. You're simply challenging those that the district attorney has used in terms of making peremptory challenges towards those jurors. The Court finds that there were valid reasons for excusing—I won't go over every one, but valid reasons for excusing peremptorily several of the members of the jury panel.

The Court notes that both the plaintiff and—or the State and the defendant exercised every challenge they had, including the additional challenge for the alternate juror, and that the jury panel as it is presently consisted, is an accurate reflection of the community, and the Court does not find that the peremptory challenges exercised by the State, there being no challenges for cause that were granted by the Court, that any of the peremptory challenges were based solely on race.

The trial judge later dismissed the possession of a firearm by a felon charges. On or about 27 October 2006, defendant was found not guilty of speeding to elude arrest or cruelty to animals and was convicted of AWDWIKISI and first degree burglary. Defendant appeals.

II. Peremptory Challenges

Defendant argues that "the trial court committed reversible error by finding that the State had not engaged in purposeful discrimination when it used all of its peremptory challenges to strike African-American jurors and did not provide race-neutral explanations for each juror." For the following reasons, we agree, and thus grant a new trial. "The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. Cofield*, 129 N.C. App. 268, 276 n.1, 498 S.E.2d 823, 829 n.1 (1998).

> In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), the United States Supreme Court established a three-step test to determine whether the State's peremptory challenges of prospective jurors are purposefully discriminatory. Under *Batson*, the defendant must first successfully establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88. If the *prima facie* case is not established, it follows that the peremptory challenges are allowed. If the *prima facie* case is established, however, the burden shifts to the prosecutor to offer a race-neutral explanation for each peremptory challenge at issue. *Id.* at 97, 90 L. Ed. 2d at 88. If the prosecutor fails to rebut the *prima facie* case of racial discrimination with race-neutral explanations, it follows that the peremptory challenges are not allowed.

Cofield at 274-75, 498 S.E.2d at 828-29. "Finally, the trial court must determine whether the defendant has proven purposeful discrimination." *State v. Lyons*, 343 N.C. 1, 11, 468 S.E.2d 204, 208, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996) (citing *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991)).

> If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997) (citing *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991); *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d 306, 312 (1994)).

Whether defendant established a *prima facie* case is moot as the prosecutor here "volunteer[ed] his reasons for the peremptory challenges"; the question now before us is whether the prosecutor has met its burden of "offer[ing] a race-neutral explanation for *each* peremptory challenge at issue." *Cofield* at 275, 498 S.E.2d at 828 (emphasis added); *see Williams* at 359, 471 S.E.2d at 386. *Black's Law Dictionary* defines "each" as "[a] distributive adjective pronoun, which denotes or refers to every one of the persons or things mentioned; every one of two or more persons or things, composing the whole, separately considered." *Black's Law Dictionary* 455 (5th ed. 1979).

Several North Carolina cases have addressed issues raised by a *Batson* motion; however, in all of these cases, unlike the case before us, the prosecutor provided a race-neutral explanation for each and every one of the challenged jurors. *See State v. Carmon*, 169 N.C. App. 750, 756, 611 S.E.2d 211, 215 (2005); *State v. Matthews*, 162 N.C. App. 339, 340-41, 595 S.E.2d 446, 447-48, *disc. rev. denied*, 358 N.C. 379, 598 S.E.2d 140 (2004); *State v. White*, 131 N.C. App. 734, 739-40, 509 S.E.2d 462, 466 (1998); *Cofield* at 270-72, 498 S.E.2d at 826-27; *Lyons* at 11-13, 468 S.E.2d at 208-09.

In the present case defendant's counsel brought all seven of the State's peremptory challenges to the court's attention because they were all used on African-American members of the jury pool, including, (1) juror number one, Ms. Mack, (2) juror number two, Ms. Pettiford, (3) juror number seven, Mr. Williams, (4) juror number nine, Mr. Stevenson, (5) juror number twelve, Ms. Reeves, (6) juror number nine in Mr. Stevenson's seat, Ms. Miller, and (7) the alternate juror, Ms. Evans. At most the prosecutor offered a race-neutral explanation for five of the seven aforementioned jurors. The prosecution responded,

> [(1)] the alternate juror had no pets. . . .[(2)] Mr. Stevenson was dismissed. He had a DWI, 72 hours of jail time. . . . The jurors that she stated, [(3)] one of them stated that he had been pulled over several times and had bad feelings towards the police for being pulled over. [(4)] One of them was a retired schoolteacher. [(5)] The other one, Mr. Williams, who actually knew the officer, had

spoken with the officer; and the investigator stated that he had a lot of interaction with that juror because of his son being tutored by him[.]

The prosecution also stated,

I mean, can go on and on with each of the jurors. There are reasons why that they were picked. It wasn't picked because of their race or anything like that. . . . Your Honor, the reasons why each of these jurors were eliminated were not because of their race, were not because of their—it was because of their background. Your Honor, it was because of their background that they were dismissed, not because of their race.

Here the prosecutor has failed to "offer a race-neutral explanation for *each* peremptory challenge at issue." *Cofield* at 275, 498 S.E.2d at 828 (emphasis added). The prosecutor gave race-neutral explanations for its use of peremptory challenges on five of the jurors; however, two jurors are not specifically mentioned at all.[1] The plain language of this Court requires the prosecution to "offer a race-neutral explanation for *each* peremptory challenge at issue." *Id.* (emphasis added). "Each" denotes or refers to "every one of the persons or things mentioned; every one of two or more persons or things, composing the whole, separately considered." *Black's Law Dictionary* 455. The prosecutor here failed to provide a race-neutral explanation for "every one" of the jurors mentioned by the defendant. *See id.* Though the prosecutor speaks of the group as a whole, the prosecutor did not, in her language to the court, "separately consider[]" each juror mentioned by defense counsel. *See id.*

It was "the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext." *Williams* at 359, 471 S.E.2d at 386. Although the trial court stated its finding "that there were valid reasons for excusing—I won't go over every one, but valid reasons for excusing peremptorily several of the members of the jury panel," the trial court could not and did not make findings as to *each*

1. From the record before us it appears that Mr. Stevens was a white male and Mr. Stevenson was a black male. During jury selection the State said it would like to excuse Mr. Stevens. However, from the record it appears Mr. Stevenson was actually excused and Mr. Stevens remained on the jury. The practical effect of this means that the State used all seven of its peremptory challenges on African-Americans. However, assuming *arguendo*, that the State did excuse Mr. Stevens and Mr. Stevenson did remain on the jury, the State still provided race-neutral explanations for only five of the six jurors mentioned by defendant's counsel.

juror, as the prosecutor had not even offered any explanation as to two jurors. The State thus failed to meet its burden in response to defendant's showing of a *Batson* violation, and the trial court erred in makings its "findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext" as there was no explanation offered for two of the jurors. *See id.* We appreciate the challenges faced by the prosecutor and the trial court in attempting to comply with the requirements of *Batson*; however, we are duty bound to follow the plain language of the law. As the prosecutor failed to provide a race-neutral explanation as to *each* challenged juror mentioned by the defendant the trial court clearly erred in not granting defendant's *Batson* motion. *Cofield* at 275, 498 S.E.2d at 828.

III. Conclusion

For the aforementioned reasons, we grant a new trial, and thus defendant's other assignments of error need not be addressed as they are not likely to arise at a new trial.

NEW TRIAL.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF Z.A.K.

No. COA07-641

(Filed 18 March 2008)

1. Homicide; Juveniles— delinquency—involuntary manslaughter—mixed toxicity drug overdose—motion to dismiss—sufficiency of evidence—proximate cause—culpable negligence

The trial court did not err in a juvenile delinquency case involving involuntary manslaughter and possession with intent to sell and deliver Ecstacy by refusing to grant defendant's motion to dismiss based on alleged insufficient evidence to show he was the proximate cause of his friend's death from a mixed toxicity drug overdose because: (1) defendant's failure to aid his friend, after providing her with Ecstacy and undertaking to provide aid,

was the proximate cause of her death; (2) regardless of whether the Ecstacy that defendant provided was a proximate cause of the victim's death, once he provided her with such a dangerous substance and she fell ill, a duty to help her arose; (3) once defendant made efforts to aid the victim, he was under a duty to do so with due caution; and (4) defendant's affirmative conduct precluded any other rescuer from rendering the aid allegedly necessary to prevent the victim's injuries, and defendant acted with such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

2. Confessions and Incriminating Statements— motion to suppress—voluntariness

The trial court did not err in a juvenile delinquency case involving involuntary manslaughter and possession with intent to sell and deliver Ecstacy by denying defendant juvenile's motion to suppress his statements, even though he contends his father essentially was turned into an agent of the State and coerced defendant into giving his statement at the police station, because the totality of circumstances revealed that: (1) defendant conceded at trial there was no indicia that it was a custodial-type interview; (2) at the time of the interview, the investigation was merely exploratory, defendant was not a suspect, and the police requested an interview with defendant as well as other witnesses the day after the victim died; (3) neither the police nor defendant's father employed the use of any force to compel defendant to come to or participate in the interview; (4) defendant actually interrupted his father to provide volunteer information at the interview; (5) the only reason the police accompanied defendant to the bathroom was that there was construction and the doors locked automatically; (6) defendant was free to leave after the interview, and he was not charged with any crime until months later; and (7) a reasonable person in defendant's position would not have believed that he was under arrest or was restrained in his movement to a significant degree.

3. Juveniles— disposition—trial court's exercise of discretion

The trial court did not err in a juvenile delinquency case involving involuntary manslaughter and possession with intent to sell and deliver Ecstacy by allegedly failing to exercise its dispositional discretion because, although defendant notes two instances in which the trial judge indicated a general policy prefer-

ence on his part for Level II disposition for juveniles who commit felonies, the extended discussion in the transcript revealed he considered a variety of factors before designating an appropriate plan to meet the needs of the juvenile and to achieve the objective of the State as required by N.C.G.S. § 7B-2500.

4. Juveniles; Probation and Parole— restitution—failure to make finding payment in best interest of juvenile

The trial court erred in a juvenile delinquency case involving involuntary manslaughter and possession with intent to sell and deliver Ecstacy by failing to make a finding that payment of restitution was in defendant's best interest, and the order of restitution is reversed and remanded with instructions to make findings as to the best interests of defendant, because: (1) requiring a juvenile to make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate the best interest of the juvenile will be promoted by the enforcement of the condition; and (2) the pertinent order merely stated defendant had the ability to pay restitution.

Appeal by juvenile from judgment entered 31 July 2006 and order entered 15 August 2006 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 28 November 2007.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant.

ELMORE, Judge.

On 31 July 2006, the trial court adjudicated juvenile Z.A.K. (defendant) delinquent for involuntary manslaughter and possession with intent to sell and deliver Ecstacy, and on 15 August 2006, the trial court entered an order of Level II disposition. Defendant now appeals.

On 30 September 2005, defendant was with his friends E.H. and A.B. Defendant and A.B. snorted cocaine, but E.H. did not. They went to a high school football game before picking up another friend, A.W., and returned to E.H.'s house. A.B. left, and the remaining friends smoked marijuana with E.H.'s mother and drank; E.H. and defendant also took Xanax obtained from E.H.'s mother.

They went to bed, and the following morning continued to hang out. A.W. snorted cocaine and defendant and E.H. split a pill of Ecstacy. Around 4:00 p.m., the friends went to A.B.'s stepfather's birthday party, where defendant and E.H. split another pill of Ecstacy; A.B. and A.W. also split a pill. Defendant provided all of the Ecstacy. During the party, defendant also provided two pills to a family member of A.B. for twenty dollars.

E.H. consumed a great deal of water over the course of the afternoon. She and defendant split yet another pill, as did A.W. and A.B. Defendant, E.H., and A.W. returned to defendant's house. E.H. continued to drink large quantities of water.

At defendant's house, E.H. complained that she felt sick. She began to vomit profusely and continued to ask for and drink water. Defendant's father checked in with the children, but left after defendant told him that although E.H. was sick, everything was fine.

E.H. exited the bathroom and fell to the ground. Her breathing was labored, and she began to foam at the mouth. A.W. attempted to call 911, but was too distraught. At approximately 11:30 p.m., she eventually managed to call, and handed the phone to defendant to inform the officer of his address. Defendant got nervous and told the operator that nothing was wrong.

A.W. administered CPR when E.H. stopped breathing, and was able to get E.H. to start breathing again. Defendant called a friend, who told him to get E.H. medical attention as soon as possible.

Eventually, defendant went to a neighbor's house to ask for help. He asked the neighbor to take E.H. to the hospital, but asked that the neighbor not call the police, fearing that there would be trouble. The neighbor called 911 and went to defendant's house. Emergency services arrived and took E.H. Eventually, E.H. passed away.

Following a toxicological evaluation, doctors discovered three different types of drugs in E.H.'s system: Ecstacy, cocaine, and methamphetamine. Both the State and defense expert witnesses opined that the cause of death was mixed toxicity drug overdose.

[1] On appeal, defendant first claims that the trial court erred in refusing to grant his motion to dismiss for insufficient evidence. Specifically, he claims that the State failed to prove that his actions were the proximate cause of death. Because we disagree that the State failed to prove proximate E.H.'s cause, we affirm the trial court's adjudication of delinquency for involuntary manslaughter.

Our standard of review for motions to dismiss is well established:

> In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator. The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence. The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt.

State v. Replogle, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (quotations and citations omitted) (alteration in original). In this case, defendant claims that the State failed to prove the element of proximate cause.

Both in his brief and at oral arguments, defendant focuses on the fact that the medical experts in this case opined that E.H. died from mixed toxicity drug overdose. Defendant claims that because the State failed to prove that E.H. died as a result of the Ecstacy, which the State did prove he provided, the State failed to prove proximate cause. This issue is complex, and we do not decide it in this case. Rather, we rely on defendant's actions after E.H. began to seize, which constitute culpable negligence, and hold that defendant's failure to aid her, after providing her with Ecstacy and undertaking to provide aid, was the proximate cause of her death.

"Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Wade*, 161 N.C. App. 686, 690, 589 S.E.2d 379, 382 (2003) (quotations and citations omitted). "Standing alone, culpable negligence supports the submission of involuntary manslaughter." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (quotations and citation omitted).

Defendant is correct when he states in his reply brief that "citizens generally have no duty to come to the aid of one who is injured." *Doerner v. City of Asheville*, 90 N.C. App. 128, 130, 367 S.E.2d 356, 357 (1988) (citation omitted). However, in this case, regardless of

whether the Ecstacy that defendant provided was a proximate cause of victim's death, once he provided her with such a dangerous substance and she fell ill, a duty to help her arose.

> Risk-creation behavior thus triggers duty where the risk is both unreasonable and foreseeable. . . . The orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty. A duty arises based on evidence showing that a defendant should have recognized that [a victim], or anyone similarly situated might be injured by their conduct.

Little v. Omega Meats I, Inc., 171 N.C. App. 583, 593, 615 S.E.2d 45, 52 (2005) (quotations and citations omitted).

More importantly, once defendant made efforts to aid the victim, he was under a duty to do so with due caution. Our Supreme Court has held that "volunteers in telephoning for aid, had the positive duty to use ordinary care in performing that task, the known and obvious purpose of which, under the circumstances, was to inform the rescue squad where the endangered persons were and an expeditious way to get there." *Hawkins v. Houser and Pless v. Houser and Houser v. Hawkins*, 91 N.C. App. 266, 270, 371 S.E.2d 297, 299 (1988) (citation omitted). In *Hawkins*, the Supreme Court addressed a situation in which a land owner gave poor directions to emergency services. "Evidence that in making the call defendants suggested that the rescuers travel to the pond by a time-wasting barricaded road when an unimpeded road was available is evidence that defendants did not use ordinary care." *Id.*

This Court, too, has held that in endeavoring to provide aid, a person has a duty use reasonable care.

> The law imposes upon every person who enters upon an act or course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. The duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, that he will cause danger of injury to the person or property of the other.

Klassette v. Mecklenburg County Area Mental Health, 88 N.C. App. 495, 502, 364 S.E.2d 179, 184 (1988) (quotations and citations omitted).

In this case, defendant's actions were even more egregious than those in the cases above.[1] After the victim first became ill, a mere ten minutes after the group of children arrived home, defendant lied to his father, telling him that everything was fine and sending him away. Even after the victim requested to go to the hospital, defendant took no action. Thirty to forty minutes after the victim went to the bathroom to be sick, she came out, fell to the ground, and began to foam at the mouth within ten minutes. Although A.W. called 911 at approximately 11:30 p.m., defendant lied to the operator, saying, "I'm sorry, my sister called." Even after A.W. screamed at defendant to "tell the truth," defendant represented to the operator that all was well. He did not give the operator his address. Thirty minutes passed from the time that the victim collapsed and began foaming at the mouth. At that point, defendant went to a neighbor's house for help. Even then, when the neighbor went to get his phone, defendant cried, "Oh, God, don't call the police there'll be trouble." It was 12:14 a.m. by the time that the paramedics arrived. At that time, defendant lied once again, claiming that he did not know whether the victim had taken any drugs.

"At the very least, [defendant's] affirmative conduct precluded any other rescuer from rendering the aid allegedly necessary to prevent [the victim's] . . . injuries." *Id.* At the worst, it actively caused her death. Dr. Karen Chilton affirmed that the victim "could have benefited [sic] from medical intervention if she'd been treated immediately after or soon after the start of her seizures," stating that "some of the complications that I think we saw could have been prevented if perhaps she'd received medical attention more quickly." Defendant breached his duty to the victim, acting with "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Wade*, 161 N.C. App. at 690, 589 S.E.2d at 382. The trial court did not err.

[2] Defendant next argues that the trial court erred in its denial of his motion to suppress his statements. We disagree.

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1. We note that both of the above cited cases arose in tort, rather than in criminal law. However, because the concepts of duty and negligence are, at their base, tort concepts, we feel free to analogize to the current criminal case. In doing so, we realize that the level of conduct required to sustain criminal liability is much different than that required in tort. *See Replogle*, 181 N.C. App. at 581-82, 640 S.E.2d at 759 ("[C]ulpable negligence is more than the actionable negligence often considered in tort law, and is such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless or needless indifference to the rights and safety of others . . . .").

Preliminarily, we note that a juvenile court "proceed[s] in accordance with the rules of evidence applicable to criminal cases." N.C. Gen. Stat. § 7B-2408 (2005). Our standard of review is well established:

> In considering a motion to suppress a statement for lack of voluntariness, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the statement was voluntarily and understandingly given. On appeal, the findings of the trial court are conclusive and binding if supported by competent evidence in the record.

State v. Nguyen, 178 N.C. App. 447, 451, 632 S.E.2d 197, 201 (2006) (citations omitted).

The thrust of defendant's argument is that the trial court erred in finding that defendant came to the police station and volunteered information, thus obviating the need for advisement of his *Miranda* rights. Defendant notes that the police contacted his father, rather than defendant himself. His father then decided that defendant would speak to the police. Defendant's father testified that he gave defendant no choice in the matter.

Defendant acknowledges that the door was open throughout the interview and that he was not handcuffed. However, he stresses that he was escorted at all times, even to the bathroom, that he was never told that he was free to leave, and that he was never told that he could refuse to continue the conversation with the police.

We note the State's contention that defendant conceded at trial that "there is no indicia that it was a custodial-type interview. There was no handcuffs, there was no throwing him in the back of the car, that sort of thing." Instead, defendant argued at trial that defendant's father essentially was turned into an agent of the State, and that he was used to coerce defendant into giving his statement.

In either case, the trial court did not err. As the trial court noted, the evidence was clear that at the time of the interview, the investigation was merely exploratory. Defendant was not a suspect. The police requested an interview with defendant, as well as other witnesses, on 4 October 2005, the day after the victim died. Neither the police nor defendant's father employed the use of any force to compel defendant to come to or participate in the interview. At the interview, defendant actually interrupted his father to volunteer information. The only reason that police accompanied defendant to the

bathroom was that there was construction and the doors locked automatically. Defendant was free to leave immediately after the interview. He was not charged with any crime until months later, on 25 January 2006.

Based on the "totality of the circumstances," from "the interrogation subject's point of view . . . a reasonable person in defendant's position would [not] have believed that he was under arrest or was restrained in his movement to [a] significant degree." *State v. Garcia*, 358 N.C. 382, 396-97, 597 S.E.2d 724, 736-37 (2004) (quotations and citations omitted). Accordingly, defendant's argument is without merit.

[3] We also find no merit in defendant's claim that the trial court failed to exercise dispositional discretion. Although defendant notes two instances in which the trial judge indicated a general policy preference on his part for level II dispositions for juveniles who commit felonies, the extended discussion in the transcripts reveals that the judge considered a variety of factors before "design[ing] an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State . . . ." N.C. Gen. Stat. § 7B-2500 (2005).

[4] Finally, defendant argues that the trial court failed to make a finding that payment of restitution was in defendant's best interest. We agree. "[R]equiring that a juvenile make restitution as a condition of probation *must* be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition." *In re Heil*, 145 N.C. App. 24, 31, 550 S.E.2d 815, 821 (2001) (quotations and citations omitted) (emphasis in original). In this case, the trial judge's order merely stated that defendant had the ability to pay restitution without any finding as to it being in his best interest. We therefore reverse the order of restitution and remand with instructions to make findings as to the best interests of defendant.

Having conducted a thorough review of the record and briefs, we affirm all aspects of the trial court's decision except for the order of restitution. Accordingly, we affirm in part, and reverse and remand with instructions in part.

Affirmed in part, reversed and remanded with instructions in part.

Judges STEELMAN and GEER concur.

RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, PLAINTIFFS v. RAYMOND A. HARRIS AND SARAH N. HARRIS, DEFENDANTS, AND RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, PLAINTIFFS AND THIRD PARTY PLAINTIFFS v. INTRACOASTAL SERVICE, INC.; JOHN BIRD, D/B/A BIRD ROOFING; LINDSAY WADE MILLSAPS, D/B/A ENGINEERED PLUMBING; ED NEWSOME'S HARDWOOD FLOORING, INC.; AND THE PAINT DOCTOR, THIRD-PARTY DEFENDANTS

No. COA06-1665

(Filed 18 March 2008)

Construction Claims— licensing requirements—construction contract signed by unlicensed contractor—summary judgment improperly granted

The trial court erred in a declaratory judgment case arising out of a dispute involving the construction of a house by granting summary judgment in favor of defendant homeowners based on the alleged bar to recovery under the licensing requirements because: (1) although defendants contend plaintiffs' claims are barred by North Carolina's contractor licensing requirements when the construction contract was signed by plaintiff individual who was an unlicensed contractor, plaintiff construction company sought to recover the value of its services in building defendants' home instead of plaintiff individual; (2) the North Carolina general contractor licensing requirements bar recovery by an unlicensed general contractor, and plaintiff construction company was not an unlicensed general contractor; and (3) a reasonable person could find that plaintiff construction company was the general contractor of defendants' house, and at all relevant times plaintiff construction company was a licensed contractor.

Appeal by plaintiffs from an order entered 5 September 2006 by Judge B. Craig Ellis in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2007.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for plaintiffs-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman and Matthew W. Buckmiller, for defendants-appellees.

JACKSON, Judge.

Ron Medlin Construction ("plaintiff Medlin Construction") and George Ronald Medlin ("plaintiff Medlin") (collectively "plaintiffs") appeal from an order granting a motion for summary judgment brought by Raymond A. Harris and Sarah N. Harris ("defendants"). For the following reasons, we reverse.

In September 2002, defendants entered into a written construction contract for a single-family residence to be built at 1770 Twisted Oak Lane SW in Brunswick County. The "Cost Plus" addendum to this contract shows the contractor is "Mr. Ron Medlin"; the signature of "Ron Medlin" appears on the "Contractor" line; and no signature appears on the "Authorized Official" line. At the time this addendum was signed, "Ron Medlin" was not a licensed general contractor in the State of North Carolina. Plaintiff Medlin Construction is a North Carolina general partnership consisting of plaintiff Medlin and his wife as general partners. At the time the addendum was signed, plaintiff Medlin Construction was a licensed general contractor in the State of North Carolina, with plaintiff Medlin as the qualifying individual.

Plaintiff Medlin Construction (1) maintained a checking account for materials and labor during construction, in the names of defendants and "Ronald Medlin"; (2) purchased materials and labor for the project; (3) obtained building permits, inspections, and certificates of occupancy; and (4) constructed a house at 1770 Twisted Oak Lane SW in Brunswick County. Defendants paid in excess of $725,000.00 towards the costs of construction, and after completion, the house was appraised at $1,300,000.00.

After construction was complete, a dispute arose between plaintiffs and defendants related to additional moneys allegedly owed on the project. Prior to the filing of this suit, defendants questioned the validity of the construction contract and refused to make further payments under it. Plaintiffs brought claims for (1) a declaratory judgment of the rights of each plaintiff, (2) *quantum meruit*/unjust enrichment, (3) negligent misrepresentation, and (4) a constructive trust. Defendants counterclaimed for (1) negligence, and (2) unfair and deceptive trade practices. After discovery, defendants brought a motion for summary judgment, which the trial court granted in their favor on 1 September 2006. Thereafter, plaintiffs filed timely notice of appeal.

The sole issue on appeal is whether the motion for summary judgment was properly granted. In ruling on a motion for summary judgment, a trial court rules only on questions of law; thus, the trial court's ruling is reviewed on appeal *de novo*. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 190-91, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). This Court must determine, based upon the evidence presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981).

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984)). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.* (citation omitted).

Defendants argue that plaintiffs' claims are barred by North Carolina's contractor licensing requirements. North Carolina General Statutes, section 87-1 defines a "general contractor" as one who "undertakes to bid upon or to construct . . . any building, . . . or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($ 30,000.00) or more" for compensation. N.C. Gen. Stat. § 87-1 (2001). Section 87-13 provides, *inter alia*, that a person or firm who contracts for or bids on a project enumerated in section 87-1 and does not hold a valid North Carolina contractor's license is guilty of a class 2 misdemeanor. N.C. Gen. Stat. § 87-13 (2001).

The purpose of the licensing requirements "is to protect the public from incompetent builders." *Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 510-11 (1968). North Carolina caselaw has established several basic principles with this purpose in mind. When an unlicensed contractor enters into a contract in violation of the statutes, he may not recover under that contract. *Id.* at 270, 162 S.E.2d at 511. Similarly, he may not recover when the cause of action

is based upon *quantum meruit* or unjust enrichment. *Id.* at 273, 162 S.E.2d at 512. However, the contract is not void; those parties who are not regulated by the statutes may enforce a contract against an unlicensed contractor. *Brady v. Fulghum*, 309 N.C. 580, 586, 308 S.E.2d 327, 331-32 (1983) (citing *Midyette*, 274 N.C. at 270-71, 162 S.E.2d at 511) *superceded by statute on other grounds as recognized in Hall v. Simmons*, 329 N.C. 779, 407 S.E.2d 816 (1991).

An unlicensed contractor cannot have his work supervised by a licensed contractor in order to comply with the licensing requirements. *Sager v. W.M.C., Inc.*, 64 N.C. App. 546, 549, 307 S.E.2d 585, 587 (1983). However, a licensed contractor may contract to perform tasks his license does not qualify him to perform, if he subcontracts such tasks to a contractor whose license covers such tasks. *Baker Construction Co. v. Phillips*, 333 N.C. 441, 447, 426 S.E.2d 679, 683 (1993). An unlicensed corporation may not enforce a contract based upon the license of its president and sole shareholder. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 328-29, 330 S.E.2d 664, 667 (1985).

In this case, the construction contract was signed by plaintiff Medlin, an unlicensed contractor. Under a strict application of the statutes, *he* is barred from recovering on the contract or under a theory of *quantum meruit* or unjust enrichment. However, he has not sought to so recover. Plaintiff Medlin sought only a judicial declaration that plaintiff Medlin Construction—rather than the individual plaintiff Medlin—constructed the residence in question. Defendants argue that just as plaintiff Medlin is barred, plaintiff Medlin Construction similarly is barred because there was an express, albeit unenforceable, contract between themselves and plaintiff Medlin.

Defendants argue that "there can be no implied agreement where an express one exists. It is only when the parties do not expressly agree that the law may raise an implied promise[,]" pursuant to *McLean v. Keith*, 236 N.C. 59, 72, 72 S.E.2d 44, 53 (1952). Only one of the cases cited by defendants in support of their argument involved a third party to an express contract; we find it distinguishable. In *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962), an express contract existed between the plaintiff and a building company. The plaintiff sought to recover in *quantum meruit* against the defendant, a third-party beneficiary of the express contract. *Id.* "When there is a contract between two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods." *Id.* at 714, 124 S.E.2d at 908 (citations omitted). In the instant case, there

was no express contract between plaintiff Medlin and plaintiff Medlin Construction of which defendants were a third-party beneficiary. There was an express contract between plaintiff Medlin and defendants. Plaintiff Medlin Construction argues that it conferred benefits upon defendants that are separate and distinct from the express contract and that there was an implied contract between itself and defendants.

Defendants also cite *Jenco v. Signature Homes, Inc.*, 122 N.C. App. 95, 468 S.E.2d 533 (1996), in support of their argument. In *Jenco*, as in the instant case, an express contract was signed by an unlicensed contractor. The licensed contractor—an individual doing business as the unlicensed contractor—sought to recover in *quantum meruit*. This Court denied recovery "because recovery under *quantum meruit* is not applicable where there is an express contract." *Id.* at 100, 468 S.E.2d at 536 (citations omitted). However, unlike the facts in the case *sub judice*, the licensed contractor in *Jenco* also was a party to the express contract; he became a party through a subsequent addendum. This Court (1) found that at the time the initial contract was signed, the named contractor was unlicensed; and (2) held that the subsequent addendum did not cure the illegal contract that existed at the time that the contract was signed. *Id.* at 100, 468 S.E.2d at 535. The *Jenco* Court did not discuss whether the licensed individual could have recovered had he not been a party to the express contract.

In this case, plaintiffs alleged that plaintiff Medlin Construction built a residence on defendants' property reasonably believing it had the right to do so, based upon defendants' express contract. Because defendants denied the existence of an express contractual relationship between themselves and plaintiff Medlin Construction, plaintiff Medlin Construction proceeded upon a theory of *quantum meruit*. In contrast, plaintiff Medlin only sought a declaratory judgment that plaintiff Medlin Construction, and not plaintiff Medlin, constructed the residence in question. He did not seek to enforce the contract. The only express contract presented to this Court was signed by defendants and plaintiff Medlin, with no indication that he signed on behalf of plaintiff Medlin Construction. Although plaintiff Medlin would be barred from recovering on the illegal contract, it is not clear that plaintiff Medlin Construction—a licensed general contractor—similarly is barred from recovering.

As stated *supra*, the purpose of the licensing requirement is to protect the public from incompetent contractors. Although plaintiff

Medlin was not a licensed contractor, he was the qualifying individual for plaintiff Medlin Construction, which was formed on 28 September 1990. Plaintiff Medlin Construction was issued an Intermediate Residential license on 16 January 1991, and its license was changed to an Intermediate Building license in 1993, after plaintiff Medlin passed the exam for a building contractor's license. Plaintiff Medlin was a licensed contractor from 21 May 1986 until 31 December 1992. Plaintiff Medlin Construction, not plaintiff Medlin, seeks to recover the value of its services in building defendants' home. The North Carolina general contractor licensing requirements bar recovery by an unlicensed general contractor. Plaintiff Medlin Construction is not an unlicensed general contractor. Therefore its claim is not barred by the licensing requirements.

In *Allen v. Roberts Construction Co.*, 138 N.C. App. 557, 532 S.E.2d 534, *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000), the sole issue with respect to one claim was whether a licensed individual and employee of the unlicensed company who entered into an express construction contract functioned as the general contractor exposing the individual to a claim for negligence. This Court recognized that a reasonable person could find the individual was the general contractor of the plaintiffs' house. *Id.* at 570, 532 S.E.2d at 542. Similarly, a reasonable person could find that plaintiff Medlin Construction was the general contractor of defendants' house.

As this Court stated in *Zickgraf Enterprises, Inc. v. Yonce*, 63 N.C. App. 166, 303 S.E.2d 852 (1983),

> [t]he failure of a general contractor to be licensed does not render "void" the contract between the contractor and the owner. The nature of the transaction is still extant, with the *proviso* that in an action brought against the owner by the general contractor, the owner may assert against the general contractor the affirmative defense of failure to be properly licensed. This fulfills the purpose of the licensing statute which is the protection of the public against incompetent builders. The licensing statutes should not be used as a shield to avoid a just obligation owed to an innocent party. Our courts will not impose penalties for the failure to comply with licensing requirements in addition to those specifically set out in the statute.

Id. at 168, 303 S.E.2d at 853 (internal citations omitted). At all times relevant to this case, plaintiff Medlin Construction was a licensed contractor. Defendants may not use the licensing statutes as a shield

to avoid any obligations owing to plaintiff Medlin Construction for the building of their home.

Defendants' motion for summary judgment was based solely upon the alleged bar to recovery pursuant to the licensing requirements, and the only specific evidence presented in support of their motion was related to the licensure status of plaintiffs. As we hold the licensing statutes do not bar plaintiff Medlin Construction from recovering on its claims, summary judgment on that issue was improper. Because plaintiffs' underlying claims for relief were not addressed below, we decline to determine whether any issues of material fact exist as to those claims.

Reversed.

Judge CALABRIA concurs.

Judge GEER concurs in the result only.

TERESA ELSHOFF, PETITIONER v. NORTH CAROLINA BOARD OF NURSING, RESPONDENT

No. COA07-599

(Filed 18 March 2008)

Nurses— disciplinary action—evidence of willfulness insufficient

Petitioner's motion to dismiss disciplinary actions against her by the Board of Nursing should have been granted where there was no evidence that her search for her patient's Oxycodone was for the purpose of or intent of harassing, abusing, or intimidating the patient, as required by statute and administrative rule. An act of patient care is not converted into a willful act of harassment, abuse, or intimidation solely because the patient becomes upset.

Appeal by petitioner from order entered 8 March 2007 by Judge John R. Jolly, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 15 November 2007.

Patrice Walker for petitioner-appellant.

Allen and Pinnix, P.A. by M. Jackson Nichols and Mary B. Shuping for respondent-appellee.

STROUD, Judge.

Petitioner appeals order of the superior court affirming the decision and order of the North Carolina Board of Nursing which issued petitioner a letter of reprimand, required petitioner to complete course work, and issued petitioner a probationary license. The dispositive question before this Court is whether the North Carolina Board of Nursing erred in not granting petitioner's motion to dismiss for the insufficiency of the evidence because respondent failed to show petitioner *willfully* violated any rules enacted by the North Carolina Board of Nursing. For the following reasons, we reverse and remand.

I. Background

Petitioner was a registered nurse who was providing home care to patient B.T. Petitioner alleged the following: B.T. had recently been released from a hospital. Petitioner first saw B.T. on or about 11 August 2004 and conducted a medication profile, a physical exam, and a patient interview. B.T. was 81 years old and was taking several prescription medications, including a psychotropic medication, Seroquel, which is used to treat schizophrenia. On or about 13 August 2004, petitioner called B.T. and told her that she realized she did not have B.T.'s medication profile and asked to come to B.T.'s home to retrieve it. When petitioner arrived at B.T.'s home, a neighbor, Ms. Cook, opened the door and escorted petitioner inside the home.

Ms. Cook, the Board's sole witness to the interaction, testified that petitioner looked in the den and then B.T. suggested that petitioner look on the kitchen table. Petitioner went in the kitchen and opened drawers and cabinets, looking inside them. Petitioner then went to look in the living room and when B.T. objected, petitioner came out of the living room.

Petitioner testified that when she arrived at B.T.'s home, she noticed that B.T.'s Oxycodone was not with her other medications. Petitioner alleged she began searching through B.T.'s home because she was concerned about the missing Oxycodone as B.T. might be taking it inappropriately. Petitioner testified she was unable to find

the missing medication. After petitioner's visit, B.T. was extremely upset and afraid for other medical personnel to visit her home.

On or about 25 February 2005, petitioner received a letter from the North Carolina Board of Nursing ("Board") which stated petitioner "may not be safe and competent to practice nursing or [she] may have violated the Nursing Practice Act." The letter went on to state that petitioner's "actions in [B.T.'s] home threatened and intimidated the patient." The letter gave petitioner the option to have an administrative hearing, have a settlement conference, or to be issued a "letter of reprimand" and a probationary license.

An administrative hearing was scheduled for 27 October 2005. Petitioner made motions to dismiss at the outset of the hearing, at the close of respondent's case, and at the close of all of the evidence; all three motions were denied. On or about 27 October 2005, the Board ordered petitioner to be issued a "letter of reprimand," to complete an ethical/legal decision making course with emphasis on therapeutic communications within three months, and to be issued a probationary license.

On or about 9 March 2006, petitioner filed an amended petition for judicial review in Superior Court, Wake County and also requested the matter be remanded to the Board with instructions to dismiss the charges. On 8 March 2007, the superior court, *inter alia*, denied petitioner's motion to remand and affirmed the decision of the Board. Petitioner appeals.

II. Willfulness

Petitioner assigns error to the Board's denial of her motion on the insufficiency of the evidence as respondent failed to show petitioner *willfully* violated any rules enacted by the Board pursuant to N.C. Gen. Stat. § 90-171.37. We agree.

The Board argues that "[i]t is absolutely the role of the [Board] to determine from the evidence of Record whether Appellant's search for the missing medication had a harassing or intimidating *effect* on Patient B.T." (emphasis added). Thus, the Board essentially contends that if petitioner's actions had a "harassing or intimidating effect" on B.T., petitioner has violated 21 N.C. Admin. Code 36.0217(c)(10), even if there is no evidence that petitioner willfully intended to harass or intimidate B.T. and even if petitioner's actions were in keeping with her assigned job duties. The Board also argues that the Court should give deference to the Board's interpretation of its own rules, s*ee Best*

v. N.C. State Bd. of Dental Examiners, 108 N.C. App. 158, 162, 423 S.E.2d 330, 332 (1992) (citation omitted), *disc. rev. denied*, 333 N.C. 461, 428 S.E.2d 184 (1993), and thus uphold the Board's final decision and order.

"A review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

> When the trial court applies the whole record test . . . it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

N.C. Dep't. of Env't and Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (internal citations and internal quotations omitted).

N.C. Gen. Stat. § 90-171.37 allows the Board to discipline licensees "in any instance or instances in which the Board is satisfied that the . . . licensee . . . [h]as willfully violated any rules enacted by the Board." N.C. Gen. Stat. § 90-171.37(8) (2003). "Behaviors and activities which may result in disciplinary action by the Board include . . . harassing, abusing, or intimidating a client either physically or verbally[.]" 21 N.C. Admin. Code 36.0217(c)(10).

"Willfully[,]" as used in N.C. Gen. Stat. § 90-171.37, is not specifically defined; however, the term "willful" and its derivatives has been defined several times within other contexts by the legislature and the judiciary. *See generally* N.C. Gen. Stat. § 58-40-5(7) (2007) (" 'Willful' means in relation to an act or omission which constitutes a violation of this Article with actual knowledge or belief that such act or omission constitutes such violation and with specific intent to commit such violation."); *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403, 549 S.E.2d 867, 870 (2001) ("Willful conduct is done with a deliberate purpose."); *Brewer v. Harris*, 279 N.C. 288, 296, 182 S.E.2d 345, 350 (1971) ("An act is done willfully when it is done purposely and delib-

erately in violation of law . . . or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason.") (internal citations and internal quotations omitted); *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (" 'Wil[l]ful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.").

Black's Law Dictionary defines "willful" as

> [p]roceeding from a conscious motion of the will; voluntary. *Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.*
>
> [a]n act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's Law Dictionary 1434 (5th ed. 1979) (emphasis added).

Therefore, to survive petitioner's motion to dismiss based upon the insufficiency of the evidence, the Board must present evidence that petitioner willfully committed actions or said words with the purpose or intent to harass, abuse, or intimidate a client either physically or verbally and that the client was actually harassed, abused, or intimidated. *See* N.C. Gen. Stat. § 90-171.37; N.C. Admin. Code 36.0217(c)(10); *see generally*, N.C. Gen. Stat. § 58-40-5; *Sawyer at* 403, 549 S.E.2d at 870; *Brewer* at 296, 182 S.E.2d at 350; *Arnold* at 349, 141 S.E.2d at 474; *Black's Law Dictionary* 1434.

In the present case, there is no dispute that B.T. was very distressed after petitioner's visit. However, the subjective effect of one person's actions upon another individual is not the test for willfulness. The trial court took no new evidence, but affirmed the Board's conclusions including:

> The act of opening drawers and cabinets; and going in and out of rooms through the patient's home, visibly upset Patient B.T. Ms. Elshoff ignored Patient B.T.'s reaction to her search and by doing so, intimidated Patient B.T.
>
> The act of opening drawers and cabinets; and going in and out of rooms through the patient's home violates the patient's privacy and space; and this act constitutes harassment.

> The licensee has violated G.S. 90-171.37(8) in that she did willfully violate Regulation 21 N.C.A.C. 36.0217(c)(11)[1] in the manner found below.
>
> The licensee did willfully violate Regulation 21 N.C.A.C. 36.0217(c)(11) in that she did harass or intimidate a client, either physically or verbally, as evidenced by the fact that during Ms. Elshoff's second visit to Patient B.T., she was opening drawers and cabinets, and going in and out of rooms through the patient's home which visibly upset Patient B.T.; and she ignored Patient B.T.'s reactions to this search, and by doing so, intimidated Patient B.T.
>
> The licensee did willfully violate Regulation 21 N.C.A.C. 36.0217(c)(11) in that she did harass, abuse or intimidate a client, either verbally or physically, as evidenced by the fact that during Ms. Elshoff's second visit to Patient B.T.'s home, she was opening drawers and cabinets, and going in and out of rooms in the patient's home, violating the patient's privacy and space; therefore, these acts constitute harassment.

The evidence is uncontroverted that petitioner willfully opened drawers and cabinets and otherwise searched in B.T.'s home for the Oxycodone. However, no evidence was presented to support a finding that petitioner's search for the medication was for the purpose or intent to harass, abuse, or intimidate B.T., which is required pursuant to N.C. Gen. Stat. § 97-171.37 and N.C. Admin. Code 36.0217(c)(10). *See* N.C. Gen. Stat. § 97-171.37; N.C. Admin. Code 36.0217(c)(10). *N.C. Dep't. of Env't and Natural Res. at* 660, 599 S.E.2d at 895. There is not substantial evidence that petitioner acted willfully, i.e., "with specific intent to commit [a] violation," "without justification or excuse," "purposely and deliberately in violation of law" or "[i]ntending the result which actually [came] to pass." *See* N.C. Gen. Stat. § 58-40-5(7); *N.C. Dep't. of Env't and Natural Res.* at 660, 599 S.E.2d at 895; *Brewer* at 296, 182 S.E.2d at 350; *Arnold* at 349, 141 S.E.2d at 474; *Black's Law Dictionary* 1434.

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1. We assume that (11) is a typographical error in the order, as pursuant to the language of the conclusions it is clear that the Board found petitioner to have violated 21 N.C.A.C. 36.0217(c)(10) which is "harassing, abusing, or intimidating a client either physically or verbally" rather than 21 N.C.A.C. 36.0217(c)(11) which is "failure to maintain an accurate record for each client which records all pertinent health care information as defined in Rule .0224(f)(2) or .0225(f)(2)[.]" *See* 21 N.C. Admin. Code 36.0217(c)(10)-(11) (2003).

We cannot conclude that "opening drawers and cabinets and going in and out of rooms through a patient's home" constitutes willful harassment, abuse, or intimidation of a patient, where there is no evidence that the petitioner performed these actions with any intent to harass, intimidate, or abuse the client in any way. Some evidence of purposefulness, deliberateness, intent, or the like on the part of petitioner to harass, abuse, or intimidate B.T. must be shown in order to find petitioner "willfully violated any rules enacted by the Board." *See* N.C. Gen. Stat. § 90-171.37(8); *see generally* N.C. Gen. Stat. § 58-40-5; *Sawyer at* 403, 549 S.E.2d at 870; *Brewer* at 296, 182 S.E.2d at 350; *Arnold* at 349, 141 S.E.2d at 474; *Black's Law Dictionary* 1434.

As a home health care nurse, petitioner was dealing with an elderly and perhaps confused patient who became extremely upset by petitioner's actions, yet there is no evidence that petitioner's actions were willfully intended to harass, abuse, or intimidate B.T. In fact, one of petitioner's job duties was to keep track of B.T.'s medications, for B.T's own benefit and protection. It would be no different if B.T. had become upset because petitioner had performed a painful but necessary medical service upon B.T., such as giving B.T. an injection; B.T. may have in fact felt that she was abused, but a "willful" act of caring for a patient is not converted into a willful act of harassment, abuse, or intimidation solely because, as a result or effect of the wilful act, the patient becomes upset. None of the evidence, nor even the Board's findings of fact, supports a conclusion that petitioner acted willfully to harass, abuse, or intimidate B.T. Petitioner's motion to dismiss based upon the insufficiency of the evidence should have been granted.

III. Conclusion

For the foregoing reasons, we reverse and remand to the Superior Court, Wake County for further remand to respondent to dismiss its proceeding against petitioner. As we are reversing the trial court order it is unnecessary to address petitioner's remaining assignments of error.

REVERSED AND REMANDED.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. DARRYL STALLINGS

No. COA07-729

(Filed 18 March 2008)

Search and Seizure— anticipatory search warrant—motion to suppress evidence

The trial court did not err in a trafficking in marijuana case by denying defendant's motion to suppress evidence obtained at his home as a result of the execution of an anticipatory search warrant, because the warrant was obtained in a manner consistent with the reasoning adopted from the two-part test set out in *Wisconsin v. Falbo*, 526 N.W.2d 814 (1994), and the already-established three-part test outlined in *State v. Smith*, 124 N.C. App. 565 (1996). Similar to the *Falbo* case in regard to the affidavit and information before the trial court, the police were able to independently confirm a number of statements an informant made, the trial court had information before it as to the informant's year-long history of purchasing drugs from defendant, and police officers testified that they considered this information reliable. Per *Smith*, the warrant contained clear triggering events, those events were ascertainable and preordained, and no search took place until after those triggering events occurred.

Appeal by defendant from judgment entered 12 September 2006 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 12 December 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen Mary Barry, for the State.

Mark Montgomery for defendant-appellant.

HUNTER, Judge.

Darryl Stallings ("defendant") pled guilty to trafficking in marijuana, reserving the right to appeal the denial of his motion to suppress certain evidence. The trial court entered judgment on 12 September 2006 pursuant to his plea and sentenced him to twenty-five to thirty months' imprisonment. Defendant now appeals the denial of his motion to suppress. After careful review, we affirm the trial court's ruling.

I.

On 22 September 2005, Detective H.N. Sampson[1] of the Guilford County Sheriff's Department applied for and was granted a search warrant for the home of defendant in Greensboro. The basis for the warrant was information from a confidential informant, who stated that he had purchased marijuana from defendant at defendant's home over the period of a year. The affidavit submitted with the warrant states: "This applicant is applying for an ANTICIPATORY search warrant. Authority for the search contained in the warrant will not commence until the below specified conditions occur within the forty-eight hour life of the warrant." Those conditions were as follows:

> On 9/22/2005, a confidential source will arrive at 2207 Cabin Court, Greensboro[,] North Carolina[,] for the purpose of purchasing marijuana. The confidential source will be at this residence for the purpose of purchasing several pounds of marijuana from a subject known to us as Darryl Stallings. Once the confidential source sees the marijuana being displayed at the residence, he/she will give a prearranged signal that the marijuana has been seen.
>
> If the marijuana is successfully seen by the confidential source, the affiant contends there is probable cause to believe that a search of the residence of 2207 Cabin Court, Greensboro[,] North Carolina[,] will result in the discovery of additional controlled substances, evidence of occupancy and other related material[.]

On 22 September 2005, the informant went to defendant's home, followed by the police. The informant entered the house, then signaled to the police officers outside that he had seen marijuana inside. The officers then entered the house and discovered more than twenty pounds of marijuana. Defendant was charged with one count of trafficking in marijuana. After the denial of his motion to suppress the evidence obtained at his home, he entered a plea of guilty. He now appeals from the denial of his motion.

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1. We note that while the application for the search warrant begins "I, Detective H.N. Sampson, of the Guilford County Sheriff's Department," the name signed in the space titled "Signature of Applicant" is that of Detective A.D. Phillips. On the search warrant itself, Detective Sampson is named as the applicant and both Detective Phillips and T. Harbour of the Eden Police Department are listed as "Additional Affiant[s]."

II.

A.

Both parties agree that the search warrant at issue was anticipatory; indeed, as noted above, the affidavit states plainly that the application is for an anticipatory warrant.

> Anticipatory search warrants are "issued in advance of the receipt of particular property at the premises designated in the warrant[.]" Issuance of an anticipatory warrant is "based on a showing of future probable cause to believe that an item will be at a specific location at a particular time in the near future."

State v. Phillips, 160 N.C. App. 549, 551, 586 S.E.2d 540, 542 (2003) (citations omitted). This definition is more easily understood when considering the prototypical anticipatory search warrant situation: A package is discovered en route to its destination to contain an illegal substance. The knowledge that this package is to be delivered to certain premises serves as probable cause on which an anticipatory search warrant can be based. The warrant may only be executed once the package arrives, because until that time, there is no probable cause to enter the premises.

This Court has set out a three-part test for the constitutionality of such warrants as follows:

> (1) The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) Those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, meaning that the property is on a sure and irreversible course to its destination; and finally, (3) No search may occur unless and until the property does, in fact, arrive at that destination.

State v. Smith, 124 N.C. App. 565, 577, 478 S.E.2d 237, 245 (1996).

B.

As we have noted, and as the State admits, this is not the typical anticipatory search warrant situation; normally, such warrants are issued in the delivery situation outlined above. *See*, *e.g.*, *Phillips*, 160 N.C. App. at 551, 586 S.E.2d at 542. Indeed, this Court has not before considered a case where an anticipatory search warrant was issued in this type of situation, and as such, the three-part test outlined above

makes little sense when applied to these facts. Wisconsin's court of appeals has considered this precise situation, however, and that opinion provides helpful guidance.[2]

In *Wisconsin v. Falbo*, police obtained a search warrant based on information from an informant who stated that he made weekly trips to the defendant's residence to purchase cocaine. *Falbo*, 526 N.W.2d 814, 815 (1994). The search warrant stated on its face that it would be valid only if certain events occurred, specifically the arrival at the residence of a certain car and certain persons. *Id.* at 816. When those events occurred, the officers would be able to search the car, and if illegal drugs were found, they would then be able to search the residence. *Id.* The search warrant also stated that it was only good for "the afternoon and evening hours" of a specific day. *Id.* While the house was under surveillance that day, the specified events occurred, and police executed the search warrant, finding cocaine and THC in the residence. *Id.*

The defendant argued to the appeals court that the search warrant should not have been issued because an anticipatory search warrant is only valid for a specific situation—namely, where contraband is known to be in route to a certain residence. *Id.* at 817. The court disagreed, stating that the "sure course of delivery" component of the test for such warrants "merely serves as a way to show probable cause that the contraband will be at the residence at the time of the search." *Id.* The court then stated that their examination of such a search warrant for validity encompassed two questions:

> First, we determine whether the probable cause affidavit established circumstances from which the affiant could conclude that the information was reliable. . . .

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2. The Court of Appeals of Virginia has also considered this issue, but its opinion in the case was unpublished. We note, however, that its holding is in accord with that of Wisconsin. *See Morton v. Commonwealth*, No. 2938-04-2, 2006 Va. App. LEXIS 208 (Va. Ct. App. May 16, 2006). In *Morton*, the court takes its reasoning directly from *United States v. Grubbs*, 547 U.S. 90, 164 L. Ed. 2d 195 (2006), utilizing a two-part test: First, whether the property at issue was likely to be at the location after a triggering event, and second, whether there is probable cause to believe the triggering event will in fact occur. *Morton* at *12-*15. This test is taken directly from *Grubbs*, where the two prerequisites were described thus: "It must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,' but also that there is probable cause to believe the triggering condition *will occur*." *Grubbs*, 547 U.S. at 96-97, 164 L. Ed. 2d at 204 (citation omitted). This two-part test is, essentially, a shorter version of the test set out by this Court in *Smith*, *supra*, although this Court did not rely on the reasoning of *Grubbs* in that opinion.

> Secondly, we decide whether the trial court had enough information upon which to determine that the underlying circumstances or manner in which the informant obtained his or her information was reliable.

Id. at 817-18. As to the first question, the court emphasized the fact that the police were able to independently verify certain pieces of information provided by the informant: The type of car a certain party owned, where that party lived, and the defendant's address. *Id.* As to the second question, the court examined the evidence provided to the court by the police in the affidavits for indications that the informant had obtained the information in a reliable manner; given the informant's firsthand participation in the actual buy and the informant's information on an accomplice's movements, the court found that the "trial court had enough information upon which to determine that the underlying circumstances or manner in which the informant obtained his or her information was reliable." *Id.* at 818.

C.

The facts in the case at hand differ materially from the usual scenario in which an anticipatory warrant is issued. As such, the more appropriate legal framework for this situation seems to this Court to be a combination of our already-established three-part test outlined in *Smith*, which is tailored to the usual scenario, and the two-part test set out above from *Falbo*, as it is directly on point and thus more precise guidance for this scenario. The two tests are in fact complementary, as they cover the two portions of the warrant process: *Falbo* concerns obtaining the warrant, the first part, and *Smith* concerns the contents of the warrant once obtained and the manner of its execution, the latter portion.

Falbo presents two issues regarding obtaining a warrant to a reviewing court: First, whether the affidavit supporting the warrant "established circumstances from which the affiant could conclude that the information was reliable"; and second, whether the trial court authorizing the warrant had sufficient information before it to determine that "the underlying circumstances or manner in which the informant obtained his or her information was reliable." *Falbo*, 526 N.W.2d at 817-18.

Smith then presents three issues as to the warrant's contents and execution to a reviewing court; excising the more specific language in the test makes it clearly applicable to the case at hand:

> (1) The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) Those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained . . . ; and finally, (3) No search may occur unless and until the property [is] . . . at that destination.

Smith, 124 N.C. App. at 577, 478 S.E.2d at 245.

Thus, in this case, we will consider whether the affidavit supporting the warrant was reliable; whether the information before the trial court was obtained in a reliable manner; whether the triggering events in the warrant were clear and narrowly drawn; whether the triggering events were ascertainable and preordained; and whether the property was at the destination at the time of the warrant's execution.

D.

As to the affidavit and information before the trial court, the facts before us are very similar to those in *Falbo*. In the case at hand, as in *Falbo*, the police were able to independently confirm a number of statements the informant made: Defendant's name, defendant's address, and defendant's history of drug charges. Further, the trial court had information before it as to the informant's year-long history of purchasing drugs from defendant, as well as the police officers' testimony that they considered this information reliable. This warrant thus was clearly obtained in a manner that passes the first part of the test we have set out in this case.

We now turn to the warrant itself. Per *Smith*, the warrant must contain clear triggering events, those events must be ascertainable and preordained, and no search may have taken place until after those triggering events occurred. These requirements are fulfilled by the language on the face of the warrant.

First, as to the triggering event, the warrant states: "Once the confidential source sees the marijuana being displayed at the residence, he/she will give a prearranged signal that the marijuana has been seen." Further, as to the requirement that no search occur until after the property is at the location, the warrant states: "If the marijuana is successfully seen by the confidential source, the affiant contends there is probable cause to believe that a search of the residence of 2207 Cabin Court, Greensboro[,] North Carolina[,] will result in the discovery of additional controlled substances, evidence of occupancy

and other related material[.]" The warrant is thus also valid under the latter part of the test we have set out in this case.

III.

Because the warrant in this case was obtained in a way consistent with the reasoning we have adopted from *Falbo* and the already-established requirements of *Smith*, we affirm the trial court's denial of defendant's motion to suppress the evidence obtained as a result of executing that warrant.

Affirmed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. TALMAGE GASTON COFFEY

No. COA07-618

(Filed 18 March 2008)

1. Sentencing— *Blakely* error—not prejudicial

A *Blakely* error in sentencing defendant for driving while impaired was not prejudicial where there was overwhelming and uncontroverted evidence to support the aggravating factor found by the trial court that defendant was driving while his license was revoked due to a prior impaired driving offense.

2. Motor Vehicles— driving while impaired—sufficiency of evidence

There was sufficient evidence of driving while impaired, despite defendant's contention that he had not been the person driving, where an officer saw defendant's vehicle in motion, watched it come to a stop, did not see anyone leave the vehicle, and found defendant in the driver's seat with the seatbelt fastened. There was also testimony that defendant had been drinking at a party, that the vehicle was going 92 m.p.h. in a 45 m.p.h. zone, and that the vehicle ran off the road, as well as the officer's testimony that defendant's eyes were red and glassy and that defendant had trouble maintaining his balance as he walked.

3. Motor Vehicles— reckless driving—evidence sufficient

There was sufficient evidence of reckless driving where defendant was driving while impaired and going 92 m.p.h. in a 45 m.p.h. zone.

Appeal by defendant from judgment entered 31 January 2007 by Judge Nathaniel J. Poovey in Caldwell County Superior Court. Heard in the Court of Appeals 28 November 2007.

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

Mercedes O. Chut for defendant appellant.

McCULLOUGH, Judge.

Defendant Talmage Gaston Coffey ("defendant") was tried before a jury at the 31 January 2007 Criminal Session of Caldwell County Superior Court after being charged with one count of driving while impaired, one count of driving while license revoked, one count of speeding 92 m.p.h. in a 45 m.p.h. zone, and one count of reckless driving to endanger.

The State's evidence tended to show the following: At approximately 12:05 a.m. on 8 September 2005, Corporal Kirby Anderson ("Corporal Anderson") of the Caldwell County Sheriff's Office observed defendant's Ford Contour speeding down a straight stretch of Connelly Springs Road, a two-lane road. Using a radar gun, Corporal Anderson determined that the vehicle was traveling 92 m.p.h. in a 45 m.p.h. zone. After passing Corporal Anderson, defendant's vehicle traveled off the shoulder of the road, slinging rocks and gravel onto the patrol car. Without losing sight of defendant's vehicle, Corporal Anderson, who was traveling in the opposite direction, turned around and began to follow defendant.

Defendant subsequently slowed down, pulled into a driveway, and stopped the vehicle. Corporal Anderson approached the vehicle and found defendant seated in the driver's seat, with his seatbelt fastened. Corporal Anderson noticed a very strong smell of alcohol coming from the car and observed defendant's eyes to be red and glassy. When asked to exit the car, defendant had trouble maintaining his balance and used the side of the car to support himself while he walked.

Defendant refused to perform field sobriety tests, and Corporal Anderson placed him under arrest. When asked to perform an intoxi-

lyzer test, defendant became very "mouthy," stating, "I'm not doing a f——— thing or signing sh—." After reviewing defendant's vehicle registration and driver's license information, Corporal Anderson determined that defendant was driving with a suspended license. At the close of the State's evidence, the defense moved to dismiss all charges. The trial court granted the motion with respect to the charge of driving while license revoked, concluding that the State had failed to produce evidence that defendant knew that his license was suspended, but denied the motion with respect to all of the other charges.

The evidence for the defense tended to show that at around 10:30 p.m. on 8 September 2005, defendant was standing in the front yard of a residence where a party was being held when a woman that he had never met approached him and asked for a ride home. The woman had walked to the residence from a nearby bar. She was crying and said that her boyfriend, who was still at the bar, had been hitting her. She begged defendant to take her to her house so that she could gather her belongings and get away from her abusive boyfriend.

Defendant testified that he told the woman that he "didn't have no [driver's] license." The woman replied that she had a driver's license, and defendant allowed her to drive his car. Defendant sat in the backseat of the car, and defendant's friend Pete sat in the front passenger's seat while the woman drove.

At the woman's request, once the group arrived at the woman's house, defendant moved to the driver's seat and kept watch for the woman's boyfriend. In the event that the woman's boyfriend arrived while the woman was in the house, defendant had agreed to try and distract him. Defendant saw the woman head towards the house, but did not see if she went inside. While defendant was sitting in the driver's seat, an officer approached and asked him to perform an intoxilyzer test. Defendant refused, as he knew that he had not been driving. No alcohol was found in defendant's vehicle.

At the close of the evidence, defendant renewed his motions to dismiss. Those motions were denied. The jury unanimously found defendant guilty of driving while impaired, speeding in excess of 80 m.p.h. in a 45 m.p.h. zone, and reckless driving. The trial court sentenced defendant to a Level I term of imprisonment of 24 months, finding two grossly aggravating factors: (1) that defendant had been convicted of a prior offense of driving while impaired within the last seven years; and (2) at the time of the current offense, defend-

ant was driving while his license was revoked due to an impaired driving revocation.

I. Aggravated Sentence

[1] On appeal, defendant argues that the trial court's imposition of a sentence in the aggravated range was done in violation of *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), and his Sixth Amendment right to a trial by a jury. Specifically, defendant argues that the trial court should have submitted to the jury the aggravating factor listed in N.C. Gen. Stat. § 20-179(c)(2) (2007), which provides that at the time of the offense, defendant was driving while his licensed was revoked, as defined by N.C. Gen. Stat. § 20-28, and the revocation was an impaired driving revocation under N.C. Gen. Stat. § 20-28.2(a). N.C. Gen. Stat. § 20-179(c)(2). While we agree that the trial court erred in failing to submit this issue to the jury, we find that this error was harmless beyond a reasonable doubt.

Under the rule in *Blakely*, trial judges may not "enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt." *State v. Blackwell*, 361 N.C. 41, 45, 638 S.E.2d 452, 455 (2006), *cert. denied*, —— U.S. ——, 167 L. Ed. 2d 1114 (2007). Although there is an exception whereby a trial court's imposition of a sentence on the basis of an admission to an aggravating factor does not violate the Sixth Amendment if "that defendant personally or through counsel admits the necessary facts," we conclude that this exception does not apply to the facts at hand. *State v. Hurt*, 361 N.C. 325, 330, 643 S.E.2d 915, 918 (2007).

Instead, we review to determine whether such error 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, 638 S.E.2d at 458 (citation omitted). Absent special exceptions set forth in N.C. Gen. Stat. § 20-19(d) and (e), when a license is revoked due to an impaired driving conviction, the period of revocation is one year. N.C. Gen. Stat. § 20-19(c1) (2005).[1] However, that period of revoca-

1. N.C. Gen. Stat. § 20-19(d) and (e) have recently been amended. Such amendments, however, apply only to offenses committed on or after 1 December 2007 and do not alter our analysis.

tion is extended indefinitely until the Division of Motor Vehicles receives certification that the driver has completed an alcohol and drug education traffic school or a substance abuse treatment program. N.C. Gen. Stat. § 20-17.6(b),(c) (2007).[2]

Here, defendant's driving record, which was admitted as evidence by the State, shows that defendant's driver's license was indefinitely revoked due to his 31 October 2001 impaired driving conviction and that such license had not been reinstated. Defendant did not dispute the accuracy of his driving record. Moreover, defendant's counsel conceded at trial that defendant's license had been revoked and that defendant had not yet had his license reinstated. Defendant testified that he had knowledge that his license was revoked, as he stated that one of the reasons defendant had the woman drive his car was because "[he] didn't have no license." We conclude that there was overwhelming and uncontroverted evidence that at the time of the offense, defendant was driving while his license was revoked and that such revocation was an impaired driving revocation. If the instant case were remanded to the trial court for a jury determination of the aggravating factor at issue, there can be no serious question that the State would offer identical evidence in support of that aggravator. Accordingly, we conclude that the *Blakely* error that occurred at defendant's trial was harmless beyond a reasonable doubt.

II. Motion to Dismiss

Next on appeal, defendant contends that the trial court erred by denying defendant's motion to dismiss the charges of driving while impaired and reckless driving to endanger. Because we find substantial evidence of both offenses, we disagree.

In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). The Court must find that there is substantial evidence of each element of the crime charged and of defendant's perpetration of such crime. *Id.* "Substantial evidence is

2. At trial, defendant argued, under the principles articulated in *Ennis v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 612, 615-16, 184 S.E.2d 246, 248 (1971), that once the one-year period of revocation for defendant's driver's license had expired, defendant was merely guilty of driving without a valid operator's license rather than driving while his license was revoked. We note that *Ennis v. Garrett* was decided prior to the enactment of N.C. Gen. Stat. § 20-17.6(b). N.C. Gen. Stat. § 20-17.6(b) effectively extends the period of revocation due to an impaired driving conviction from the former one-year maximum period to a now indefinite period of time.

relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

A. Driving While Impaired

[2] N.C. Gen. Stat. § 20-138.1(a) provides, in pertinent part, that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . while under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2007). Our Supreme Court has held that "the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138.' " *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)).

Here, Corporal Anderson testified that he saw defendant's vehicle in motion, watched the vehicle come to a stop, did not see any person leave the vehicle, and found defendant, with seatbelt fastened, seated in the driver's seat. Taking this evidence in the light most favorable to the State, there is substantial evidence that defendant was the driver of the Ford Contour. Both defendant and defendant's friend Cathy testified that defendant was drinking at the party. Likewise, the State's evidence that the vehicle was traveling at a speed of 92 m.p.h. in a 45 m.p.h. zone and that the vehicle ran off the road demonstrates that defendant's vehicle was driven in a faulty manner. Moreover, the State presented evidence of physical impairment, as Corporal Anderson testified that defendant's eyes were red and glassy and that defendant had trouble maintaining his balance as he walked. Accordingly, we conclude that there was substantial evidence that defendant committed the offense of driving while impaired. This assignment of error is overruled.

B. Reckless Driving to Endanger

[3] N.C. Gen. Stat. § 20-140(b) (2007) provides, "Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." Here, the State presented evidence that defendant drove his vehicle while impaired and traveled 92 m.p.h. in 45 m.p.h. zone. This evidence is sufficient for a jury determination as to whether defendant was guilty of reckless driving to endanger. *See State v. Floyd*, 15 N.C. App. 438, 440, 190 S.E.2d 353, 354, *cert. denied*,

281 N.C. 760, 191 S.E.2d 363 (1972) (holding that the State's evidence that a defendant drove his vehicle 60 to 70 m.p.h. in a 45 m.p.h. zone combined with the vehicle's sudden "fishtailing" was sufficient for a jury determination as to whether the defendant was guilty of reckless driving). Accordingly, this assignment of error is overruled.

For the foregoing reasons, we conclude that there has been no prejudicial error.

No prejudicial error.

Judges STEELMAN and GEER concur.

DURHAM HOUSING AUTHORITY, PLAINTIFF v. A. LARRY PARTEE, DEFENDANT

No. COA07-581

(Filed 18 March 2008)

1. Public Assistance— Section 8 rental assistance—breach of lease contract—summary ejectment—violation of N.C.G.S. § 14-435

The trial court did not err in a summary ejectment case based on a breach of lease contract for Section 8 termination by finding that defendant violated N.C.G.S. § 14-435 even though he contends there was no evidence that he sold, advertised, or intended to profit from the DVDs in his possession that did not show the name of the true manufacturer because: (1) there was competent evidence that defendant advertised and sold DVDs; (2) the trial court implicitly found that defendant advertised and sold the DVDs for financial gain by concluding that defendant's advertising and sale of the DVDs violated N.C.G.S. § 14-435; and (3) defendant's purpose of financial gain can be inferred from his agreement to make an illegal DVD copy of a movie.

2. Public Assistance— Section 8 rental assistance—breach of lease contract—illegal activity—finding illegal activity impaired physical or social environment not required

The trial court did not err in a summary ejectment case by concluding that defendant's violation of N.C.G.S. § 14-435 was a breach of his Section 8 housing lease and that defendant should

be evicted on that basis because: (1) defendant's lease could reasonably be interpreted to allow the management of the apartment complex to terminate the lease for participation in any illegal activity or for any other activity which impaired the physical or social environment of the apartment complex; and (2) it was sufficient for the trial court to find defendant's activity was illegal, without finding as fact that defendant's illegal activity also impaired the physical or social environment of the apartment complex, in order to conclude the lease had been breached.

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

Although defendant assigned error to the trial court's denial of his counterclaim for the restoration of his Section 8 housing assistance benefits, this assignment of error is overruled because defendant failed to cite authority in support of this argument as required by N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 3 January 2007 by Judge David Q. LaBarre in District Court, Durham County. Heard in the Court of Appeals 15 November 2007.

The Banks Law Firm, P.A. by John Roseboro, for plaintiff-appellee.

Daniel F. Read for defendant-appellant.

STROUD, Judge.

Plaintiff appeals from an order summarily ejecting him from the dwelling located at 500 Pickwick Trail, Apartment 321, Durham, North Carolina, and denying his counterclaim for restoration of his Section 8 rental assistance[1] benefits. On review, we conclude that the trial court's findings of fact were supported by competent evidence and that those findings of fact supported the trial court's conclusions of law. Accordingly, we affirm.

I. Background

Plaintiff received Section 8 rental assistance from the Durham Housing Authority (DHA) for his residence at 500 Pickwick Trail, Apartment 321, at Preiss-Steele Place in Durham, North Carolina.

1. *See* 42 U.S.C. § 1437f (2006); 24 C.F.R. § 982.501 (2006). "Section 8" is a federal program which subsidizes rental payments for low-income tenants.

Among several conditions of continued receipt of Section 8 benefits, plaintiff was not allowed to seriously violate his lease,[2] 24 C.F.R. § 982.551(e) (2006), or "engage in . . . criminal activity that threaten[ed] the . . . right to peaceful enjoyment of other residents[,]" 24 C.F.R. § 982.551(l) (2006).

In or around July of 2006, defendant advertised for sale and sold copies of movies on DVD at the Priess-Steele property. Because those DVDs did not bear the name of their true manufacturers, plaintiff was charged with violation of N.C. Gen. Stat. § 14-435.[3]

By a letter dated 31 July 2006, defendant received notice from the manager of Preiss-Steele Place that he was required to vacate his apartment by 31 August 2006 because his advertising and attempted sale of the mislabeled DVDs violated N.C. Gen. Stat. § 14-435, an illegal act which resulted in violation of his lease. By a letter dated 15 August 2006, DHA notified defendant that his Section 8 rental assistance would be terminated because his violation of N.C. Gen. Stat. § 14-435 was a "serious . . . violation of the lease," and also a "criminal activity that threaten[ed] the . . . right to peaceful enjoyment of other residents[.]"

On or about 8 September 2006, plaintiff filed a complaint in Small Claims Court, Durham County. The complaint sought summary ejectment of defendant on the basis that defendant had breached his lease agreement by violating N.C. Gen. Stat. § 14-435.

On or about 17 September 2006, DHA held an informal hearing and affirmed the termination of defendant's Section 8 rental assist-

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2. Defendant's lease read, in pertinent part:

> Management may terminate this Lease upon the occurrence of . . . the conduct or participation of a member of Resident's household in *any illegal or other activity* within or outside Preiss-Steele Place which impairs the physical or social environment of Preiss-Steele Place or the safety of members of Resident's household or other members of households in Preiss-Steele Place[.]

(Emphasis added.)

3. A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale, or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

N.C. Gen. Stat. § 14-435(a) (2005).

ance. On or about 19 September 2006, the small claims court found that "the plaintiff has failed to prove the case by the greater weight of the evidence[,]" and entered an order dismissing the complaint with prejudice. Plaintiff filed notice of appeal to District Court, Durham County on or about 26 September 2006.

In a motion filed with the district court on or about 6 October 2006, defendant counterclaimed for restoration of his Section 8 benefits, alleging that the termination was "contrary to all evidence, and a violation of due process of law[.]" In the same motion, defendant moved for dismissal of plaintiff's summary ejectment complaint alleging: (1) there was no evidence that defendant had sold the DVDs for commercial gain or financial advantage, therefore plaintiff had failed to prove one of the essential elements of N.C. Gen. Stat. § 14-435; and (2) alternatively, even if defendant was found to have violated N.C. Gen. Stat. § 14-435, there was no evidence that the activities of defendant impaired the physical or social environment of Preiss-Steele Place.

A bench trial was held on or about 7 December 2006. The trial court found that defendant possessed, advertised and sold DVDs which did not show the name of the true manufacturer. Accordingly, the trial court concluded that defendant had violated N.C. Gen. Stat. § 14-435(a), and in so doing had violated his lease agreement. Defendant was therefore ordered to immediately vacate the dwelling unit located at 500 Pickwick Trail, Apartment 321, Durham, North Carolina. The trial court also concluded that defendant had seriously breached the lease agreement and engaged in criminal activity that threatened the peaceful enjoyment of other residents, which were proper grounds for termination of Section 8 benefits. Accordingly, the trial court denied defendant's counterclaim for restoration of Section 8 housing assistance benefits. Defendant appeals.

II. Standard of Review

At a bench trial, "the trial judge considers the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007) (citations, brackets and quotation marks omitted). On review of a bench trial, "the appellate courts are bound by the trial courts' findings of fact where there is some evidence to sup-

port those findings, even though the evidence might sustain findings to the contrary," *Cardwell v. Henry*, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (citation and quotation omitted), but "[t]he trial court's conclusions of law are reviewed *de novo*." *Kraft v. Town of Mount Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007).

III. Analysis

Defendant argues that the trial court erred when it: (1) found that defendant violated N.C. Gen. Stat. § 14-435, because there was no evidence that defendant sold, advertised, or intended to profit from the DVDs in his possession; (2) concluded that defendant's violation of N.C. Gen. Stat. § 14-435 was a breach of his lease and that defendant should be evicted on that basis; and (3) concluded that defendant's Section 8 housing benefits were properly terminated because defendant's violation of N.C. Gen. Stat. § 14-435 was a serious breach of his lease and also interfered with the peaceful enjoyment of other residents.

A. Violation of N.C. Gen. Stat. § 14-435

[1] "Findings of fact supported by competent evidence are binding on appeal [from a bench trial], notwithstanding the existence of contradictory evidence." *Terry's Floor Fashions, Inc.*, 184 N.C. App. at 10, 645 S.E.2d at 816. The trial court found that defendant advertised DVDs. The record contains a copy of a flyer posted by defendant at Preiss-Steele Place, which bore the caption "Movies Available" and listed twenty-five movie titles, and had defendant's phone number written vertically across the bottom on easy-to-tear strips. This is competent evidence that defendant advertised DVDs, and the trial court did not err in so finding.

The trial court further found that defendant sold DVDs. A witness testified that defendant stated that he could make a copy of a movie named *Madea's Family Reunion*; thereafter he delivered a DVD copy of the movie to the witness in exchange for fifteen dollars. This is competent evidence that defendant sold DVDs, and the trial court did not err in so finding.

In concluding that defendant's advertising and sale of the DVDs violated N.C. Gen. Stat. § 14-435, the trial court implicitly found that defendant advertised and sold the DVDs for financial gain. Defendant's purpose of financial gain can be inferred from his agreement to make an illegal DVD copy of a movie and his sale of the DVD for fifteen dollars. The trial court's conclusion that defendant violated

N.C. Gen. Stat. § 14-435 was supported by its findings of fact on all the essential elements. The trial court did not err in so concluding.

B. Eviction and Termination of Benefits

[2] Defendant contends that even if the trial court correctly concluded that defendant violated N.C. Gen. Stat. § 14-435, it erred when it concluded that defendant's violation of N.C. Gen. Stat. § 14-435 was a breach of his lease, for which defendant could be evicted, and was also both a serious breach of his lease and a violation of the federal regulations governing participation in the Section 8 program, for which his Section 8 housing benefits could be terminated, because no evidence was presented that anyone was disturbed by any alleged illegal activity on the part of defendant.

Defendant's lease allowed the management of the apartment complex to terminate the lease for "participation . . . in any illegal or other activity . . . which impairs the physical or social environment" of the apartment complex. We believe that the lease could be reasonably interpreted to allow termination of the lease for any illegal activity *or* for any other activity which impaired the physical or social environment of the apartment complex. Defendant's proposed interpretation of the lease would make an illegal activity acceptable if the particular illegal activity actually enhances the physical or social environment of the complex. Indeed, defendant argues that his activity did enhance the social environment of the complex. We hold that the trial court was not required to find as fact that defendant's illegal activity also impaired the physical or social environment of the apartment complex in order to conclude the lease had been breached. It was sufficient for the trial court to find that the defendant's activity was illegal.

[3] Defendant assigned error to the trial court's denial of his counterclaim for the restoration of his Section 8 housing assistance benefits, but cited no authority in the brief in support of the argument. This assignment of error is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges TYSON and JACKSON concur.

AMY McQUILLIN, PLAINTIFF v. CARLOS PEREZ, DEFENDANT

No. COA07-949

(Filed 18 March 2008)

Appeal and Error— preservation of issues—appellate rules violations—notice of appeal—failure to include certificate of service—appeal dismissed

Plaintiff's appeal from an order denying her motion in aid of enforcement of execution to recover against an annuity defendant had purchased from Jefferson-Pilot Insurance Company (JP) while a resident of Florida is dismissed because: (1) plaintiff's notice of appeal did not comport with the requirements of N.C. R. App. P. 3 when plaintiff's notice of appeal purported to be brought under Rule 4 which governs a criminal case, plaintiff failed to indicate to which court the appeal was taken, and there was no certificate of service of the notice of appeal in the record on appeal as required by N.C. R. App. P. 26; (2) JP did not waive the issue and the court is without jurisdiction to hear the appeal since JP filed a motion to dismiss the appeal based on a defective notice of appeal including a lack of certificate of service in the record; and (3) plaintiff failed to comply with N.C. R. App. P. 28(b)(6) when there was no statement of the applicable standard of review either at the beginning of each question presented or at the beginning of the discussion of all questions presented.

Appeal by plaintiff from an order entered 19 April 2007 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 6 February 2008.

William E. West, Jr., for plaintiff-appellant.

Gregory T. Higgins, for Jefferson-Pilot Life Insurance Company, respondent-appellee.

No brief filed, for defendant-appellee.

JACKSON, Judge.

Pursuant to a civil judgment issued on 11 August 2005 in Indian River County, Florida ("the Florida judgment"), Amy McQuillin ("plaintiff") was awarded the sum of $15,000,000.00 from Carlos Perez ("defendant"). On 12 July 2006, plaintiff filed the Florida judg-

ment with the Forsyth County Clerk of Superior Court. By order dated 18 September 2006, the Florida judgment was domesticated and given full faith and credit in North Carolina. Plaintiff sought to recover against an annuity defendant had purchased from Jefferson-Pilot Insurance Company ("JP") while a resident of Florida. On 6 February 2007, plaintiff filed a motion in aid of enforcement of execution in Forsyth County in an attempt to execute against defendant's annuity with JP in Guilford County.

After a hearing held before an assistant clerk of the Forsyth County Superior Court, the matter was referred to a superior court judge for decision. On 25 April 2007, the trial court entered an order denying plaintiff's motion in aid of enforcement of execution, without prejudice to her right to seek to levy upon the annuity in the State of Florida. Plaintiff brought a motion pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure requesting the trial court make findings of fact and conclusions of law. The court's order was amended on 21 May 2007 to include findings of fact and conclusions of law, including that the laws of Florida control whether the annuity is subject to levy and execution.

Before reaching the merits of plaintiff's appeal, we first must address JP's motion to dismiss the appeal which is pending before this Court. Among JP's arguments for dismissal is a defective notice of appeal. Rule 3 of the North Carolina Rules of Appellate Procedure governs how and when appeals are taken in civil cases. Pursuant to Rule 3,

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

N.C. R. App. P. 3(a) (2007) (emphasis added).

Plaintiff's notice of appeal does not comport with the requirements of Rule 3. First, it purports to be brought pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure. Rule 4 governs how and when appeals in criminal cases are to be taken. Plaintiff did not appeal a criminal case.

Second, plaintiff's notice of appeal fails to indicate to which court the appeal is taken. Among other things, the notice of appeal "shall

designate . . . the court to which appeal is taken[.]" N.C. R. App. P. 3(d) (2007). Plaintiff contends that such designation is unnecessary under the circumstances. However, she cites no authority in support of this contention; therefore, it is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2007) ("Assignments of error . . . in support of which no . . . authority [is] cited, will be taken as abandoned.").

Finally, and most significantly, there is no certificate of service of the notice of appeal in the record on appeal.

> Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

N.C. R. App. P. 26(d) (2007). Without proof of service, we cannot know whether a copy of the notice of appeal was properly served upon defendant. This issue is controlled by *In re C.T. & B.T.*, 182 N.C. App. 166, 641 S.E.2d 414, *aff'd*, 361 N.C. 581, 650 S.E.2d 593 (2007) (per curiam). *See also Blevins v. Town of West Jefferson*, 182 N.C. App. 675, 643 S.E.2d 465, *rev'd*, 361 N.C. 578, 653 S.E.2d 392 (2007) (per curiam).

In *C.T.*, the appellant had not attached a certificate of service to the notice of appeal in the record on appeal and the appellees had filed a motion to dismiss the appeal. This Court held that the failure to attach a certificate of service was fatal and dismissed the appeal. *C.T.*, 182 N.C. App. at 168, 641 S.E.2d at 415.

There also was no certificate of service in the record on appeal in *Blevins*; however, the issue was raised *sua sponte* by the Court, rather than by the parties by motion or otherwise. Our Supreme Court agreed with Judge Geer's dissent in which she stated that a failure to include a certificate of service for the notice of appeal does not support dismissal of the appeal if the appellee has waived the issue by failing to raise the issue by motion or otherwise. *Blevins*, 182 N.C. App. at 679, 643 S.E.2d at 469-70 (Geer, J., dissenting).

In *Hale v. Afro-American Arts International*, 110 N.C. App. 621, 430 S.E.2d 457, *rev'd per curiam*, 335 N.C. 231, 436 S.E.2d 588 (1993), this Court stated that "[w]ithout proper service of notice of appeal on the other party as required by Rule 26(b) [of the North Carolina Rules

of Appellate Procedure], and proof pursuant to Rule 26(d) in the record before this Court that such notice was given, this Court obtains no jurisdiction over the appeal." *Id.* at 623, 430 S.E.2d at 458 (citation omitted). In his dissent, adopted by our Supreme Court in its *per curiam* opinion, Judge Wynn added that the appellee may waive the service of the notice of appeal without depriving this Court of subject matter jurisdiction. *Id.* at 625, 430 S.E.2d at 459-60 (Wynn, J., dissenting). The failure to include the proof of service in the record was inconsequential "where the appellee failed, by motion or otherwise, to raise the issue as to service of notice in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case." *Id.* at 626, 430 S.E.2d at 460 (Wynn, J., dissenting).

In the case *sub judice*, as in *C.T.*, the record on appeal contains no certificate of service of the notice of appeal, and JP filed a motion to dismiss the appeal, alleging a defective notice of appeal, including a lack of certificate of service in the record. Therefore, JP has not waived the issue and this Court is without jurisdiction to hear the appeal. Further, "[a]ppellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990) (citing *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976)).

In addition to failing to comply with Rule 3, plaintiff has failed to comply with Rule 26 as described above, and Rule 28 of our Rules of Appellate Procedure. Pursuant to Rule 28(b)(6), "[t]he argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." N.C. R. App. P. 28(b)(6) (2007). There is no statement of the applicable standard of review, either at the beginning of each question presented or at the beginning of the discussion of all questions presented.

Our Appellate Rules are mandatory, and failure to comply with them subjects an appeal to dismissal. *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). Although this Court was reminded in *Hart* that not every rules violation requires dismissal, *id.*, due to the nature of the rules violations in the instant case and JP's motion to dismiss, this appeal must be dismissed.

Dismissed.

Judges HUNTER and BRYANT concur.

KENNETH HEATHERLY, EMPLOYEE, PLAINTIFF v. THE HOLLINGSWORTH COMPANY, INC., EMPLOYER, AND STONEWOOD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA07-222

(Filed 18 March 2008)

1. Workers' Compensation— lightning strike—standard

The Full Commission erred in a workers' compensation case involving a lightning strike by applying the incorrect standard in reaching its ultimate conclusion. The evidence supported findings concerning plaintiff's location, but the Commission did not make the findings required to support a conclusion that plaintiff was at an increased risk of a lightning strike compared to members of the public generally.

2. Workers' Compensation— expert medical testimony—hand injury after fall on concrete

The appellate court rejected defendant's contention in a workers' compensation case that plaintiff should have been forced to produce expert testimony about his hand injury where plaintiff received an electrical charge from a lightning strike and landed on a concrete floor.

Appeal by defendants from opinion and award filed 3 November 2006 by the Full Commission. Heard in the Court of Appeals 19 September 2007.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for defendants.

Bazzle & Carr, P.A., by Ervin W. Bazzle, for plaintiff.

ELMORE, Judge.

Kenneth Heatherly (plaintiff) was working as a drywall hanger for his brother, Randy Heatherly, the owner of CDS Drywall on 12 July 2004. As a result of inclement weather including rain and light-

ning, he and other workers ceased work on the project and took shelter in the garage. The garage was mostly finished but lacked doors. Plaintiff picked up a "landline" telephone located in the garage to call his brother and inform him that the crew had stopped work, but just as he dialed the number, a lightning strike occurred. The record is unclear whether the lightning struck plaintiff directly, came in through the telephone line, or simply charged the surrounding air and gave him a jolt. Plaintiff was knocked back several feet in the air, landed on his right side, and broke his right hand in the fall.

Plaintiff's coworkers rushed him to the hospital, where his hand was x-rayed, revealing fractures in his fourth and fifth metacarpals. Plaintiff received morphine for the pain and a splint for his hand. When he went to Dr. G. Ruffin Benton after his release from the hospital, plaintiff received a referral to an orthopedist and was prescribed Percocet and Ibuprofen. However, because "his workers' compensation papers were not in order," he was not able to see the orthopedist.

Plaintiff filed a claim for workers' compensation benefits, which the Hollingsworth Company and its carrier, Stonewood Insurance Company (together, defendants) denied. Deputy Commissioner Kim Ledford filed an opinion and award on 6 January 2006, in which she awarded plaintiff past and future medical expenses; total disability compensation of $333.35 per week for the period of 12 July 2004 through 2 January 2005; attorneys' fees; and costs. Defendants appealed to the Full Commission, which affirmed the Deputy Commissioner's opinion with slight modifications. Defendants now appeal to this Court.

[1] Defendants first argue that because there was insufficient evidence that plaintiff's employment placed him at an increased risk of being struck by lightning, the Full Commission erred in finding and concluding that his injury arose out of and in the course of his employment. Because the Full Commission applied the incorrect standard in reaching its ultimate conclusion of law that plaintiff's injury arose out of and in the course of his employment, we reverse and remand for new findings of fact and conclusions of law.

" 'Whether an accident arose out of the employment is a mixed question of law and fact.' " *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007) (quoting *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 197, 128 S.E.2d 218, 221 (1962)). A

determination that a worker was, or was not, at an increased risk of injury is a conclusion of law. *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 502, 358 S.E.2d 380, 382 (1987).

"This Court's review is limited to a consideration of whether there was any competent evidence to support the Full Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259 (2007) (quotations, citations, and emphasis omitted). Additionally, if "there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Id.* at 496, 642 S.E.2d 257, 259-60 (quotations and citations omitted). However, "[i]f the conclusions of the Commission are based upon a . . . misapprehension of the law, the case should be remanded so 'that the evidence [may] be considered in its true legal light.' " *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)).

Defendants rely heavily on *Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 524 (1959). In *Pope*, our Supreme Court addressed the issue of when suffering a lightning strike is compensable under the Workers' Compensation statutes. Conducting a fairly thorough survey of cases from across the nation, the Court articulated the proper inquiry as follows: "Was the danger to which [the employee] was subjected one which was incident to the employment, or was it one to which other people, the public generally, in that neighborhood, were subjected?" *Id.* at 696, 107 S.E.2d at 528. Defendants, characterizing this inquiry as an "increased risk test in lightning strike cases," posit that plaintiff failed to prove, and that the Full Commission failed to find, any indication of increased risk.

The Full Commission found that plaintiff was working at a job site high on a mountain; that a thunderstorm arose; that plaintiff was organizing his equipment in order to leave the site; that plaintiff was located in an unfinished garage that had no doors; and that plaintiff received a charge or jolt from lightning. These findings are all supported by competent evidence, and are thus binding on this Court. *See Owens-Illinois*, 182 N.C. App. at 496, 642 S.E.2d at 259-60.

We agree with defendants that *Pope* sets forth the appropriate "increased risk" test to be applied in the present case. It therefore

appears that the Full Commission did not consider the evidence " 'in its true legal light.' " *See Clark*, 360 N.C. at 43, 619 S.E.2d at 492 (quoting *McGill*, 215 N.C. at 754, 3 S.E.2d at 326). In conclusion of law 1, the Commission, quoting 1 *Arthur Larson and Lex K. Larson*, *Larson's Workers' Compensation Law* 5-1 (2000), stated, "One exception used to soften the increased-risk rule is the holding that if the harm, though initiated by an act of God, takes effect through contact of claimant with any part of the premises, causal connection with the employment is shown." (Quoting Defendants are correct that this is not the law in North Carolina; this Court has articulated an "increased risk" test and rejected the "positional risk" analysis adopted in many jurisdictions. *See*, *e.g.*, *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 401, 637 S.E.2d 251, 257 (2006) (holding that "the 'increased risk' test and not the 'positional risk' rule is the law of the State"). Moreover, the Full Commission did not cite *Pope* and did not make the findings required to support a conclusion of law that plaintiff was at an increased risk of a lighting strike as compared to members of the "public generally, in that neighborhood . . . ." *Pope*, 249 N.C. at 696, 107 S.E.2d at 528.

Whether or not the evidence supports a conclusion of law that plaintiff was at an increased risk of a lightning strike, it appears that the Full Commission reached its ultimate conclusion under a misapprehension of the law. Therefore, we reverse the Full Commission's opinion and award and remand the matter to the Full Commission to make new findings of fact and conclusions of law in accordance with the "increased risk" principles set forth in *Pope*. *See Clark*, 360 N.C. at 46, 619 S.E.2d at 494 (remanding a case "to the Court of Appeals for further remand to the Industrial Commission with instructions to find new facts and make new conclusions of law in accordance with the proper burden of proof").

[2] Because we reverse and remand, we need not address defendants' remaining assignments of error. However, we reject defendants' contention that the Full Commission should have forced plaintiff to produce expert witness testimony on the cause of his hand injury. Defendants are correct that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citation omitted). However, we agree with the Full Commission that "[t]his is not a situation that involves com-

plex medical issues, such that expert testimony is needed to establish the cause and effect between being thrown up into the air and landing on a concrete floor and sustaining a hand fracture."

Reversed and remanded.

Judges McGEE and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 MARCH 2008

BAILEY v. BRUCH No. 07-1101	Durham (04CVS3907)	Affirmed in part and reversed in part
BRADLEY v. CONTINENTAL GEN. TIRE No. 07-1093	Indus. Comm. (I.C. 471602)	Affirmed
BRAMMER v. FREEDOM COMMUNICATIONS No. 07-692	Indus. Comm. (I.C. 342769)	Affirmed
CARTRETTE v. DUKE UNIV. MED. CTR. No. 07-834	Durham (06CVS5674)	Affirmed
CHANDLER v. CHEESECAKE FACTORY RESTS., INC. No. 07-809	Durham (06CVS724)	Affirmed
CLONTZ v. HOLLAR & GREENE PRODUCE CO. No. 07-1118	Indus. Comm. (I.C. 206828)	Affirmed
DEVOS v. PROVIDENCE OBSTETRICS & GYNECOLOGY ASSOCS., P.A. No. 07-633	Mecklenburg (02CVS23006)	Affirmed
GARNER v. GARNER No. 07-790	Greene (06CVD171)	Affirmed
IN RE C.L.H. No. 07-1314	Wayne (05JT151)	Affirmed
IN RE D.A.A.W. No. 07-1248	Burke. (05J110)	Affirmed
IN RE D.R.W. No. 07-977	Cabarrus (06JB152)	Affirmed
IN RE J.N.L., J.D.E., M.J.L. No. 07-1224	Durham (04J92-94)	Affirmed
IN RE K.H. No. 07-1277	Cumberland (04JT697)	Vacated
JONES v. E.I. DUPONT DE NEMOURS & CO. No. 07-479	Indus. Comm. (I.C. 236401)	Affirmed
JONES v. PARSONS No. 07-826	Wake (04CVS3277)	Dismissed

KLEIN v. STATE BD. OF EXAM'RS OF PLUMBING No. 07-637	Swain (06CVS215)	Affirmed
KLINGER v. SCI N.C. FUNERAL SERVS., INC. No. 07-620	New Hanover (05CVS1725)	Affirmed in part; reversed in part
LEWIS v. BEACHVIEW EXXON SERV. No. 07-1046	Indus. Comm. (I.C. 744105)	Affirmed
MEANY v. WAKEMED No. 07-794	Indus. Comm. (I.C. 053285)	Affirmed
PRITCHARD v. SLADOJE No. 07-194	Mecklenburg (06CVS13065)	Dismissed
RODRIGUEZ-CARIAS v. NELSON'S AUTO SALVAGE & TOWING SERV. No. 07-570	Indus. Comm. (I.C. 472777) (PH-1218)	Affirmed
ST. JOHN CHRISTIAN HOLINESS CHURCH OF GOD v. HINES No. 07-820	Gaston (05CVS2458)	Affirmed
STATE v. BORKAR No. 07-815	Swain (02CRS880) (02CRS50432)	No error
STATE v. GILMORE No. 07-600	Gaston (03CRS62121) (03CRS62123) (03CRS19229)	No error
STATE v. HARB No. 07-1140	Davidson (06CRS5225) (06CRS53156)	No error
STATE v. HICKS No. 07-767	McDowell (06CRS4295)	Affirmed
STATE v. LIGON No. 07-799	Buncombe (06CRS50904-05) (06CRS11405)	No error
STATE v. LITTLE No. 07-614	Guilford (05CRS72993)	No error
STATE v. McHONE No. 07-782	Cabarrus (00CRS19019)	No error
STATE v. McKOY No. 07-1040	Harnett (06CRS52420)	No prejudicial error

STATE v. PLATT No. 07-1063	Forsyth (05CRS54581)	Affirmed
STATE v. ROBERTS No. 07-858	Wake (06CRS36962) (06CRS48040)	No error
STATE v. RUTLEDGE No. 07-795	Guilford (03CRS93652-53) (04CRS66975-76) (04CRS68318-19) (04CRS68322-23) (04CRS68325-26) (04CRS68303) (04CRS68307-08) (04CRS68312) (04CRS68315)	Affirmed
STATE v. SANDRES No. 07-1022	Wayne (06CRS54406)	No error
STATE v. SMITH No. 07-1200	Mecklenburg (06CRS226742) (06CRS226744)	No error
STATE v. STEPHENS No. 07-1000	Forsyth (03CRS60690)	No error
WILLIAMS v. COUNTY OF WAKE No. 07-192	Indus. Comm. (I.C. 292360) (I.C. 240598)	Affirmed

FORMAL ADVISORY OPINION: 2009-01

February 13, 2009

QUESTION:

May a newly installed judge maintain the position of manager of a Professional Limited Liability Company (PLLC)? Prior to being installed into judicial office, the judge worked as an attorney in private practice, as a solo practitioner, organized as a PLLC under N.C.G.S. §57C-2-01(c). As such, the attorney is required to serve as both a member and manager of the PLLC. The judge desired to place the PLLC in an inactive status so that in the event the judge is not re-elected in the future, the judge would not need to reorganize nor lose the use of the entity's name.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it would be inappropriate for judges to serve as an officer, director or manager of any business.

DISCUSSION:

Canon 5C(2) of the North Carolina Code of Judicial Conduct provides "[s]ubject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business."

The language included in the relevant portion of Canon 5C(2) includes ". . . but should not serve as an officer, director or manager of any business." This language precludes judges from serving in an official capacity for any business concern. The Code does not contain any exception for a wholly owned or closely held family business. Canon 4C of the Code allow judges to engage in certain quasi-judicial activities, including service as member, officer or director of an organization or governmental agency concerning cultural or historical activities and activities concerning the economic, educational, legal, or governmental system, or the administration of justice, and to participate in its management and investment decisions. Similarly, Canon 5B of the Code permits judges to engage is extra-judicial activities, specifically including serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization.

The Commission observed the clear distinction in the Code between civic/charitable/cultural entities and business entities. The Commission also noted that service in any official capacity of a business entity has the potential to reflect adversely on impartiality, demean the judicial office, and interfere with the proper performance of judicial duties, without any counter balancing public benefit. Such service could also create an appearance of impropriety and lead to the misuse of the prestige of judicial office.

References:
North Carolina Code of Judicial Conduct
Canon 4C
Canon 5B
Canon 5C(2)

STATE OF NORTH CAROLINA v. NOEL JOHN TYSON

No. COA07-389

(Filed 1 April 2008)

1. Criminal Law— plea bargain involving multiple offenses— inadequate explanation

Convictions were remanded when there had been an earlier plea bargain involving multiple offenses and it was not clear whether defendant received a proper explanation of the full consequences of the agreement, and whether defendant relied on any resulting misrepresentations in tendering his guilty plea. The fact that a misrepresentation was inadvertent does not lessen its impact.

2. Drugs— sale near playground—playground defined

In a criminal action remanded on other grounds, there was sufficient evidence of possession of marijuana with intent to sell or deliver within 300 feet of a playground where the playground equipment consisted of a number of connected apparatuses. Although the statute refers to "separate apparatuses," the requirement will be satisfied if the recreation area contains three types of apparatuses as described in the statute, even if joined by common elements.

3. Sentencing— habitual felon—inconsistent birthdate on judgments

In an action remanded on other grounds, there was sufficient evidence that defendant had achieved the status of habitual felon even though the birthdate of defendant on one of the convictions differed from the other two. The names were the same and the three judgments were prima facie evidence that the defendant in those judgments was the same as in this case. Further discrepancies in the judgments were for the jury to consider.

Appeal by Defendant from judgment entered 25 September 2006 by Judge Jerry C. Martin in Superior Court, Beaufort County. Heard in the Court of Appeals 1 November 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, Sr. and Assistant Attorney General G. Mark Teague, for the State.

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

McGEE, Judge.

A jury found John Noel Tyson (Defendant) guilty on 25 September 2006 of one count of possession of marijuana with intent to sell or deliver marijuana within 300 feet of a playground and one count of having attained the status of habitual felon. The trial court sentenced Defendant to a term of 116 months to 149 months in prison. Defendant appeals.

The evidence contained in the record and presented at trial tends to show the following: Officer Jerry Davis (Officer Davis) of the Washington Police Department was conducting surveillance on 24 March 2005 at the intersection of Ninth and Gladden streets in Washington, North Carolina. Officer Davis testified that he had positioned himself in an upstairs apartment of a building overlooking the intersection. Officer Davis observed Defendant approach the intersection around 11:40 a.m. A few minutes later, a gray Ford Escort (the Escort) entered the intersection, and Defendant approached the Escort. Defendant reached into a brown paper bag and handed an object to the driver of the Escort. The driver handed Defendant paper currency in return. Defendant left the intersection at 11:50 a.m. and returned at 12:16 p.m. carrying a brown paper bag. Officer Davis contacted other police officers in the area and advised them to arrest Defendant. A police detective and two police officers arrived at the intersection, quickly exited their police vehicle, and apprehended Defendant at 12:23 p.m. When the officers arrested Defendant, Defendant dropped the brown paper bag he had been carrying. Police later discovered that the bag contained ten blue zipper baggies of marijuana.

Shortly after Defendant's arrest, Magistrate D.M. Hurst entered an order finding that probable cause existed to believe that Defendant had committed the offense of possession with intent to manufacture, sell, or deliver a controlled substance within 300 feet of a playground. This order was issued under file number 05 CR 51171 (file 51171). Five days later, Magistrate Donald R. Sadler issued an arrest warrant

for Defendant.[1] The warrant stated that there was probable cause to believe that on 24 March 2005, Defendant had committed the offense of possession with intent to manufacture, sell, or deliver marijuana within 300 feet of a playground, as well as the separate offense of sale of marijuana within 300 feet of a playground. This warrant was issued under file number 05 CR 51260 (file 51260). Neither the probable cause order in file 51171 nor the arrest warrant in file 51260 set out the specific facts that allegedly occurred on 24 March 2005 that gave rise to the various charges described in the two documents.

At the time of Defendant's arrest in connection with the above-described events, Defendant was awaiting trial on prior charges of possession with intent to sell and deliver cocaine, and of sale and delivery of cocaine. These charges were pending under file number 04 CRS 54772 (file 54772). Defendant had also been charged with having attained the status of habitual felon in connection with the cocaine charges. The habitual felon charge was pending under file number 05 CRS 2015 (file 2015).

Defendant pled guilty on 10 August 2005 to both cocaine charges in file 54772. According to the written plea transcript filled out by Superior Court Judge J. Richard Parker, the terms of Defendant's plea arrangement were as follows:

> Def[endant] will plead guilty to [possession with intent to sell or deliver] cocaine and sell/deliver cocaine. Def[endant] will receive consecutive sentences. State will dismiss sell + del. marijuana and [possession with intent to sell or deliver] marijuana charges and habitual felon indictment.

This written recitation of Defendant's plea agreement did not reference a file number associated with the marijuana charges to be dismissed. It is not clear that either the prosecutor or Defendant was aware that two separate criminal files had been created in connection with Defendant's actions on 24 March 2005.

In addition to the written recitation of Defendant's plea arrangement, the plea transcript also contained sections entitled "Pleas" and

1. This arrest warrant was not included in the record on appeal, apparently because Defendant was unaware of its existence at the time the record on appeal was submitted. Defendant asks that we take judicial notice of this arrest warrant, and we grant Defendant's request. *See State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998) (stating that "[t]his Court may take judicial notice of the public records of other courts within the state judicial system"); N.C. Gen. Stat. § 8C-1, Rule 201(d) (2007) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.").

"Superior Court Dismissals Pursuant to Plea Arrangement." In the "Pleas" section, Judge Parker noted that Defendant was pleading guilty to both offenses in file 54772, including possession with intent to sell or deliver cocaine, and sale or delivery of cocaine. In the "Superior Court Dismissals" section, Judge Parker noted that the habitual felon charge in file 2015 would be dismissed. Judge Parker also noted that charges of possession with intent to sell or deliver marijuana, and sale or delivery of marijuana, would likewise be dismissed. However, Judge Parker listed these two marijuana-related charges under file number 05 CRS 52733, which was a file number that was either incorrect or did not exist. The plea transcript shows that this file number was later struck through and the following notation was added: "incorrect file # per atty—disregard." A correct file number was never substituted for the marijuana charges that were to be dismissed. However, the arrest warrant issued in file 51260 indicates that the State did later dismiss the two marijuana charges associated with file 51260.

Two months later, on 10 October 2005, a grand jury indicted Defendant for possession with intent to sell or deliver a controlled substance (marijuana) within 300 feet of a playground. This indictment was issued under file 51171, the same file number appearing in the probable cause order issued by Magistrate D.M. Hurst on 24 March 2005. Defendant was also indicted on a new habitual felon charge. This indictment was issued under file number 05 CRS 4678 (file 4678). The grand jury issued a superseding indictment for the marijuana charge in file 51171 on 13 March 2006.

Defendant appeared for trial on 8 August 2006 on the marijuana charge in file 51171 and the habitual felon charge in file 4678. At that time, Defendant moved to dismiss the charges. Defendant claimed that pursuant to his earlier plea arrangement on the cocaine charges in file 54772, the State should have dismissed all the marijuana-related charges pending against him stemming from his 24 March 2005 arrest. Defendant also asked that his motion to dismiss be heard before Judge Parker, who had taken Defendant's guilty plea on the prior cocaine charges. The trial court denied Defendant's request and proceeded to hear arguments on Defendant's motion to dismiss.

The State disputed Defendant's characterization of the plea arrangement, claiming that the State had only agreed to dismiss the marijuana charges in file 51260, and not the marijuana charge in file 51171, for which Defendant was now on trial. According to the State,

Defendant's activities on 24 March 2005 had led to the creation of two different police files. First, between 11:40 a.m. and 11:50 a.m., Defendant allegedly possessed drugs, and then sold those drugs to the driver of the Escort. This series of events led to the creation of file 51260. In connection with this file, Defendant was charged with two offenses: possession with intent to sell or deliver marijuana within 300 feet of a playground, and sale of marijuana within 300 feet of a playground. Second, after Defendant left the intersection at 11:50 a.m., he returned at 12:16 p.m. with another brown paper bag containing marijuana. Defendant possessed this bag from 12:16 p.m. until he dropped the bag during his arrest at 12:23 p.m. This series of events led to the creation of file 51171. In connection with this file, Defendant was charged with one offense: possession with intent to sell or deliver marijuana within 300 feet of a playground. The State maintained that when Defendant pled guilty on 10 August 2005 to the cocaine charges in file 54772, the State only agreed to dismiss the marijuana charges in file 51260. In fact, according to the State, it could not have agreed to dismiss the marijuana charge in file 51171 because Defendant had not yet been indicted for that offense.

After hearing the State's explanation, the trial court denied Defendant's motion to dismiss. However, the trial court was unable to try Defendant at that time because Defendant was wearing his prison uniform and did not have a change of clothes.

Defendant was again called for trial on 22 August 2006 on the marijuana charge in file 51171 and the habitual felon charge in file 4678. At that time, the State informed the trial court that it had reached a new plea agreement with Defendant and recapped the series of events leading to Defendant's prior motion to dismiss:

> I think the basis of [Defendant]'s motion to dismiss was that we were—he was thinking that he was wrapping up all cases or was disposing of all pending matters at the time . . . . [O]ne of the things in [Defendant]'s motion is that, "Well, that case [in file 51171] was dismissed and was dismissed as part of that original plea deal." I think the argument from the State would be it didn't exist at that time . . . . However, recognizing that [Defendant] sought to clean up everything he had out there in August, the proposal I have made . . . is that . . . . he'll plead to the Possession with Intent to Sell and Deliver Marijuana [in file 51171] today, [and] the Habitual Felon [in file 4678], and consolidate these offenses with the ones in August for a sentence[.]

The trial court then began the process of accepting Defendant's guilty plea. However, a dispute arose as to the specific terms of the plea agreement. The trial court then refused to accept any further plea agreements, stating that Defendant would be tried on both the marijuana charge in file 51171 and the habitual felon charge in file 4678.

Defendant was called for trial for a third time on 21 September 2006 on the marijuana charge in file 51171 and the habitual felon charge in file 4678. On 25 September 2006, a jury found Defendant guilty of possession of marijuana with intent to sell or deliver within 300 feet of a playground in file 51171, and also found Defendant guilty of having attained habitual felon status in file 4678. Defendant appeals.

I.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charges in files 51171 and 4678 because these charges were encompassed in his prior plea arrangement. Defendant further argues that the State's failure to adhere to the plea arrangement violated his constitutional right to due process.

A plea agreement, although it "arises in the context of a criminal proceeding, . . . remains in essence a contract." *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), *remanded on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (2000). As such, "judicial interpretation of plea agreements is largely governed by the law of contracts." *United States v. Martin*, 25 F.3d 211, 216-17 (4th Cir. 1994). *See also State v. Lacey*, 175 N.C. App. 370, 377, 623 S.E.2d 351, 356 (2006) (stating that plea agreements are to be analyzed using principles of contract law). However, our Courts have also recognized that a plea agreement "is markedly different from an ordinary commercial contract" because "[b]y pleading guilty, a defendant waives many constitutional rights[.]" *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315. Therefore, according to the United States Supreme Court, the plea bargain "phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Santobello v. New York*, 404 U.S. 257, 262, 30 L. Ed. 2d 427, 433 (1971). Although a defendant has no constitutional right to have a guilty plea accepted by a trial court, *see id.*, both the defendant and the State are bound by the terms of the plea agreement once the defendant has entered a guilty plea and such plea has been accepted by the trial court. *See State v. Collins*, 300 N.C.

142, 148, 265 S.E.2d 172, 176 (1980) (holding that the terms of a plea agreement become binding after "the actual entry of the guilty plea by [the] defendant"); *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (stating that "due process mandates strict adherence to any plea agreement").

In *Santobello*, the United States Supreme Court vacated the defendant's conviction where prosecutors had violated the terms of the defendant's plea agreement. Under the terms of the agreement, the defendant agreed to plead guilty in New York state court to a certain offense in exchange for the prosecutor's agreeing to make no sentencing recommendation to the trial court. *Santobello*, 404 U.S. at 258, 30 L. Ed. 2d at 431. The defendant pled guilty to the offense as agreed. However, a different prosecutor unfamiliar with the plea agreement appeared at the defendant's sentencing hearing and recommended that the trial court impose the maximum sentence. *Id.* at 258-59, 30 L. Ed. 2d at 431. The trial court then imposed the maximum sentence over the defendant's objection. *Id.* at 259-60, 30 L. Ed. 2d at 431-32.

The Supreme Court began its opinion by lamenting "another example of an unfortunate lapse in orderly prosecutorial procedures[.]" *Id.* at 260, 30 L. Ed. 2d at 432. The Court held that requirements of fairness and due process apply to the negotiation and tender of a plea bargain. *Id.* at 261-62, 30 L. Ed. 2d at 432-33. While the Court noted that the process due a defendant would vary in different circumstances, it was nonetheless clear that "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262, 30 L. Ed. 2d at 433. The State argued that its breach of the plea agreement was inadvertent, but the Court was not persuaded. According to the Court, "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Id.* Because the State failed to fulfill its promise, the Court vacated the judgment and remanded the case for appropriate relief. *Id.* at 262-63, 30 L. Ed. 2d at 433.

In *Santobello*, it was clear that the prosecutors violated the explicit terms of the defendant's plea agreement. Our own Court has also extended the logic of *Santobello* to apply where the State violates the "spirit," though not the express terms, of the plea agreement. In

Blackwell, the defendant was charged with a number of crimes in connection with a fatal drunk-driving accident. As part of a plea agreement, the defendant pled guilty to some of the offenses, including felonious impaired driving, and agreed to stand trial on four counts of assault with a deadly weapon and one count of first-degree murder under the felony-murder rule. *Blackwell*, 135 N.C. App. at 730, 522 S.E.2d at 314. In exchange, the State agreed not to use the felonious impaired driving charge as the predicate felony for the felony murder charge. *Id.* at 730, 522 S.E.2d at 315. At trial, the State used the four assaults as the predicate felonies for the felony murder charge. However, the State also used the defendant's guilty plea to the felonious impaired driving charge to prove that the defendant acted with culpable negligence, which was a necessary element of the assault charges. *Id.* at 730-31, 522 S.E.2d at 315. The defendant was later convicted of the assault and murder charges. *Id.* at 730, 522 at 314.

On appeal, we agreed with the defendant that the derivative use of his guilty plea violated his plea agreement. Although the express terms of the plea agreement did not bar the State's specific use of the defendant's guilty plea, we found that the State violated the spirit of the plea agreement because the defendant could have reasonably interpreted the agreement to bar all uses of his guilty plea:

> [D]ue process mandates strict adherence to any plea agreement. Moreover, this strict adherence "require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." While the plea agreement here may not have been ambiguous, it was imprecise in light of what the State intended to argue at trial.
>
> The State promised not to use the felonious impaired driving charge "as a theory of first degree murder" for its prosecution of [the] defendant under felony murder. The defendant quite reasonably interpreted this to mean that the State promised not to use the felonious impaired driving in any way, shape, or form—directly or derivatively—to prove felony murder.

Id. at 731, 522 S.E.2d at 315 (citation omitted) (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). The State argued that if the defendant had wanted to preclude the State from using his guilty plea in any way, he should have negotiated this as part of his plea agreement. We again disagreed:

> The State suggests that [the] defendant should have bargained for this interpretation. But [the] defendant should not be forced to anticipate loopholes that the State might create in its own promises. . . . [E]ven if the State did not violate the express terms of the plea agreement, it did violate the *spirit* of that agreement. We therefore hold that the State violated [the] defendant's plea agreement.

Id. at 731-32, 522 S.E.2d at 315 (citations omitted).

Neither *Santobello* nor *Blackwell* are directly on point in this case. Defendant does not allege a violation of the specific terms of his plea agreement, as in *Santobello*, nor does he allege that the State has made an improper derivative use of his guilty plea, as in *Blackwell*. However, we find that the general principles of due process and prosecutorial responsibility embodied in those two opinions guide our determination in the present case.

Courts have recognized that "[w]hile the government must be held to the promises it made, it will not be bound to those it did not make." *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986). Further, "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson*, 467 U.S. 504, 508, 81 L. Ed. 2d 437, 443 (1984). However, these general rules do not bar relief for a defendant where the defendant alleges that he was induced into accepting a plea agreement based on misrepresentations made by the State, thus depriving the defendant of a full understanding of the consequences of his guilty plea. *See Mabry*, 467 U.S. at 509, 81 L. Ed. 2d at 443 (stating that "only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause"); *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970) (defining the standard by which to judge the voluntariness of a guilty plea as follows: " '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . . [or] misrepresentation' " (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26, 2 L. Ed. 2d 579 (1958))). *Cf. Lacey*, 175 N.C. at 377, 623 S.E.2d at 356 (applying contract law principles to plea agreements to conclude that " 'neither side should be able, any more than would be private contracting parties, unilater-

ally to renege or seek modification simply because of *uninduced* mistake or change of mind' " (quoting *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004))).

On the record before us, it appears that Defendant's 10 August 2005 guilty plea to the cocaine charges in file 54772 may have been induced by misrepresentations made by the State. Under *Santobello*, Defendant was entitled to whatever process was "reasonably due" when negotiating his plea arrangement and entering his guilty plea. *Santobello*, 404 U.S. at 262, 30 L. Ed. 2d at 433. Given the similarity of the offenses allegedly committed by Defendant on 24 March 2005 and the close temporal proximity of those offenses, we believe that Defendant was entitled to an explanation that the State was only agreeing to dismiss the marijuana charges in file 51260, and that the State might later choose to prosecute Defendant for the marijuana offense described in file 51171. This type of disclosure is consistent with holding the State to "a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements," *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (quoting *Harvey*, 791 F.2d at 300), and also ensures that a defendant will not "be forced to anticipate loopholes that the State might create in its own promises." *Id.* Without such an explanation, the State might have led Defendant to reasonably believe that his guilty plea encompassed all the marijuana-related charges that Defendant faced in connection with the events of 24 March 2005. Under such circumstances, Defendant might not have fully understood the direct consequences of his guilty plea.[2] *See Mabry*, 467 U.S. at 509, 81 L. Ed. 2d at 443.

It is unclear from the record whether Defendant received a proper explanation from the State regarding the full consequences of his plea agreement, and whether Defendant relied on any resulting misrepresentations in tendering his guilty plea. We therefore remand this case to the trial court for a determination of: (a) whether, consistent with the due process principles outlined above, Defendant was fully apprised of the consequences of his 10 August 2005 guilty plea, including any outstanding criminal liability he might have faced with respect to the marijuana offense described in file 51171; and (b) if not, whether Defendant could have reasonably interpreted his plea agreement, based on the limited information he had at the time he

2. Indeed, the State acknowledged Defendant's confusion when it admitted to the trial court that "[Defendant] was thinking that he was wrapping up all cases or was disposing of all pending matters at the time," and that "[Defendant] sought to clean up everything he had out there in August[.]"

entered his guilty plea, to preclude the State from prosecuting him in connection with the marijuana offense described in file 51171. *See Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (focusing on whether the defendant had "reasonably" interpreted his plea agreement as barring the State from undertaking certain future actions). We acknowledge that any misrepresentation made to Defendant in this case was likely an inadvertent result of one prosecutor having incomplete knowledge of all criminal files connected to Defendant's actions on 24 March 2005. However, the fact that a misrepresentation "was inadvertent does not lessen its impact." *Santobello*, 404 U.S. at 262, 30 L. Ed. 2d at 433.

If the trial court answers the above questions in the affirmative, we leave it to the trial court's discretion to select an appropriate remedy. *See id.* at 262-63, 30 L. Ed. 2d at 433; *Blackwell*, 135 N.C. App. at 732, 522 S.E.2d at 316. A trial court's typical options in such cases include either granting specific performance of the plea agreement in accordance with the defendant's reasonable interpretation of that agreement, or allowing rescission of the defendant's guilty plea. *See id.*

II.

Defendant raises two additional arguments with regard to his convictions. We address these arguments in the event that the trial court finds that Defendant received due process with regard to his plea agreement and was not misled by any misrepresentations on the part of the State.

A.

[2] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver marijuana within 300 feet of a playground. Defendant contends that the State did not introduce sufficient evidence to support a conviction on this charge.

To survive a motion to dismiss based on insufficient evidence, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence exists if, considered in the light most favorable to the State, the evidence "gives rise to a reasonable inference of guilt[.]" *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). However, a

defendant's motion to dismiss must be granted "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it[.]" *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

Under N.C. Gen. Stat. § 90-95(a)(1) (2005), "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" Marijuana is a controlled substance. *See* N.C. Gen. Stat. § 90-94 (2005). Further, under N.C. Gen. Stat. § 90-95(e)(10) (2005):

> Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property that is a playground in a public park or within 300 feet of the boundary of real property that is a playground in a public park shall be punished as a Class E felon. . . . [T]he term "playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation open to the public, and with any portion thereof containing three or more separate apparatuses intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.[3]

Defendant argues that the State did not introduce sufficient evidence that he possessed marijuana within 300 feet of a "playground," as that term is defined in the statute.

At trial, the State introduced a photograph of the "playground" near which Defendant allegedly possessed marijuana. The playground appears to contain a number of different recreation apparatuses, including two slides, at least three sets of climbing stairs, monkey bars, two firemen's poles, a small gazebo, and a tic-tac-toe game. However, these objects are all connected in one large structure and do not stand on their own. Defendant argues that such a structure does not satisfy the statutory definition of "playground," which requires "three or more *separate* apparatuses." N.C.G.S. § 90-95(e)(10). We disagree.

Our Courts have consistently recognized that "[c]riminal statutes are generally construed narrowly against the State and in favor of the accused." *State v. Dent*, 174 N.C. App. 459, 467, 621 S.E.2d 274, 280 (2005). However,

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3. The General Assembly recently amended N.C.G.S. § 90-95(e)(10) to remove the sentence defining the word "playground." This amendment only applies to offenses committed after 1 December 2007, and is therefore inapplicable to the present case. *See* 2007 N.C. Sess. Laws ch. 375, §§ 1-2.

> "[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."

Id. at 467, 621 S.E.2d at 280 (quoting *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448, *reh'g denied*, 333 U.S. 850, 92 L. Ed. 2d 1132 (1948)). We find that the evident statutory purpose of N.C.G.S. § 90-95(e)(10) is to protect young children from being exposed to illicit drug activity while playing at public recreation areas. Consistent with this legislative intent, we decline to interpret the words "separate apparatuses" in such a narrow manner as to require each apparatus to be entirely physically separate in order to satisfy the statutory definition of "playground." So long as a recreation area contains three types of apparatuses as described in the statute, the requirement of having "three or more separate apparatuses" will be satisfied, even if these apparatuses are joined by some common elements. In this case, we find that the State presented substantial evidence that the recreational facility in question contained at least three separate apparatuses. The State has thus satisfied its burden, and Defendant's contention is without merit.

B.

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of having attained the status of habitual felon. Defendant contends that the State did not introduce sufficient evidence to support a conviction on this charge.

Under N.C. Gen. Stat. § 14-7.1 (2007), "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon." At trial, the State introduced the following evidence: (1) a criminal judgment from 22 October 1998 stating that Noel John Tyson, a Black male born on 24 December 1979, pled guilty to the offense of possession with intent to sell or deliver cocaine; (2) a criminal judgment from 21 August 2000 stating that Noel John Tyson, a Black male born on 24 December 1979, pled guilty to the offense of possession with intent to sell or deliver cocaine; and (3) a criminal judgment from 7 October 2003 stating that Noel John Tyson, a Black male born on 24 December 1978, pled guilty to the offense of possession with intent to sell or deliver cocaine.

Defendant notes that according to the judgments, two of the offenses were committed by a man born on 24 December 1979, and one of the offenses was committed by a man born on 24 December 1978. Defendant argues that because the State offered no evidence to explain or contradict the age discrepancy in the judgments, the State did not introduce substantial evidence that he was the perpetrator of each of those offenses. We disagree. When the State introduces court records of prior judgments to prove that a defendant has committed three prior felonies for the purposes of the habitual felon statute,

> [t]he original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.4 (2007). Each of the three judgments introduced by the State listed the name of the defendant as "Noel John Tyson," which is the same name by which Defendant here was charged. Therefore, pursuant to this statute, the three judgments were prima facie evidence that the defendant named in those judgments was the same Defendant as in the current case. Defendant introduced no evidence to rebut this prima facie showing by the State.[4] Any further discrepancies in the judgments were for the jury to consider. *See State v. Petty*, 100 N.C. App. 465, 470, 397 S.E.2d 337, 341 (1990) (where three prior judgments introduced by the State to prove an habitual felon charge contained a discrepancy regarding the defendant's age, the Court held that "any discrepancy between the actual age of the defendant at the time of conviction and his age as reflected on the record of conviction, goes to the weight of the evidence and not its admissibility"). We therefore find that the State presented substantial evidence that Defendant had attained the status of habitual felon. Defendant's contention is without merit.

In sum, we find that the trial court committed no error with regard to the issues discussed in Parts II.A and II.B of this opinion. We remand the case to the trial court to make additional findings of fact and conclusions of law with regard to the issues discussed in Part I of this opinion.

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4. We have previously held that N.C.G.S. § 14-7.4 does not unconstitutionally shift the burden of proof to a criminal defendant. *See State v. Hairston*, 137 N.C. App. 352, 355-56, 528 S.E.2d 29, 31-32 (2000).

Remanded.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. KARSHIA BLIAMY LY AND JEFFREY XIONG

No. COA07-578

(Filed 1 April 2008)

1. Kidnapping— first-degree—motion to dismiss—sufficiency of evidence—restraint separate from robbery with dangerous weapon

The trial court did not err by denying defendants' motions to dismiss the five first-degree kidnapping charges even though defendants contend the restraint of the victims was an inherent part of robbery with a dangerous weapon instead of a separate or independent restraint or removal because: (1) defendants bound and blindfolded each victim as he or she entered the room, forced them to lie on the floor, and left the victims bound; (2) one of the victims attempted to escape, but was brought back to the house at gunpoint and was bound and blindfolded; and (3) the restraint of the victims was not necessary to effectuate the armed robbery, and the victims were placed in greater danger than that inherent in the offense of robbery with a dangerous weapon.

2. Kidnapping— first-degree—motion to dismiss—sufficiency of evidence—safe place

The trial court did not err by denying defendants' motions to dismiss the five first-degree kidnapping charges even though defendants contend the victims were released in a safe place because: (1) defendants committed no affirmative or willful act to release the victims in a safe place; (2) defendants departed the premises leaving the victims bound, blindfolded, and without access to a telephone; and (3) although defendants contend their victims were released in a safe place since they were left bound in their home, the mere departing of a premises was not an affirmative act sufficient to effectuate a release in a safe place.

3. Burglary and Unlawful Breaking or Entering— indictment—location and identity of building entered

The trial court did not err by denying defendants' motions to dismiss the charges of breaking and entering even though defendants contend the indictment failed to sufficiently allege the location and the identity of the building entered because: (1) both indictments allege defendants broke and entered a building occupied by Xang Ly used as a dwelling house located at Albemarle, North Carolina; and (2) although the evidence at trial tended to show that Xang Ly owned several buildings including six rental houses, the evidence also showed there was only one building where he actually lived, which was the 1147 Hilltop Street residence.

4. Burglary and Unlawful Breaking or Entering— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motions to dismiss a breaking and entering charge even though defendant contends the State failed to present sufficient evidence that defendants intended to commit robbery with a dangerous weapon as alleged in the indictment because the evidence showed: (1) defendants entered the victims' home with the knowledge that members of the family would arrive at the home while defendants were still inside; (2) defendants were not surprised and were prepared for the arrival of the first victim as demonstrated by the immediacy with which defendants accosted, bound, and blindfolded him; (3) defendants asked the first victim the location of members of his family, thus demonstrating that defendants were familiar with the family; (4) as each member of the family arrived home, defendants were well prepared to overcome them in the same manner in which they overcame the first victim; (5) defendants were armed with two guns when they entered the victims' home; and (6) defendants took a black bag containing money from one of the victims.

5. Evidence— hearsay—corroboration—limiting instruction

The trial court did not err in a double robbery with a firearm, multiple first-degree kidnapping, and felonious breaking and entering case by admitting alleged hearsay testimony from a detective as corroboration even though one defendant contends it contradicted the testimony of one of the victims because: (1) the trial court gave a limiting instruction to the jury to only

consider the detective's testimony for the purpose of assessing the credibility of the witnesses that had already testified and for no other purpose; (2) the testimony was not elicited to corroborate one particular family member victim's testimony, but was intended to corroborate the testimonies given by three family members; and (3) although one victim testified at trial that he did not give this defendant's name to the detective as a suspect on 2 April 1999, the two other victims testified at trial that they did.

6. Constitutional Law— effective assistance of counsel—failure to present evidence during sentencing hearing—trial strategy

Defendant did not receive ineffective assistance of counsel in a double robbery with a firearm, multiple first-degree kidnapping, and felonious breaking and entering case based on defense counsel refraining from speaking or presenting evidence during defendant's sentencing hearing because defense counsel's decision to remain silent was strategy and trial tactics properly left within the control of counsel.

Judge WYNN concurring in the result.

Appeal by defendants from judgments dated 8 May 2000 by Judge Sanford L. Steelman, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 27 November 2007.

Attorney General Roy Cooper, by Assistant Attorney Generals Creecy Chandler Johnson and Harriet F. Worley, for the State.

Gilda C. Rodriguez for defendant-appellant Karshia Bliamy Ly.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant Jeffrey Xiong.

BRYANT, Judge.

Karshia Bliamy Ly and Jeffrey Xiong (defendants) appeal from judgments dated 8 May 2000 and entered consistent with jury verdicts finding defendants guilty of two counts each of robbery with a firearm, five counts each of first-degree kidnapping, and one count each of felonious breaking and entering. We find no error.

Facts & Procedural History

On 1 April 1999, at approximately 5:30 p.m., Nhia Ly arrived at 1477 Hilltop Street in Albermarle, North Carolina where he resided with his parents, Kia and Xang Ly, and his wife and his two children. Nhia noticed nothing unusual when he approached the sliding glass door entrance to the house. However, after entering the house, as he walked towards the kitchen, Nhia was accosted by four unmasked males. One of the males pointed a gun in his face while the others shouted obscenities at him and ordered him to get down on the floor and "shut up." Once Nhia was on the floor, the assailants turned his head to the right, blindfolded him, and tied his hands behind his back. The assailants asked Nhia where his mother, wife and children were, then dragged him into the bathroom. While still bound and detained in the bathroom, Nhia overheard his father's truck pull into the driveway, his father enter the house, and the assailants restrain and bind him. Over the next five to ten minutes Nhia also overheard his mother, his sister-in-law, and his brother enter the house and the assailants attack and restrain each person.

The State also presented the testimony of Xang Ly, Nhia's father. Xang Ly testified he entered the Hilltop Street house through the front door at approximately 5:45 p.m. carrying a black bag containing currency in the amount of $8,000.00. Xang Ly testified that defendant Ly approached with a gun pointed towards him. Two other men came from behind defendant Ly, took the black bag, pushed Xang Ly, tied his hands behind his back, and blindfolded him. Xang Ly identified defendant Ly as one of the assailants and testified he recognized defendant Ly because defendant Ly's family were tenants in one of his rental properties. The State also presented the testimonies of Kia Ly, Nou Ly, and Pheng Ly. Each witness testified to substantially the same facts as Nhia Ly and Xang Ly.

On 2 August 1999, defendant Ly was indicted on one count of breaking and entering, two counts of robbery with a dangerous weapon, and five counts of first-degree kidnapping. On 13 September 1999, defendant Xiong was indicted on one count of breaking and entering, two counts of robbery with a dangerous weapon, and five counts of first-degree kidnapping. Defendants' cases were joined and came on for trial on 1 May 2000. On 5 May 2000, a jury returned a verdict finding both defendants guilty of one count of breaking and entering, two counts of robbery with a dangerous weapon, and five counts of first-degree kidnapping. In a judgment dated 5 May 2000, the trial court sentenced each defendant to two consecutive terms of

64 to 86 months imprisonment followed by two consecutive terms of 73 to 94 months imprisonment. Defendants appeal.

Defendants jointly raise four issues: (I) whether there is sufficient evidence of restraint apart from that inherent in the offense of robbery with a dangerous weapon to support the kidnapping convictions; (II) whether there was sufficient evidence that the victims were not released in a safe place to support the first-degree kidnapping convictions; (III) whether the indictments of breaking and entering were fatally defective because they did not sufficiently allege the identity and location of the building; and (IV) whether the breaking and entering convictions must be vacated because there is insufficient evidence that defendants intended to commit a felony at the time of the entry. In addition, defendant Xiong raises two separate issues: (I) whether the trial court erred by admitting hearsay evidence as corroborative testimony; and (II) whether defendant Xiong received effective assistance of counsel during the sentencing hearing. For the reasons given below, we find no error.

I & II

[1] Defendants argue the trial court erred by denying their motions to dismiss the first-degree kidnapping charges. We disagree.

The standard of review for a motion to dismiss 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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quotation and 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." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

A. Restraint of victims

Defendants argue the first-degree kidnapping charges should have been dismissed because the restraint of the victims was an inherent part of robbery with a dangerous weapon and no separate or independent restraint or removal occurred. We disagree.

First-degree kidnapping is the unlawful confinement, restraint or removal from one place to another, of any other person 16 years of age or over without the consent of such person for the purpose of facilitating the commission of any felony or facilitating flight of any person following the commission of a felony. N.C.G.S. § 14-39(a) (2007). "A person may not be convicted of kidnapping and another felony if the restraint or removal is an inherent and inevitable element of the other felony, such as robbery with a dangerous weapon." *State v. Morgan*, 183 N.C. App. 160, 166, 645 S.E.2d 93, 99 (2007). "The key question is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the armed robbery itself." *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (citation and quotations omitted). Our Supreme Court held in *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992):

> all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he exposed the victim to a greater danger than that inherent in the armed robbery itself. This action, which had the effect of increasing the victim's helplessness and vulnerability . . . constituted such additional restraint as to satisfy that element of the kidnapping crime.

Id. at 210, 415 S.E.2d at 561.

In *Morgan*, the defendant was convicted of two counts of both first-degree kidnapping and robbery with a dangerous weapon. *Morgan*, 183 N.C. App. at 163, 645 S.E.2d at 97. This Court, in upholding the defendant's kidnapping convictions, determined that the restraint was not a necessary part of the robbery because the defendant placed the victims in greater danger than that inherent in the armed robbery by binding the victims' wrists with duct tape. *Id.* at 166, 645 S.E.2d at 99. Likewise, in *Beatty*, the defendant was convicted of two counts of kidnapping. *Beatty*, 347 N.C. App. at 556, 495 S.E.2d at 368. Our Supreme Court upheld the defendant's conviction as to one of the victims because the defendant restrained that victim by binding his wrists. *Id.* at 559, 495 S.E.2d at 370. The Court reasoned that by binding the victim, defendant "increased the victim's helplessness and vulnerability beyond what was necessary to enable him and his comrades to rob the restaurant." *Id.*

Here, defendants bound and blindfolded each victim as he or she entered the home, forced them to lie on the floor, and left the victims bound. In addition, one of the victims attempted to escape, but was brought back to the house at gunpoint, and was bound and blindfolded. As in *Beatty* and *Morgan*, the restraint of the victims in the present case was not necessary to effectuate the armed robbery and the victims were placed in greater danger than that inherent in the offense of robbery with a dangerous weapon. Accordingly, defendants' motions to dismiss were properly denied. This assignment of error is overruled.

B. Release in a Safe Place

[2] Defendants argue their first-degree kidnapping convictions should be vacated because the victims were released in a safe place. We disagree.

Kidnapping is of the first-degree when "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C. Gen. Stat. § 14-39(b) (2007). Releasing a person in a safe place "implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place. *State v. Love*, 177 N.C. App. 614, 625, 630 S.E.2d 234, 242 (2006).

In *Love*, the defendants were convicted of four counts of first-degree kidnapping. Like defendants in the present case, the defendants in *Love* contended that their victims were released in a safe place because the victims were left bound in their own home. This Court held that "the mere departing of a premise" was not an affirmative action sufficient to effectuate a release in a safe place. *Id.* at 626, 630 S.E.2d at 242. Similarly, in *Morgan*, the defendant left the victims restrained by duct tape in their hotel room after the defendant stole the victims' cash and cell phones. This Court, in upholding the defendant's first-degree kidnapping conviction, reasoned there was no "affirmative or wilful action on the part of defendants to 'release' the victims." *Morgan*, 183 N.C. App. at 167-68, 645 S.E.2d at 100.

As in *Love* and *Morgan*, defendants in the present case committed no affirmative or wilful act to release the victims in a safe place. Defendants departed the premises leaving the victims bound, blindfolded, and without access to a telephone. Without any action on

either defendant's part to release the victims in a safe place, there was sufficient evidence to submit a charge of first-degree kidnapping to the jury. Therefore, the trial court did not err by denying defendants' motions to dismiss the first-degree kidnapping charges and defendants' convictions stand. Accordingly, this assignment of error is overruled.

III

[3] Defendants argue their breaking and entering judgments should be vacated because the indictments failed to sufficiently allege the location and the identity of the building entered. We disagree.

An indictment alleging breaking and entering of a building under N.C. Gen. Stat. § 14-54 must describe the building to show that it is within the language of the statute and to identify it with reasonable particularity "so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense." *State v. Sellers*, 273 N.C. 641, 650, 161 S.E.2d 15, 21 (1968).

In the present case, both indictments allege defendants broke and entered "a building *occupied* by Xang Ly used as a dwelling house located at Albermarle, North Carolina[.]" (emphasis added). Defendants argue the indictments failed to sufficiently identify the building because Xang Ly owned six buildings used as dwelling houses and the indictments do not specify which building defendants broke and entered. Defendants base their argument on *State v. Smith*, 267 N.C. 755, 148 S.E.2d 844 (1966), where our Supreme Court vacated a conviction of breaking and entering because the indictment alleged the defendant broke and entered a building occupied by the Chatham County Board of Education but did not specify the particular building. *Id.* at 756, 148 S.E.2d at 845. *Smith* is distinguishable from the present case.

In the case before us, the indictments identified the particular building defendants allegedly broke and entered as "a building occupied by Xang Ly used as a dwelling." Unlike the indictment in *Smith*, the description of the building in the present case specifically identified the building as a building which Xang Ly used as a dwelling. Although the evidence at trial tended to show that Xang Ly owned several buildings, including six rental houses, the evidence also showed there was only one building where Xang Ly actually lived—the 1147 Hilltop Street residence. Therefore, we hold the indictments where sufficient to reasonably identify the building as required by

N.C.G.S. § 14-54. Accordingly, the trial court did not err in denying defendants' motions to dismiss. This assignment of error is overruled.

IV

[4] Defendants argue the trial court erred by denying their motions to dismiss the breaking and entering charges because the State failed to present sufficient evidence that defendants intended to commit robbery with a dangerous weapon as alleged in the indictments. We disagree.

Breaking and entering is defined as "break[ing] or enter[ing] any building with [the] intent to commit any felony or larceny therein[.]" N.C. Gen. Stat. § 14-54(a) (2007). Although a breaking and entering indictment is not required to state the specific felony a defendant intended to commit, *State v. Worsley*, 336 N.C. 268, 281, 443 S.E.2d 68, 74 (1994), "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged," *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996) (citation omitted). *See also State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006). "An essential element of the crime is that the intent exist at the time of the breaking or entering." *State v. Hill*, 38 N.C. App. 75, 78, 247 S.E.2d 295, 297 (1978).

The indictments in the present case specifically allege defendants broke and entered the Ly home with the intent to commit the felony of robbery with a dangerous weapon. The elements of robbery with a dangerous weapon are: "1) the unlawful taking or 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. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993). Thus, the State was required to prove defendants intended to commit robbery with a dangerous weapon at the time of the breaking and entering.

Defendants argue there was insufficient evidence of their intent to commit robbery with a dangerous weapon at the time they entered the Ly home. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963). In breaking and entering cases, "[t]he intent to commit the felony must be present at the time of entrance, and this can but need not be inferred from the defendant's

subsequent actions." *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995).

Here, the evidence shows defendants entered the Ly home with the knowledge that members of the Ly family would arrive home while defendants were still inside. The evidence also shows defendants were not surprised when Nhia Ly arrived home, but were prepared for his arrival as demonstrated by the immediacy with which defendants accosted, bound and blindfolded Nhia Ly. Also, the evidence shows defendants asked Nhia Ly the location of members of his family, demonstrating that defendants were familiar with the Ly family. As each member of the Ly family arrived home, defendants were well prepared to overcome them in the same manner in which they overcame Nhia Ly. In addition, the evidence shows defendants were armed with two guns when they entered the Ly home. The evidence presented was sufficient for the jury to conclude that defendants intended to commit robbery with a dangerous weapon at the time defendants entered the Ly home. Accordingly, the State met its burden of proving each element of breaking and entering including intent. Therefore, this assignment of error is overruled.

Defendant Xiong's Appeal

I

Corroborative Testimony

[5] In addition to the issues raised jointly with defendant Ly, defendant Xiong argues he is entitled to a new trial because the trial court erroneously admitted hearsay testimony. We disagree.

Defendant Xiong specifically argues Detective Danny Bowen's testimony was erroneously admitted as corroborative testimony because it contradicted the testimony of one witness, Nhia Ly. Nhia Ly testified at trial that during an interview with Detective Bowen on 2 April 1999, he did not identify defendant Xiong as a suspect. Later, Detective Bowen testified that during the interview with the Ly family on 2 April 1999, Nhia, Pheng, and Nou Ly were the primary family members who answered his questions and that Nhia along with Pheng and Nou gave him defendant Xiong's name as a suspect. Before Detective Bowen testified about statements made by members of the Ly family during the 2 April 1999 interview, the trial court gave a limiting instruction to the jury to "only consider [Detective Bowen's] testimony for the purpose of assessing the credibility of the witnesses that have already testified, and for no other purpose."

"It is well established that a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence." *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000). "However, the State may not introduce as corroboration prior statements that actually, directly contradict trial testimony." *Id.*

Here, Detective Bowen's testimony was admitted as corroborative testimony. Detective Bowen's testimony was not elicited to corroborate one particular family member's testimony, but was intended to corroborate the testimonies given by Nhia, Pheng and Nou. Although Nhia Ly testified at trial that he did not give defendant Xiong's name to Detective Bowen as a suspect on 2 April 1999, two other witnesses, Pheng Ly and Nou Ly, testified at trial that they gave defendant Xiong's name to Detective Bowen on 2 April 1999. Given the trial court's limiting instruction and the testimonies by Pheng Ly and Nou Ly, Detective Bowen's corroborative testimony regarding the 2 April 1999 interview with members of the Ly family was properly admitted. Accordingly, this assignment of error is overruled.

II

Sentencing Hearing

[6] Defendant Xiong argues he is entitled to a new sentencing hearing because he did not receive effective assistance of counsel at the sentencing hearing. We disagree.

Defendant Xiong's counsel stated the following during the sentencing hearing:

> [Defense Counsel]: Your Honor, I've known some years this day would come, a hesitant prize fighter that's come into the ring one too many times, a lesson to be learned. And I'll have the weekend to reexamine what I'm to do in the future.
>
> The Court: All right. Do you want to be heard on behalf of your client?
>
> [Defense Counsel]: No, Your Honor, I do not.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)

(quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)), *writ of cert. denied*, 166 L. Ed. 2d 116 (2006). "Generally, 'to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted).

In *State v. Taylor*, 79 N.C. App. 635, 339 S.E.2d 859 (1986), the defense counsel refrained from speaking or presenting evidence during the sentencing hearing. This Court determined the defense counsel's decision, although "troublesome," did not "constitute[] deficient performance prejudicial to the defendant." *Id.* at 637, 339 S.E.2d at 861. The defense counsel's decision to remain silent was " 'strategy and trial tactics' properly left within the control of counsel." *Id.* at 638, 339 S.E.2d at 861.

Here, as in *Taylor*, defense counsel refrained from speaking or presenting evidence during defendant Xiong's sentencing hearing. Unlike the case of *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), relied on by defendant Xiong, where the defense counsel not only refused to present evidence during the sentencing hearing but also made negative statements regarding the defendant, the statements made by defense counsel in the present case were not concerning defendant Xiong and did not prejudice him. Therefore, we are constrained to hold that defendant Xiong has not demonstrated that his counsel's performance was deficient or that he was prejudiced by said performance. Accordingly, this assignment of error is overruled.

Defendants' remaining assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2007) because defendants have failed to make any argument in support thereof.

NO ERROR.

Judge ELMORE concurs.

Judge WYNN concurs in a separate opinion.

WYNN, Judge, concurring in result only.

I concur with the majority opinion's holding that, under our previous precedents, we must affirm Defendants' convictions for first-

degree kidnapping and other charges. I write separately to point out that our recent case law fails to make any distinction between the crimes of first-degree kidnapping and robbery with a dangerous weapon in the context of armed home invasions.

As our Supreme Court articulated in *State v. Fulcher*,

> It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). In applying the test laid out in *Fulcher*, the Supreme Court further clarified,

> The key question here is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to *greater danger* than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the *kind of danger and abuse* the kidnapping statute was designed to prevent.

State v. Pigott, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (emphasis added) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). Thus, when faced with the type of armed-home invasion that occurred in the instant case, the critical issue is whether the restraint used by the defendants placed the victims in "greater danger" or subjected the victims to a particular "danger and abuse" aside from that which is inherent in robbery with a dangerous weapon.

In *State v. Beatty*, our Supreme Court found that "the binding and *kicking* [of the victim] were not inherent, inevitable parts of the robbery" and exposed the victim to a greater degree of danger than which is inherent in an armed robbery. 347 N.C. 555, 559, 495 S.E.2d 367, 368 (1998) (emphasis added). Likewise, in *Pigott*, the binding of the victim's hands and feet, "rendering him utterly helpless," was held to "constitute[] such additional restraint as to satisfy that element of

the kidnapping crime." 331 N.C. at 210, 415 S.E.2d at 561. However, the victim in *Pigott* was also shot in the head while bound, and was found to have died either from the gunshot wound or from smoke inhalation from the fire that the defendant subsequently set to the building. *Id.* at 202, 415 S.E.2d at 557.

In the instant case, this Court is bound by our prior holding in *State v. Morgan*, 183 N.C. App. 160, 645 S.E.2d 93 (2007). *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."). In *Morgan*, this Court held that simply binding the victims, even in the absence of other physical violence, was sufficient to sustain a charge of first-degree kidnapping. 183 N.C. App. at 168-69, 645 S.E.2d at 99-100. Thus, on the question of restraint, this Court has extended the holdings of our Supreme Court to the point wherein any binding of the victims in an armed home invasion or robbery will constitute restraint sufficient to sustain a charge of kidnapping. I note the subsequent incongruity of outcomes in a case such as this, in which the victims were loosely bound and physically unharmed, but the defendants are nonetheless guilty of first-degree kidnapping, and a case such as *State v. Wade*, in which we vacated the charge of second-degree kidnapping because the dragging and severe beating of the victim—but without binding his hands or feet—was held to be "an inherent and integral part of either the robbery with a dangerous weapon or the assault." 181 N.C. App. 295, 302, 639 S.E.2d 82, 88 (2007). This incongruence needs resolution by our Supreme Court.

SANDRA BIRMINGHAM, PLAINTIFF v. H&H HOME CONSULTANTS AND DESIGNS, INC., RON HERMAN, JOAN K. EVERETT & COMPANY, T. EDWARDS, DANIEL G. BARNES & KATHERINE W. BARNES, DEFENDANTS

No. COA07-630

(Filed 1 April 2008)

1. Unfair Trade Practices— sale of residence—not a business or commercial transaction

The trial court did not err by granting the Barnes defendants' motion for partial summary judgment regarding an unfair and deceptive practices claim in an action arising from the sale of a

house. Private homeowners selling their residences are not subject to unfair and deceptive practice liability; neither the complaint nor the affidavits allege any facts showing that the Barnes defendants were engaged in a business or that this sale was a commercial land transaction that affected commerce.

2. Civil Procedure— partial summary judgment—before discovery complete

The trial court did not err by granting a partial summary judgment for the Barnes defendants in an action arising from the sale of a house where third-party defendants had been added and had not completed discovery. However, there was no evidence to show that any discovery from the third-party defendants would provide any information affecting the issue determined by the partial summary judgment.

3. Unfair Trade Practices— attorney fees—standard for determining—remand

The trial court used an incorrect standard in awarding attorney fees for an unfair and deceptive practices claim where the court found an unwarranted refusal to fully resolve the case rather than knowledge that the action was frivolous. The matter was remanded for additional findings and conclusions.

4. Appeal and Error— cross-assignment of error—different order

A cross-assignment of error was not proper where it concerned an order extending the time for service of the record on appeal rather than the order granting summary judgment from which plaintiff appealed.

Appeal by plaintiff from order entered 19 December 2006 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 28 November 2007.

Law Offices of Matthew K. Rogers, PLLC, by Joseph M. Long, for plaintiff-appellant.

Young, Morphis, Bach & Taylor, LLP, by Thomas C. Morphis and Henry S. Morphis, for defendants-appellees.

CALABRIA, Judge.

Sandra Birmingham ("plaintiff") appeals from the trial court's order granting partial summary judgment in favor of Katherine and

Daniel Barnes ("the Barnes defendants") and attorney's fees to the Barnes defendants. We affirm, but remand to the trial court for correction of the trial court's order awarding attorney's fees to the Barnes defendants.

In 2005, plaintiff and her daughter decided to move to North Carolina from California. T. Edwards ("Ms. Edwards") acted as plaintiff's real estate agent to assist plaintiff in purchasing a house in Hickory, North Carolina. In June of 2005, Ms. Edwards showed plaintiff a house for sale owned by the Barnes defendants. On 23 June 2005, plaintiff signed an Offer to Purchase and Contract ("Offer to Purchase"), agreeing to purchase 3755 11th St. NE in Hickory, North Carolina ("the house"). On 24 June 2005, the Barnes defendants accepted plaintiff's offer.

According to the Offer to Purchase, *inter alia*, plaintiff received a copy of the North Carolina Residential Property Disclosure Statement ("Disclosure Statement"), signed by the Barnes defendants in April 2005. On the Disclosure Statement, the Barnes defendants were asked to answer questions regarding the house. Specifically, they were asked, "do you know of any problem (malfunction or defect) with any of the following [questions]." On the first page of the Disclosure Statement, the instructions to the property owners explained, *inter alia*:

> b. If you check "No", you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misstatement.
>
> c. If you check "No Representation", you have no duty to disclose the conditions or characteristics of the property, even if you should have known of them.

Although the Barnes defendants had the option of checking "No Representation" or "No," they checked "No" in response to every question except question #19, regarding homeowners' expenses or assessments. For this question, the Barnes defendants checked "Yes" and explained the homeowners' association dues were $40 per year.

After signing the Offer to Purchase, plaintiff returned to California and did not return to North Carolina until after the house closed. Before the closing, plaintiff hired H&H Home Consultants and Design, Inc. ("H&H") to inspect the property. H&H inspected the house and provided plaintiff a home inspection report ("the report").

After the closing on 27 July 2005, plaintiff moved from California to North Carolina.

After plaintiff moved into the house, plaintiff noticed problems with the house that had not been disclosed on the Disclosure Statement or identified in the report. Plaintiff attempted to have the Barnes defendants repair the defects after the closing, but only limited repairs were made. On 13 September 2006, plaintiff filed a complaint against the Barnes defendants; H&H; the owner of H&H, Ron Herman; Ms. Edwards; and the real estate agent who represented the Barnes defendants, Joan K. Everett & Company ("Ms. Everett"). Plaintiff's complaint alleged: (1) breach of contract against the Barnes defendants, H&H, and Ms. Edwards; (2) fraudulent and negligent misrepresentation against the Barnes defendants, H&H, and Ms. Everett; and (3) unfair and deceptive trade practices against all parties. Specifically, regarding the house's defects, plaintiff alleged the defects that were not repaired included, but were not limited to, *inter alia*: the front porch bricks separating and falling away from the porch and house; broken windows and structural problems with the greenhouse structure; the pool liner separated from edges of pool; the microwave oven did not work; and the invisible dog fencing did not work. Plaintiff alleged that several of the defects either should have been noticed and included in the report or disclosed on the Disclosure Statement.

The Barnes defendants answered plaintiff's complaint, pled affirmative defenses, and filed counterclaims against Ms. Edwards and Ms. Everett. On 20 November 2006, the Barnes defendants moved for partial summary judgment on the unfair and deceptive trade practices claim. On 19 December 2006, in Catawba County Superior Court, Judge Timothy S. Kincaid ("Judge Kincaid") granted the Barnes defendants' motion for partial summary judgment and dismissed plaintiff's unfair and deceptive trade practices claim against the Barnes defendants. Judge Kincaid also awarded attorney's fees to the Barnes defendants. Since this action involves more than one claim for relief and multiple parties, Judge Kincaid certified the order for an interlocutory appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. From Judge Kincaid's order, plaintiff appeals.

On appeal, plaintiff argues the trial court erred by (1) granting the Barnes defendants' motion for partial summary judgment; (2) granting the Barnes defendants' motion dismissing plaintiff's unfair and deceptive trade practices claim; and (3) awarding the Barnes defend-

ants attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 (2005). The Barnes defendants cross-assign as error the trial court's order granting plaintiff an extension of time to serve the proposed record on appeal to the Barnes defendants.

I. The Barnes defendants' motion for partial summary judgment

[1] Plaintiff argues the trial court erred by granting the Barnes defendants' motion for partial summary judgment. Plaintiff contends the trial court applied the wrong legal standard for evaluating a summary judgment proceeding, and that the trial court failed to consider all evidence in the light most favorable to the non-moving party.

"We review a trial court's order for summary judgment de novo to determine whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (internal quotation marks omitted) (quotation and internal citation omitted).

> 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) (alteration in original) (internal quotation marks omitted) (quotation and citation omitted).

In the instant case, plaintiff argues that at the hearing on the partial summary judgment motion, she presented affidavits revealing contradictory evidence to show genuine issues of material fact existed. She contends that the trial court granted the Barnes defendants' motion based upon her complaint and not based on any evidence presented.

As a preliminary matter, we note that when referring to the unfair and deceptive practices claim under N.C. Gen. Stat. § 75-1.1 (2005), both plaintiff and defendant included the word "trade" in the com-

plaint and in the motion for summary judgment. In 1977, N.C. Gen. Stat. § 75-1.1 was revised. One of the statute's revisions deleted the term "trade" from the phrase "trade or commerce" in order to expand the coverage of the statute. *See Talbert v. Mauney*, 80 N.C. App. 477, 480, 343 S.E.2d 5, 8 (1986). The unfair and deceptive acts or practices statute states in relevant part:

> 75-1.1. Methods of competition, acts and practices regulated; legislative policy.
>
> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C. Gen. Stat. § 75-1.1 (2005).

Therefore, in order "to prevail on a cause of action for unfair and deceptive . . . practices, a plaintiff must show that the matter was in or affecting commerce." *MacFadden v. Louf*, 182 N.C. App. 745, 746, 643 S.E.2d 432, 433 (April 17, 2007) (No. COA06-647). Moreover, "private homeowners selling their private residences are not subject to unfair and deceptive practice liability." *Davis v. Sellers*, 115 N.C. App. 1, 7, 443 S.E.2d 879, 883 (1994). *See also Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995); *Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440 (1991); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979). Thus, the North Carolina appellate courts created a "homeowner exception" to the unfair and deceptive acts or practices statute which exempts private homeowners selling their personal residence from the purview of the statute.

Here, plaintiff's complaint alleges: (1) that plaintiff and her daughter desired to move to North Carolina and (2) plaintiff returned to California and did not return to North Carolina until after the property closing. Therefore, the complaint reveals plaintiff sought to purchase a residence for personal and family purposes. Furthermore, regarding the unfair and deceptive practices claim, plaintiff's complaint alleges "[the Barnes defendants] sold the property in commerce in North Carolina." This statement alone does not sufficiently allege that the Barnes defendants engaged in a commercial land transaction. In addition, both plaintiff and the Barnes defendants submit-

ted affidavits. The Barnes defendants' affidavits stated that they have never been in the business of selling real property and the house in this action was their personal residence where they resided and raised their family.

Plaintiff submitted an affidavit stating that the Barnes defendants' house included an office. Plaintiff also presented correspondence from the Barnes defendants on the letterhead of a company called "CT Group." Judge Kincaid's response to the affidavits submitted by both plaintiff and the Barnes defendants that were included in the record was:

> Upon a review of the record in this matter and in particular the complaint filed by the plaintiff, nowhere is it alleged that the defendants Daniel and Katherine Barnes were anything other than private individuals selling their own residence. There is no allegation they were acting as an agency, enterprise, business or a commercial or industrial establishment. There is not even a hint of the same, nor is there any allegation that they were doing business as any of the same.

Therefore, Judge Kincaid considered both the record and the complaint in granting the Barnes defendants' motion.

[2] Plaintiff also argues that the court erred in granting the motion for partial summary judgment because the parties were not finished with discovery procedures. "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." *Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) (emphasis supplied) (quoting *Conover v. Newton and Allman v. Newton and In re Annexation Ordinance*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979)). However, this "rule presupposes that any information gleaned [from the discovery] will be useful." *Manhattan Life Ins. Co. v. Miller Machine Co.*, 60 N.C. App. 155, 159, 298 S.E.2d 190, 193 (1982).

In the instant case, the hearing for the partial summary motion was held on 13 December 2006. However, third-party defendants had been added and were not required to file responsive pleadings until 22 January 2007. Thus, at the time of the partial summary judgment hearing, the pleading and discovery period had not ended. However, plaintiff did not submit evidence to show any discovery gleaned from

the third-party defendants would provide any information that the Barnes defendants were engaged in a commercial sale that was "in or affecting commerce." N.C. Gen. Stat. § 75-1.1.

In conclusion, we hold Judge Kincaid did not err when he granted the Barnes defendants' motion for partial summary judgment regarding plaintiff's unfair and deceptive practices claim. Neither the complaint nor the affidavits allege any facts showing the Barnes defendants were engaged in a business or that this sale was a commercial land transaction that affected commerce. Furthermore, there is nothing presented to show any information gained by discovery from the newly added third-party defendants would show that the Barnes defendants were engaged in business and commerce for the unfair and deceptive practices statute to apply to them. Since we hold there is no unfair and deceptive practices claim against the Barnes defendants, we need not address plaintiff's remaining assignments of error regarding the unfair and deceptive practices claim in this appeal.

II. Attorney's fees

[3] Plaintiff contends that the trial court erred in ordering plaintiff to pay the Barnes defendants' attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 (2005). An award of attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1 is "within the sound discretion of the trial judge [and] . . . may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 421-22 (2005) (citations omitted). N.C. Gen. Stat. § 75-16.1 states:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party . . . upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

Thus, N.C. Gen. Stat. § 75-16.1 has two standards that allows the trial court to assess attorney's fees to the opposing side, depend-

ing on which party is the prevailing party. The trial court, in its order awarding attorney's fees to the Barnes defendants, states in relevant part:

> It is therefore the judgment of the Court that the [Barnes] defendants' motion to dismiss the unfair and deceptive . . . practices claim against the Barnes is allowed.
>
> . . . The Court listened to the arguments of counsel and the evidence presented and following the same makes the following findings of fact:
>
> 1. The statute provides that the prevailer in an unfair and deceptive . . . practices may claim they recover attorney's fees provided, A, they in fact do prevail and, B, there was *an unwarranted refusal to settle*. This is a conjunctive requirement.
>
> . . . .
>
> Based upon the foregoing, the Court concludes as a matter of law as follows:
>
> 1. That Defendants Barnes have prevailed;
>
> 2. *That there was an unwarranted refusal to settle this matter*;
>
> 3. Defendants Barnes are entitled to attorney's fees and that the same as alleged is reasonable for one of the education and experience of Defendants Barnes' counsel.

In the instant case, the Barnes defendants' motion for partial summary judgment was granted, and they are the "prevailing party" under N.C. Gen. Stat. § 75-16.1. Since the plaintiff instituted the action against the Barnes defendants, N.C. Gen. Stat. § 75-16.1(2) is applicable to the motion for attorney's fees. However, the trial court's order finds "an unwarranted refusal" to fully resolve the case, a standard which applies only to cases falling under N.C. Gen. Stat. § 75-16.1(1). Therefore, the trial court erred in using the incorrect standard in its order awarding attorney's fees to the Barnes defendants.

The standard for awarding attorney's fees under N.C. Gen. Stat. § 75-16.1(2) is that the plaintiff "knew, or should have known, the action was frivolous and malicious." As the trial court instead applied the lower standard of an "unwarranted refusal" to resolve the case, we cannot determine if the trial court would have awarded attorney's fees if it had applied the correct standard of a knowing or reckless

"frivolous and malicious" institution of the Chapter 75 claim against the Barnes defendants. Therefore, we must remand this matter to the trial court for additional findings of fact and conclusions of law regarding the award of attorney's fees under N.C. Gen. Stat. § 75-16.1(2) and to determine if, in the trial court's discretion, the Barnes defendants are entitled to recovery of attorney's fees. We also note that as plaintiff has not raised any argument on this appeal as to the findings regarding the amount or reasonableness of the attorney fee award, on remand the trial court need not address any issues other than whether plaintiff "knew, or should have known, the action was frivolous and malicious."

III. The cross-assignment of error

[4] Lastly we address the Barnes defendants' cross-assignment of error. The Barnes defendants argue the appeal should be dismissed because plaintiff failed to serve them the proposed record on appeal within the time required pursuant to N.C.R. App. P. 11 (2006).

Rule 10(d) of our Rules of Appellate Procedure provides that, "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*." N.C.R. App. P. 10(d) (2006) (emphasis supplied).

Here, after the trial court entered its order granting the Barnes defendants' motion for partial summary judgment, plaintiff moved for extension of time to serve the proposed record on appeal. The trial court granted plaintiff's motion and extended the time for plaintiff to serve the proposed record to the Barnes defendants. The Barnes defendants' cross-assignment of error concerns the trial court's order granting plaintiff's separate motion for an extension of time to serve the proposed record on appeal. The Barnes defendants' cross-assignment of error does not address the order entered by the trial court from which plaintiff appeals. Therefore, the Barnes defendants' cross-assignment of error is not proper. This assignment of error is overruled.

In conclusion, the trial court's order granting partial summary judgment in favor of the Barnes defendants is affirmed, but we remand to the trial court for the sole purpose to determine the award of attorney's fees in accordance with the correct standard under N.C. Gen. Stat. § 75-16.1(2).

Affirmed in part; remanded in part with instructions.

Judges HUNTER and STROUD concur.

TARA WARNER, PLAINTIFF v. JASON BRICKHOUSE AND DEBORAH BRICKHOUSE (CHATHAM), DEFENDANTS

No. COA07-640

(Filed 1 April 2008)

1. Appeal and Error— preservation of issues—sufficiency of notice of appeal

Although plaintiff mother contends the trial court erred in a child custody case by denying her motion to modify custody even though she was never deemed unfit in the order that awarded custody to the paternal grandmother, this issue is dismissed because: (1) N.C. R. App. P. 3 requires a notice of appeal to designate the judgment or order from which appeal is taken as well the court to which appeal is taken; (2) although plaintiff properly filed a timely notice of appeal to the Court of Appeals, the notice failed to make any reference to the order entered by the district court on 15 January 2004 that terminated the mother's visitation and awarded custody to the grandmother; (3) plaintiff sought to gain custody of the minor child by filing a motion to modify the 15 January 2004 order based on a material and substantial change of circumstances; and (4) a notice of appeal from denial of a motion to modify a judgment does not also specifically appeal the underlying judgment.

2. Child Support, Custody, and Visitation— modification—substantial change in circumstances standard

The trial court did not err in a child custody case by applying the substantial change in circumstances standard when denying plaintiff mother's motion to modify custody even though she was never deemed unfit in the order that awarded custody to the paternal grandmother because: (1) there are no exceptions in North Carolina law to the statutory requirement under N.C.G.S. § 50-13.7(a) that a change in circumstances be shown before a custody decree may be modified; and (2) this case was not an ini-

tial custody proceeding, plaintiff did not appeal from the initial custody order entered 15 January 2004, and plaintiff filed a motion on 17 March 2005 to modify the 2004 order based on a material and substantial change in circumstances.

3. Child Support, Custody, and Visitation— modification—failure to show effect of substantial change in circumstances

The trial court did not err in a child custody case by finding that plaintiff mother failed to meet her burden of showing the substantial change in circumstances standard because: (1) although the trial court found the minor child suffered from severe developmental delays, evidence was presented that the child was receiving the recommended medical and therapeutic treatments she needed to aid in her development while in her paternal grandmother's custody; (2) evidence was presented that the minor child was an energetic loving child who showed incremental progress in her development under the care and supervision of medical and educational personnel while in the custody of the grandmother; (3) although the fact that plaintiff has not been able to demonstrate the effect that the changed circumstances in her own personal life and environment might have on the minor child was based largely on the fact that she had been ordered to have no contact with the minor child, and even though the grandmother purposefully withheld gifts to the child from plaintiff, the moving party has the burden of proving a nexus between the changed circumstances and the welfare of the child in order for the trial court to determine that a child support order may be modified; and (4) plaintiff failed to present evidence that her substantial change in circumstances affected the minor child.

Appeal by plaintiff from judgment entered 16 January 2007 by Judge Jimmy L. Love, Jr. in Johnston County District Court. Heard in the Court of Appeals 4 February 2008.

Mast, Schulz, Mast, Johnson & Wells, P.A., by George B. Mast, Bradley N. Schulz, and Ron L. Trimyer, Jr., for plaintiff-appellant.

No brief, for defendants-appellees.

Kristoff Law Offices, P.A., by Sharon H. Kristoff, Guardian Ad Litem.

MARTIN, Chief Judge.

D.L.B. was born on 19 December 1997 to plaintiff Tara Warner ("mother") and defendant Jason Brickhouse ("father"). Mother and father lived with father's mother, defendant Deborah Brickhouse (Chatham) ("grandmother"), after D.L.B.'s birth. Mother, who has a learning disability, communication difficulties, and "a bit of a speech impediment," asserted that grandmother "took over the role of mother" to D.L.B. after she was born and "would not allow [mother] to assist with feeding or caring for the baby." On 19 December 1998, mother and father ended their relationship and mother moved out of grandmother's house. Mother did not take D.L.B. with her. After she moved out of grandmother's residence, mother asserted that grandmother would "not allow [her] to have any contact at all with the minor child." Mother filed a complaint with the Johnston County District Court on 13 January 1999 seeking custody of and support for D.L.B. On 11 October 1999, the district court entered an agreement between the parties granting mother visitation with D.L.B. at grandmother's house during specified days and times. Although visitation was ordered to occur at grandmother's house, neither child support nor permanent custody were addressed in the order.

On 14 April 2000, mother moved the court to increase visitation with D.L.B. in part because father had moved out of grandmother's house and was "no longer residing with the minor child." The court granted mother's motion on 11 May 2000. On 16 August 2000, mother moved the court to increase visitation again to include Thanksgiving, Christmas, Easter, and Mother's Day. On 3 October 2000, the court granted "some day visitation" with D.L.B. on Thanksgiving, Christmas, and Easter. On 12 April 2001, mother filed a motion to relocate the site of exchange for visitation from grandmother's house to the Benson Police Department due to "a violent altercation" between grandmother and D.L.B.'s maternal grandmother. Mother alleged she and her own mother were "in fear for their safety." On 25 July 2003, mother's motion was involuntarily dismissed without prejudice pursuant to Rule 41(b) for mother's failure to appear at the hearing.

On 21 September 2003, mother moved the court for increased visitation and prayed that the site of exchange be moved to a public place. In this motion, mother alleged in part that grandmother relocated with D.L.B. without notifying mother of their new address or phone number and "deliberately kept the minor child from [her]." On

14 October 2003, grandmother moved to terminate mother's visitation with D.L.B.

On 15 January 2004, the district court entered a Custody and Visitation Order in which it found that mother "neglected to exercise her visitations for a period of at least two years." However, the court also found that this two-year "absence" occurred during the time when mother could not locate grandmother after she (grandmother) relocated with D.L.B. The court found that, while mother "did make some efforts to locate [grandmother,] . . . these efforts were minimal based upon the lack of visitation over the past two years with a vast number of alternatives available to have remedied this problem before two years have past [sic]." The court did not make a specific finding regarding mother's fitness as a parent, but instead concluded that "[t]he best interest of [D.L.B.] would be served" by awarding custody to grandmother, "would not be served" by allowing visitation with mother, and concluded that grandmother was "a fit and proper person to maintain the custody, care and control of the minor child." The court awarded custody of D.L.B. to grandmother and ordered that mother not have "any form of visitation or contact with the minor child." Mother did *not* appeal from this order.

On 17 March 2005, mother moved to gain custody of D.L.B. due to a material and substantial change in circumstances, and moved the court to appoint a guardian ad litem for D.L.B. Mother's motion to appoint a guardian ad litem was granted on 5 May 2005. On 16 January 2007, District Court Judge Jimmy L. Love, Jr. entered an order denying mother's motion for custody and dismissing the matter with prejudice. In that order, the court found that "[t]here is evidence from which this Court can find [mother] has experienced substantial circumstantial changes in her own personal life and environment[,] however there is no evidence put forth to show effect on the child whether positive or negative." On 24 January 2007, mother filed her notice of appeal to this Court from the order entered 16 January 2007.

I.

[1] Mother first contends that, in its 15 January 2004 order, the trial court erred by awarding custody to grandmother over mother without first finding that mother was unfit. For the reasons discussed below, this argument is not properly before us and we may not consider it.

"Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special

proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . .” N.C.R. App. P. 3(a) (2008). “The 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* and the court to which appeal is taken . . . .” N.C.R. App. P. 3(d) (emphasis added).

“Appellate Rule 3 requirements for specifying judgments are jurisdictional in nature.” *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 158, 392 S.E.2d 422, 425 (1990). “ ‘[J]urisdiction cannot be conferred by consent, waiver, or estoppel[;] . . . [j]urisdiction rests upon the law and the law alone.’ ” *Id.* (first and third alterations in original) (quoting *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953)). “As such, 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.” *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health & Human Services*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006) (internal quotation marks omitted). “Without proper notice of appeal, this Court acquires no jurisdiction.” *Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424 (internal quotation marks omitted).

In the present case, mother properly filed a timely notice of appeal to this Court from “the Order entered in open court by the Honorable Jimmy L. Love, Jr., District Court Judge Presiding at the December 22, 2006 Session of the District Court of Johnston County, and filed with the Johnston County District Court on January 16, 2007.” The Notice of Appeal made no reference to the order entered by the district court on 15 January 2004 in which mother’s grant of visitation with D.L.B. was terminated and custody was awarded to grandmother. The record indicates that, rather than file a timely notice of appeal to this Court from the 15 January 2004 order, mother instead sought to gain custody of D.L.B. by filing a motion to *modify* the 15 January 2004 order based on a material and substantial change in circumstances. However, in her Assignments of Error 1 and 3 in the record before this Court, mother attempts to direct our attention to errors arising out of the 15 January 2004 order. In other words, mother asks this Court to review errors she contends arise out of an order *not* included in the Notice of Appeal.

Applying the principle stated in *Von Ramm* to the present case, we conclude that a “[n]otice of appeal from denial of a motion to . . . [modify] a judgment which *does not also specifically appeal the*

underlying judgment does not properly present the underlying judgment for our review." *See id.* (emphasis added). Thus, we must dismiss these assignments of error.

II.

[2] Mother next contends that the trial court erred by applying the "substantial change in circumstances" standard when denying her motion to modify custody because mother was never deemed "unfit" in the order that awarded custody to grandmother. We disagree.

"In *Petersen v. Rogers*, [337 N.C. 397, 445 S.E.2d 901 (1994),] our Supreme Court recognized that parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 806 (2000); *see also Everette v. Collins*, 176 N.C. App. 168, 173 n.3, 625 S.E.2d 796, 799 n.3 (2006) ("In *Petersen*, the North Carolina Supreme Court found that in custody disputes between parents and third parties, parents have a constitutionally-protected paramount right to the custody, care, and control of their children."). However, this Court has stated that this presumption "only applies to an *initial* custody determination." *Brewer v. Brewer*, 139 N.C. App. 222, 229, 533 S.E.2d 541, 547 (2000) (emphasis added); *see also Bivens v. Cottle*, 120 N.C. App. 467, 468, 462 S.E.2d 829, 830 (1995) ("[I]n a custody dispute between a natural parent found to be a fit and proper parent who did not neglect the welfare of their child, and any third party excepting only the other natural parent, *the natural parent must prevail in an initial determination of child custody*.") (emphasis added), *appeal dismissed per curiam*, 346 N.C. 270, 485 S.E.2d 296 (1997).

To modify a child custody or support order, N.C.G.S. § 50-13.7(a) requires a "motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2007). This Court has held that, once the custody of a minor child is "*judicially determined*, that order of the court *cannot be modified until* it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831 (emphasis added) (internal quotation marks omitted); *see also Brewer*, 139 N.C. App. at 232, 533 S.E.2d at 548 (holding that a party must first show that "there has been a substantial change of circumstances affecting the welfare of the child[]" and then, based on the factual situation, may be entitled

to the *Petersen* presumption *or* will be subject to the "best interest of the child" standard). "There are no exceptions in North Carolina law to the [statutory] requirement that a change in circumstances be shown before a custody decree may be modified." *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831.

"[T]he case at hand is not an initial custody proceeding and, in fact, [mother] did not appeal from . . . [the] initial custody order entered" on 15 January 2004. *See id.* at 469, 462 S.E.2d at 830. Instead, as discussed in Section I above, mother filed a motion on 17 March 2005 to modify the 2004 custody order based on a material and substantial change in circumstances. Since the custody of D.L.B. was judicially determined in 2004 and that order is not on appeal before this Court, we conclude that the trial court did not err by applying the "substantial change in circumstances" standard in its 16 January 2007 order denying mother's motion to modify the initial custody order.

III.

[3] Mother finally contends that, if "substantial change in circumstances" was the proper standard to apply in the 16 January 2007 order, the trial court erred by not finding the standard was met. We must disagree.

"The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963) (internal quotation marks omitted). "In a custody modification action, even one involving a parent, the existing child custody order cannot be modified [unless] . . . the party seeking a modification [first shows] that there has been a substantial change in circumstances *affecting the welfare of the child* . . . ." *Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (emphasis added). Our Supreme Court articulated the following purpose for this rule:

> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). Thus, when considering a motion to modify child custody, "[t]he trial court must determine whether there was a change in circumstances *and then* must examine whether such a change affected the minor child." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (emphasis added). "If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered." *Id.*

"[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000) (internal quotation marks omitted). Where "the effects of the change on the welfare of the child are not self-evident[, the moving party must show] . . . evidence *directly* linking the change to the welfare of the child." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256 (citing 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.103 (5th rev. ed. 2002)). "Evidence linking . . . [changed] circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent." *Id.*

In the present case, the trial court found that "[t]here is evidence from which this Court can find [mother] has experienced substantial circumstantial changes in her own personal life and environment," but concluded that "[t]here [wa]s an insufficient showing of affect on the child [D.L.B.] whether positive or negative" because "there [wa]s no evidence put forth to show effect on the child."

Evidence was presented that, in early 2003, D.L.B. was evaluated for and began participating in an individualized preschool special education program at her school to address her developmental delays, particularly in the areas of receptive and expressive language. Following an audiological evaluation with an ear, nose, and throat specialist, D.L.B.'s adenoids and tonsils were removed in April 2003 to correct her diagnosed hypernasality, and speech therapy was added to her individualized education program. D.L.B.'s progress on a variety of developmental goals was evaluated on 12 February, 31 March, 26 May, and 9 September 2003, and D.L.B. was reported to have moved from "No progress made" to "Little progress made" to "Some progress made" for each of the goals. In addition, grandmother

testified that, in February 2006, she began sending D.L.B. to see a licensed professional counselor to further assist D.L.B. with overcoming her learning deficiencies. Thus, although the court found that D.L.B. suffered from "severe" developmental delays, evidence was presented that D.L.B. was receiving the recommended medical and therapeutic treatments she needed to aid her development while in grandmother's custody.

The guardian ad litem testified that D.L.B. is "just full of energy, she's very lively. She's a very sweet child, she likes to hug." She also testified that D.L.B. "loves to do things with her grandmother in the apartment complex that [sic] she lives. She enjoys bike riding and roller skating. She told me that she plays basketball and . . . that she played on a real team called the Allstars . . . ." During her visit at grandmother's house, the guardian ad litem observed that D.L.B. "would go over and give [grandmother] hugs and tell her she loved her and so forth."

The guardian ad litem further testified that D.L.B. "knows that she has a biological mother that is not [grandmother], but she does refer to [grandmother] as ['']mama.['']" She testified that D.L.B. told her "that she had not seen her [biological mother] in quite some time and she really could not remember when was the last time that she had seen her." D.L.B. "didn't express any fear of having a biological mom and not knowing or anything of that nature. She—she basically just didn't seem to know a whole lot about her."

"In cases involving custody of children, the trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion." *In re Williamson*, 32 N.C. App. 616, 620, 233 S.E.2d 677, 680 (1977) (citing *Blackley v. Blackley*, 285 N.C. 358, 204 S.E.2d 678 (1974)). "[A]bsent a clear showing of abuse of discretion," *id.*, "should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253-54 (internal quotation marks omitted); *see also Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal quotation marks omitted).

Here, evidence was presented that D.L.B. was an energetic, loving child who showed incremental progress in her development under

the care and supervision of medical and educational personnel while in the custody of grandmother. Since the effects of mother's changed circumstances on D.L.B.'s welfare were not "self-evident," mother had the burden to show "evidence *directly* linking the change[s in her circumstances] to the welfare of [D.L.B.]" *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 256 (citing 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.103 (5th rev. ed. 2002)). We recognize that mother has not been able to demonstrate the effect that the changed circumstances "in her own personal life and environment"—recognized as "substantial" by the trial court—might have on D.L.B. largely because she has been ordered to have no contact with D.L.B. Additionally, the guardian ad litem testified that grandmother purposefully withheld gifts from D.L.B. that mother sent to her over the years while in grandmother's custody including: an Easter basket, because grandmother "complained that it was just candy and nothing else"; and a blouse, because grandmother "was not particularly happy about [the blouse] being purchased at Wal-Mart." Nonetheless, the moving party has the burden of proving a "nexus" between the changed circumstances and the welfare of the child in order for the trial court to determine that a child support order may be modified. *See id.* at 478, 586 S.E.2d at 255-56 (citing 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.103 (5th rev. ed. 2002)). Therefore, since mother did not present evidence that her substantial change in circumstances affected D.L.B., we must find that the trial court did not err by denying mother's motion to modify the January 2004 custody order.

No error.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. BRYAN LEON ROBINSON

No. COA07-1180

(Filed 1 April 2008)

1. Search and Seizure— probable cause—plain feel doctrine—film canister with crack cocaine

The trial court did not err in a maintaining a vehicle to keep or sell controlled substances and possession with intent to sell and deliver cocaine case by concluding that an officer had prob-

able cause to search defendant's pocket and seize a film canister and its contents, because the totality of circumstances revealed that there was substantial evidence that the film canister was immediately identifiable by the officer as containing crack cocaine including that: (1) the officer testified that he had arrested at least three others who had exactly the same type of canister, and they had narcotics stored in it; (2) the area the officer patrolled had a reputation for being a drug location, and the officer was aware of reports that defendant sold drugs from the apartment building behind where he drove; (3) the officer made eye contact with defendant, defendant stopped talking, straightened up abruptly, and looked surprised or frightened, and the officer thought defendant was going to take off running; and (4) defendant turned his right side away from the officer and reached into his right pocket, thus prompting the officer to tell defendant to keep his hands out of his pocket. Under the plain feel doctrine, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons.

2. Search and Seizure— *Terry* frisk—investigatory stop—reasonable articulable suspicion

The trial court did not err in a maintaining a vehicle to keep or sell controlled substances and possession with intent to sell and deliver cocaine case by denying defendant's motion to suppress, even though defendant contends the officer did not have reasonable articulable suspicion to justify an investigatory stop and frisk under *Terry*, because the totality of circumstances revealed that the officer had more than a generalized suspicion when: (1) the officer heard a car engine revving, and thereafter defendant's car came into view crossing over onto the left side of the road, jumping the curb, and driving onto the grass; and (2) the officer's further investigation revealed defendant talking to someone inside the apartment, the officer made eye contact with defendant who stopped talking abruptly and thereafter displayed a surprised or frightened look on his face, the officer thought defendant was going to run, and defendant backed away and reached into his right pocket.

3. Appeal and Error— meaningful review—sufficiency of findings of fact

The trial court did not err in a maintaining a vehicle to keep or sell controlled substances and possession with intent to sell and deliver cocaine case by allegedly failing to make several findings of fact essential for meaningful appellate review, because: (1) the trial court's findings of fact were thorough and unambiguous; and (2) the factual findings supported the trial court's ultimate conclusions of law.

Appeal by Defendant from judgment entered 15 February 2007 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 6 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Sofie W. Hosford, for Defendant.

ARROWOOD, Judge.

Bryan Leon Robinson (Defendant) appeals from judgment entered 15 February 2007 convicting him of maintaining a vehicle to keep or sell controlled substances, of possession with intent to sell and deliver cocaine, and of attaining the status of an habitual felon. We find no error.

The evidence tends to show that on 11 August 2006, while Officer William Coble (Officer Coble) conducted a "bicycle patrol" in the Ray Warren Homes community, which was "notorious for drug activity[,]" he "heard a car engine revving, [and] a loud engine noise, [which] sound[ed] like a car . . . speeding down the street." Defendant's car "came into view[,] . . . cross[ed] over onto the left side of the road[,]" "jumped the curb . . . [and drove] onto the grass[.]" Defendant then drove the vehicle "behind [a] building" out of Officer Coble's view. As Defendant drove, he "kicked up" grass with the tires. Officer Coble was "informed by radio" that Defendant owned the vehicle, and Officer Coble recalled that: "[W]e . . . received a Crime Stoppers tip which specifically named . . . the [building behind which Defendant drove] . . . as being a drug location[,]" and which named Defendant as "selling a large amount of cocaine from the [building]."

Officer Coble dismounted his bike and walked to the corner of the building. There, he saw "[Defendant] talking to someone . . . inside

the apartment." Officer Coble "made eye contact with [Defendant,]" and "[Defendant] stopped talking[.]" Defendant "straightened up very abruptly, and he had . . . a surprised or frightened look on his face." Officer Coble thought "he was going to take off running." When Officer Coble "asked him what he was doing[,]" Defendant "started backing away." He "turn[ed] his right side away" from Officer Coble and "reach[ed] into his right pocket[.]" Officer Coble told him to "[j]ust keep your hands out of your pockets."

Officer Coble "did a pat frisk" and "touched the pocket [into which Defendant reached,]" feeling a cylindrical object which made "a rattling sound when it moved[.]" The object felt like "[a] film canister." Officer Coble then asked, "[i]s that crack in your pocket?" Defendant responded, "No[,]" "lower[ing] his head [and] slump[ing] his shoulders[.]" Officer Coble then "reached in the pocket, pulled out the cannister, popped the lid off, [and] saw that it was full of rocks that looked like crack cocaine[.]" Officer Coble then placed Defendant under arrest. Thereafter, Officer Coble searched the car that Defendant drove, finding "several razor blades in it . . . [with] white powdery residue on them[, and] . . . a set of electronic scales."

On 18 January 2007, Defendant filed a motion to suppress evidence of "contraband found on . . . Defendant and [in] his motor vehicle[,]" arguing that the contraband was seized in violation of the 4th Amendment of the United States Constitution and Art. I, §§ 19, 21 and 23 of the North Carolina Constitution.

On 14 and 15 February 2007, the trial court heard Defendant's motion, and on 5 April 2007, the court entered an order denying Defendant's motion to suppress, concluding that Officer Coble "detained and frisked the defendant" based on "specific and articulable facts[,]" and that Officer Coble "had probable cause to search the defendant's pocket and seize the contraband[.]" The court stated that "the incriminating nature of the object was immediately apparent to the officer during an appropriately limited frisk of the defendant's person[.]"

Defendant entered a guilty plea to the charges of maintaining a vehicle to keep or sell controlled substances, of possession with intent to sell and deliver cocaine, and of attaining the status of an habitual felon. The court entered judgment sentencing Defendant to 70 to 93 months in the North Carolina Department of Correction.

From the order denying Defendant's motion to suppress, and pursuant to N.C. Gen. Stat. § 15A-979(b), Defendant appeals.

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 . . . 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). Findings of fact are "conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994). "However, the trial court's conclusions of law are fully reviewable on appeal." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (citations omitted). "At a suppression hearing, conflicts in the evidence are to be resolved by the trial court[; t]he trial court must make findings of fact resolving any material conflict in the evidence." *Id.* (citations omitted).

Plain Feel Doctrine

[1] In his first argument, Defendant contends that the trial court erred in concluding that Officer Coble had probable cause to search Defendant's pocket, seizing the film canister and its contents, because this exceeded the scope of a *Terry* frisk. We disagree.

In *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968), the United States Supreme Court held that when a police officer observes unusual behavior which leads him to conclude, in light of his experience, that criminal activity may be occurring and that the person may be armed and dangerous, the officer is permitted to conduct a pat-down search to determine whether the person is carrying a weapon. *Terry* established that "[a] police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007).

The purpose of the officer's frisk or pat-down is for the officer's safety; as such, the pat-down "is limited to the person's outer clothing and to the search for weapons that may be used against the officer." *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 (2005). If during "[a] limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime." *State v. Streeter*, 17 N.C. App. 48, 50, 193 S.E.2d 347, 348 (1972). "Evidence of contraband, plainly felt during a pat-down or

frisk, may . . . be admissible, provided the officer had probable cause to believe that the item was in fact contraband." *Shearin*, 170 N.C. App. at 226, 612 S.E.2d at 376 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375-77, 124 L. Ed. 2d 334, 346-47 (1993)).

Under the "plain feel" doctrine if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. *Minnesota*, 508 U.S. 366, 124 L. Ed. 2d 334.

This Court must consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, whether probable cause existed to seize it. *State v. Briggs*, 140 N.C. App. 484, 492, 536 S.E.2d 858, 863 (2000). A probable cause determination does not require hard and fast certainty by the officer but involves more of a common-sense determination considering evidence as understood by those versed in the field of law enforcement. *Id.* at 493, 536 S.E.2d at 863.

In the instant case, there was substantial evidence that the film cannister seized was immediately identifiable by Officer Coble as crack cocaine. When asked at the hearing on Defendant's motion to suppress whether "it [was] . . . immediately apparent to you that this was crack cocaine packaged in the film cannister," Officer Coble stated, "Yes, it was." Officer Coble stated that "as soon as I touched it, I heard it rattle," and then he immediately asked Defendant, "Is that crack in your pocket?" Officer Coble also said that he had "arrested [at least three] other[s] . . . [who] had exactly the same type of canister[,] and they had narcotics stored in it." The area that Officer Coble patrolled had a reputation for being a "drug location," and Officer Coble was aware of reports that Defendant sold drugs from the apartment building behind which he drove. Further, when Officer Coble "made eye contact with [Defendant,]" "[Defendant] stopped talking[,]" "straightened up very abruptly," and looked "surprised or frightened[.]" Officer Coble thought "he was going to take off running." In fact, Defendant "started backing away." Defendant "turn[ed] his right side away" from Officer Coble and "reach[ed] into his right pocket[.]" Officer Coble told him to "[j]ust keep your hands out of your pockets."

Viewing the totality of the circumstances to determine whether the incriminating nature of the film cannister was immediately appar-

ent, we conclude that Officer Coble had probable cause to seize the film cannister from Defendant's pocket. The trial court did not err in concluding that its seizure was lawful and that the film cannister filled with crack cocaine could be admitted into evidence. We overrule this assignment of error.

Reasonable Suspicion

[2] In his second argument, Defendant contends that the trial court erred in denying Defendant's motion to suppress because Officer Coble did not have a reasonable articulable suspicion sufficient to justify an investigatory stop and frisk under *Terry*. We disagree.

"A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *Barnard*, 184 N.C. App. at 29, 645 S.E.2d at 783.

> 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. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994). (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop. *Id.* at 441, 446 S.E.2d at 70.

Defendant specifically cites *State v. Fleming* for the proposition that Officer Coble lacked reasonable articulable suspicion. In *Fleming*, the officer "had only 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." *State v. Fleming*, 106 N.C. App. 165, 171, 415 S.E.2d 782, 785 (1992).

We conclude that the instant case is distinguishable from *Fleming*. Here, Officer Coble had more than a "generalized suspicion[.]" *Id.* The evidence tends to show that Officer Coble "heard a car engine revving," after which Defendant's car "came into view[,] . . . cross[ing] over onto the left side of the road[,]" "jump[ing] the curb . . . [and driving] onto the grass[.]" When Officer Coble investi-

gated further, he discovered Defendant, "talking to someone . . . inside the apartment." Officer Coble "made eye contact with [Defendant,]" and "[Defendant] stopped talking[.]" Defendant "straightened up very abruptly, and he had . . . a surprised or frightened look on his face." Officer Coble thought "he was going to take off running." Defendant then "started backing away" and "reach[ed] into his right pocket[.]"

Considering the totality of the circumstances, we conclude that the foregoing evidence is sufficient to support the trial court's conclusion that Officer Coble possessed a reasonable and articulable suspicion to make an investigatory stop. This assignment of error is overruled.

Findings of Fact

[3] In his final argument, Defendant contends that the trial court erred in "fail[ing] to make several findings of fact that were supported by the evidence and essential for meaningful appellate review of this matter." We find Defendant's argument unpersuasive.

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." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

Here, Defendant cites *Quick v. Quick* for the proposition that "[f]indings of fact must be sufficient to enable meaningful appellate review." 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). We agree with Defendant that findings and conclusions are required in order that there may be a meaningful appellate review of the decision. *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). However, here, the trial judge's findings of fact are thorough and unambiguous. The trial court made the following findings of fact:

> 1) On August 11, 2006, Cpl. W. D. Coble and other officers with the Greensboro Police Department were conducting a bicycle patrol in the Ray Warren Homes community. The officers were part of a unit specially assigned to the public housing properties.
>
> 2) Cpl. Coble is a veteran police officer with more than twelve years of law enforcement experience. In the course of his career with the city police department, Cpl. Coble has made hundreds of

drug-related arrests. Through both formal training and practical experience, the officer has become familiar with the modes or patterns of operation of street-level drug violators, the identity of controlled substances they possess, and the manner in which those controlled substances are packaged or concealed.

3) Cpl. Coble and members of his police unit are also acquainted with the reputation for drug-related activity occurring in the Ray Warren Homes community. The immediate area subject to the bicycle patrol on this particular date was known to the officers as a place frequented by drug dealers and users. During his tenure with the unit, Cpl. Coble has personally made close to one hundred drug-related arrests in the Ray Warren Homes neighborhood.

4) In his experience, Cpl. Coble has come to recognize that often those who are involved in drug dealing activities carry firearms. In a number of drug-related arrests, the officer has recovered firearms and other weapons from the offenders.

5) During the afternoon hours on this particular date, the officers observed a vehicle, later determined to be operated by the defendant, driving erratically. The vehicle crossed the roadway, drove over a curb and onto the lawn in front of an apartment building. The vehicle then continued around to the rear of the property and disappeared from view.

6) Cpl. Coble and Officer M.A. Overman then responded to the location to further investigate the matter. While enroute (sic), they learned from another unit officer familiar with the defendant that the vehicle belonged to him.

7) Cpl. Coble and the other officers were acquainted with the defendant based in part on a complaint received some months before that he was involved in drug activity at this particular address. Cpl. Coble knew based on that earlier investigation that the defendant had prior felony convictions for drugs and firearms.

8) As Cpl. Coble arrived at the rear of 879 Burbank Street he observed the defendant between the parked vehicle and the back door of the apartment unit. The defendant appeared to be speaking with someone inside the home.

9) When the defendant made eye contact with the approaching officer, he abruptly stopped talking, straightened and reacted in a

startled manner. The officer, who was dressed in a uniform with identifiable police insignia, recognized the defendant as the same from the prior investigation.

10) As Cpl. Coble began asking what he was doing and why he was there, the defendant, who did not respond, started backing away from the officer.

11) When the officer instructed him to stop, the defendant turned so that his right side was away from Cpl. Coble and started to reach into his pocket. The defendant ignored Cpl. Coble's command to keep his hand out of his pocket.

12) The officer, who had been walking toward the defendant during the encounter, reached and took the defendant's arm and had him place his hands on the hood of the car. Cpl. Coble, based on his observations, what he knew of the defendant, and in his experience given the circumstances, believed that the defendant may be armed with a weapon and presently dangerous.

13) Cpl. Coble informed the defendant that he was going to make sure that he did not have a gun, and then began to conduct a frisk of his outer clothing for weapons.

14) When the officer pressed an open hand against the defendant's right side pocket he felt a cylindrical container and heard its contents "rattle". It was immediately apparent to Cpl. Coble based on his prior experience that the item was a container of crack cocaine. The officer had made arrests in the past wherein crack cocaine was kept in similar containers.

15) Cpl. Coble asked the defendant if the item was crack cocaine. The defendant, who did not answer the officer, slumped his shoulders and lowered his head.

16) The officer retrieved the suspected item from the defendant's pocket and found that it was a 35mm film canister with several off-white rock-like substances inside that he recognized to be crack cocaine.

17) The defendant was then placed under arrest and his vehicle was searched. The officer recovered items of drug paraphernalia that included a set of electronic scales and several razor blades covered in suspected cocaine residue from the passenger compartment.

We do not believe the findings of fact in this case are comparable to the findings of fact in *Quick*, which the Court stated were "woefully inadequate . . . [and in which] a serious 'gap' exist[ed]." *Quick*, 305 N.C. at 458, 290 S.E.2d at 661.

Because our review of the denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence[,]" we cannot agree with Defendant's contention that the trial court erred by failing to make several specific findings of fact in addition to the foregoing comprehensive findings.

We conclude that the findings of fact "are supported by competent evidence, [and therefore] . . . conclusively binding on appeal[.]" *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. Moreover, the "factual findings . . . support the judge's ultimate conclusions of law." *Id.*

For the foregoing reasons, we conclude that the trial court did not err by denying Defendants motion to suppress.

No Error.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA, Plaintiff v. BREON JERRARD BEATTY, Defendant

No. COA07-593

(Filed 1 April 2008)

1. Appeal and Error— preservation of issues—proposed instruction—given without objection—plain error not alleged

An issue concerning a self-defense instruction in a homicide case was not properly before the appellate court where the proposed instruction was given (despite defendant's contention to the contrary) and defendant did not object to the wording, request any modification or addition, and did not assert plain error.

2. Evidence— notebook found in brother's bedroom—prejudice not established

Defendant did not establish prejudice from the admission of a notebook with gang information found in the bedroom of defendant's brother, assuming that the notebook was irrele-

vant. The jury did not find that gang involvement was an aggravating factor.

Appeal by defendant from judgment entered on or about 27 September 2007 by Judge Ripley E. Rand in Superior Court, Durham County. Heard in the Court of Appeals 28 November 2007.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General Melissa L. Trippe for the State.

Leslie C. Rawls for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of voluntary manslaughter. Defendant appeals. The issues before this Court are whether the trial court erred (1) in refusing to give defendant's proposed jury instruction and (2) in admitting a notebook into evidence. For the following reasons, we find no error.

I. Background

The State's evidence tended to show the following: On 11 January 2005, Calib Thomas ("Thomas"), Antonio Dent ("Dent"), and several other boys were at the Joy Store Food Mart ("Food Mart") when they saw "two dudes riding on bikes . . . throwing gang signs" which they recognized to be from the Folk Nation ("Folk") gang. At the Food Mart, Thomas and Dent were associating with gang members from the Bloods and the Crips. Thomas and Dent approached the boys throwing gang signs. Dent said, "Blood Time" to the two boys on bikes who said they didn't "bang" (were not members of the gang). Thomas and Dent then left them alone and went to Jarrell's house to smoke.

Later Thomas and Dent returned to the Food Mart and then decided to visit Thomas' aunt. As Thomas and Dent were crossing Banner Street they saw three "dudes on bikes" in the Advance Auto parking lot, including the two individuals from their earlier encounter and defendant. Thomas knew defendant because they had attended the same school. Defendant pulled out a gun and Thomas heard shots as he and Dent headed back to the Food Mart. Dent asked if he was shot and then "started shaking, his eyes started rolling back in his head, he fell down, and that's when he started screaming and saying call the ambulance." Dent died as a result of "a gunshot wound of the abdomen."

On 22 February 2005, Cindy Felts ("Felts"), a crime scene investigator with the Durham Police Department visited defendant's home "to locate documents and collect evidence from the scene." Felts found a red notebook "in the bottom left dresser drawer" in the bedroom belonging to defendant's brother, Nick. That same day a warrant was issued for defendant's arrest because defendant "unlawfully, willfully and feloniously did of malice aforethought kill and murder Antonio Demetrius Dent." On or about 21 March 2005, defendant was indicted for second degree murder. On 5 September 2006, defendant notified the State he would be claiming self-defense. Trial was held 14-27 September 2006.

During defendant's case-in-chief, defendant testified that he was a member of the Folk gang and that he shot Dent because Dent had pulled a gun on him. Defendant was convicted of voluntary manslaughter, but the jury did not find an aggravating factor regarding gang involvement. Defendant appeals. The issues before this Court are whether the trial court erred (1) in refusing to give defendant's proposed jury instruction and (2) in admitting the red notebook into evidence. For the following reasons, we find no error.

II. Proposed Jury Instruction

[1] Defendant first contends "[t]he trial court erred when it denied Mr. Beatty's request for jury instructions supported by the evidence and by the law." Defendant argues that the refusal of the trial court to submit the proposed jury instructions was prejudicial error. We disagree with defendant's argument.

At the charge conference, defendant's counsel proposed three jury instructions, only one of which is before us on appeal. The proposed jury instruction which is at issue read,

> Ladies and Gentlemen of the Jury, I further instruct you that
>
> When a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable [sic].
>
> One who merely does an act which affords an opportunity for conflict is not thereby precluded from claiming self-defense. Fault implies misconduct not lack of judgment. That one is armed does not foreclose the right of self-defense if otherwise the defendant would have been entitled to the defense.

During the discussions regarding the proposed instruction, the trial court initially declined to give the instruction, then agreed to give the instruction, and then later declined to give the instruction. Defendant's counsel objected. The jury was brought back into the courtroom and heard defendant's closing argument. The jury was then excused for lunch and the judge asked the attorneys if they had any further requests before the lunch break; the attorneys did not.

Upon reconvening, outside of the presence of the jury, the judge reviewed the jury instructions which he intended to give. Both attorneys actively analyzed the instructions and defendant's counsel did not bring up the proposed jury instruction, which was not included in the final instructions. The jury entered the courtroom and heard the State's closing argument. The court then took an afternoon break and the judge again asked the lawyers outside of the presence of the jury if they would like to address any other matters; neither attorney did.

Upon reconvening from their afternoon break, the court handed out the jury instructions for the jurors to follow along with as they were read aloud. Those instructions did not contain defendant's proposed jury instruction. After being instructed the jury retired to the jury room to select a foreperson. The judge asked the attorneys if there were "any requests for any additional, or modified, or corrected instructions or anything of that nature[.]" Defendant's counsel did not mention the proposed jury instruction.

When the jury returned, the judge gave some final instructions and dismissed the jury for the evening. Before leaving for the evening, the trial judge asked the attorneys one final time if they had anything further; neither attorney did.

Upon reconvening the next day, the judge sent the jury back into the jury room for deliberations and asked the attorneys if there was anything they needed to talk about; defense counsel did not address the proposed instruction. After approximately two hours, the court received two notes from the jury—one requesting "a better definition of aggressor and of excessive force" and the other requesting a break. In discussing the issue of a "better definition of aggressor and of excessive force" defendant's counsel again requested the proposed jury instruction and the court agreed to instruct the jury accordingly, stating that he had intended to give that instruction earlier and had "neglected" to do so.

The judge then informed the jury,

> I further instruct you at this time that if you find from the evidence that the defendant was not the aggressor, he could stand his ground and repel force with force, regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

We note that the record indicates that the judge's stated intent was to give the instruction as previously requested by defendant's counsel, because he had "neglected" to do so. Defendant did not object to the instruction as given or request any modification to it. After the jury again retired to deliberate the judge asked the attorneys if they had anything further and defendant's counsel did not address the proposed jury instruction.

"Where a defendant fails to properly object at trial, he may argue plain error on appeal. N.C.R. App. P. 10(c)(4). However, [where a] defendant has not asserted plain error . . . [he] has waived plain error review." *State v. Johnson*, 181 N.C. App. 287, 290, 639 S.E.2d 78, 80 (citing *State v. Dennison*, 359 N.C. 312, 312, 608 S.E.2d 756, 757 (2005)), *disc. rev. denied*, 361 N.C. 364, 644 S.E.2d 555 (2007).

Here, defendant argues the trial court erred in refusing to give his proposed jury instruction. However, the trial court actually did give the proposed jury instruction and afterward defendant did not object at trial to the substance of the instruction as given. We are aware that the trial judge originally declined to give defendant's proposed jury instruction and that the proposed jury instruction was not actually given to the jury until almost two hours after the jury had begun deliberations; however, defendant does not argue that this delay caused any prejudice, but rather only contends that his proposed jury instructions were not given and that he was prejudiced because of the failure of the trial court to give the proposed jury instructions. We find defendant's argument to be factually incorrect as an instruction addressing the same issue as the proposed instructions was actually given to the jury, even if the wording was not exactly as defendant had proposed. We note that defendant has not objected to the wording of the instruction as given, but instead contends that the instruction was not given at all. However, the instruction was given and defendant did not object or request any modification or addition to the instruction when it was given. Defendant also failed to assert plain error on this appeal. Therefore, this issue is not properly before us. *See Johnson* at 290, 639 S.E.2d at 80.

III. Admissibility of the Red Notebook

[2] Defendant next contends "[t]he trial court erred when it overruled [d]efendant's objection to the admission of the red notebook found in [d]efendant's brother's room because no evidence connected the notebook to the [d]efendant and any probative value was outweighed by its prejudicial effect." "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).

At trial defendant's counsel objected to the introduction of the red notebook found by Felts into evidence and the following dialogue took place outside of the presence of the jury:

> MS. BROWN: Your Honor, I would object based on the fact that there is no tie-in with my client and that notebook, at least—maybe the State is going to bring a tie-in later, but at the moment, I would just—I'd object insofar as being admitted in this case. I certainly would not object to the fact that they have shown a chain of custody and having received that notebook out of the house, and they properly brought it here, and I don't contend that there's any alteration to the notebook or anybody has done anything to the notebook. I'm just simply saying—the State is yet to make a connection between that notebook that was found in in [sic] Nicholas' room with my client. And so I at this moment, I would object to that.
>
> THE COURT: So is it a relevancy argument at this point?
>
> MS. BROWN: It's a relevancy argument.
>
> THE COURT: Mr. Saacks.
>
> MR. SAACKS: Your Honor, clearly, this notebook and the whole reason that this is an argument is this notebook has a bunch of gang graffiti and bunch of gang information inside of it. The point is just like anything that's found in a house would be relevant. For instance, if a movie was found in the living room, or the den, or a book, you know, that outlined how to do something, even though you can't show that the defendant actually read that book or saw that movie, it would be relevant and be circumstances to be considered by the jury. The point is that even though this is Nick's room, this is obviously a close family member of this defendant,

and he probably had access to it. It's in the home where he's living and it was in the room of an immediate family member that was there.

I agree with what we were talking about before, I think that goes to the weight of the evidence as opposed to the admissibility of it, and I think there will be some further evidence which shows even more relevance than what already does exist, because there's going to be other items coming up, another notebook that was found in this defendant's room, that has the same kinds of gang graffiti in it as well. So it's going to corroborate each other to show that he's involved, just as his brother, in this kind of gang stuff.

So we would argue that clearly goes to the weight. If he wants to argue that at closing, that's fine, but it has nothing to do with whether it's admissible or not.

THE COURT: Let me make sure I understand what you're saying. What you're saying is that there is another notebook that was found in this defendant's room?

MR. SAACKS: Yes, sir.

THE COURT: That has basically the same types of information.

MR. SAACKS: Not everything, but some of the same types, yes, sir. Specifically, some of the same symbols and graffiti and things like that. And this will come out when Detective Dodson gets on the stand and talks about that. The red notebook is more of what might be known as a Book of Knowledge. It's really a gang manual. It gives a lot of codes, it gives a lot of symbols, it gives a lot of terms that are used. In the blue notebook you're going to have a lot of just random drawings and things of that nature, but—which are very similar, or the same, as to what is found in the red notebook that was found in Nicholas' room.

THE COURT: And other than it being information that a family member had, the defendant had, you know, potentially had access to, is there any other tie between this defendant and that notebook, other than it was in the house?

MR. SAACKS: Only other thing I can think of is that, you know, we had the school issue, there was that graffiti on the school desk that was done earlier. I don't know when this notebook was

prepared, so I can't say the school graffiti was before the notebook was prepared. Certainly before it was found. That would be the only other thing that I would think, plus, obviously, the gang issue being involved. I mean this all goes to the same basic motive that we keep talking about in this case and what's going on out there. It's gang related, it's a gang motive. And this is showing either gang knowledge or gang involvement.

THE COURT: Mr. Brown, do you want to be heard in response to that?

MR. BROWN: Well, as the Court well knows, from the time we did jury voir dire, we never contended that our client was not a member of a gang, and we do not now contend he's not a member of the gang. We have not changed our position on that. We're—and we don't—we don't disagree with Mr. Saacks that what he found in my client's room is not relevant and should not be admitted. We're not objecting to that. We're just simply saying that insofar as what's in his brother's room, he can't be held liable for his brother's stuff unless there's some tie-in here.

Now, I don't doubt for a second that there is gang material in the notebook that they took from Mr.—from Breon's room, but, and certainly—and I don't object to it. I don't object. But just insofar as this—insofar as Nicholas' room, unless there's some tie-in, I just simply contend that he would be no more guilty than if, you know, for example, you know, you found some child pornography in, you know, the father's bedroom, or something, you know, that would not make my client guilty of that. It wouldn't make the whole house guilty of that.

THE COURT: Well, let me ask this. If your position during the course of this trial is that your client is in fact a member of a gang, and that there's no dispute as to that, there's no dispute as to the gang—the particulars of the gang involvement, what's the prejudice in this coming in? Is there any particular prejudice based on the information contained in the notebook, or is it just that this is not something that was found in his room and therefore it shouldn't be tied to him?

MR. BROWN: May we approach the bench?

THE COURT: Sure.

(Bench conference not reported.)

> THE COURT: All right, with respect to the defendant's objection as to the introduction of State's Exhibit—is it 30—State's Exhibit 30, the objection is overruled. Based on a consideration of the probative value and the potential prejudice, I do find that under Rule 403 that the probative value of the evidence outweighs the potential of any unfair prejudice, given that there is no dispute as to the defendant's involvement in gang-related activities, and that there is in fact another notebook of similar—of a similar nature and quality that was found in the defendant's room, I do find that there is some probative value as to the notebook and the potential for unfair prejudice is fairly low. So the objection is overruled.

The red notebook was then admitted into evidence. The blue notebook was also later admitted into evidence.

" '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. "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. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402.

> [R]elevant 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. Cunningham, 188 N.C. App. ——, ——, —— S.E.2d ——, —— (2008) (quoting *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986) (internal quotations omitted)).

> The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

State v. Taylor, 154 N.C. App. 366, 372, 572 S.E.2d 237, 242 (2002) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)).

We need not address whether the red notebook was relevant, as even assuming *arguendo* that the red notebook was irrelevant, defendant failed to establish prejudice as the blue notebook found in defendant's room containing gang information was entered into evidence without objection and defendant himself testified that he was a member of the Folk gang. *See* N.C. Gen. Stat. § 15A-1443(a) (2005); *Taylor* at 372, 572 S.E.2d at 242. Furthermore, the jury specifically found that the following aggravating factor did not exist: "The offense was committed for the benefit of any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy[;]" as the jury did not find that gang involvement was an aggravating factor of the crime, we see no undue prejudice from the introduction of the red notebook containing gang information into evidence. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we find that the trial court did not err in the jury instructions it provided or in admitting the red notebook into evidence. Accordingly, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. GREGORY JAMAR LEE, DEFENDANT

No. COA07-539

(Filed 1 April 2008)

1. Evidence— extrinsic—unrelated matter showing defendant lied—attack on defendant's character for truthfulness

The trial court erred in a prosecution for first-degree murder and other crimes by admitting extrinsic evidence that defendant had lied to a witness about an unrelated matter because it attacked defendant's character for truthfulness in violation of N.C.G.S. § 8C-1, Rule 608(b). However, this error was not prejudicial because it could not be said as a matter of law that absent the error there was a reasonable possibility that the jury's verdict would have been different.

2. Jury— voir dire—challenge for cause—personal relationship with witness

The trial court did not abuse its discretion in a prosecution for first-degree murder and other crimes by denying defendant's motion to dismiss a juror for cause based on the fact the juror was once the next-door neighbor of a deputy sheriff who was testifying and also the accountant who prepared that deputy's tax returns because: (1) for the first two years these two individuals were neighbors, they chatted about once a month; (2) the two did not have regular social contact at the time of the trial and interacted about once a year for tax preparation purposes; (3) each time the juror was asked if he could impartially weigh the evidence and render a verdict accordingly, he unequivocally answered yes; and (4) the deputy's testimony was not crucial to the case.

3. Appeal and Error— appealability—denial of mistrial—sleeping juror—waiver

Although defendant contends the trial court erred in a prosecution for first-degree murder and other crimes by failing to declare a mistrial ex mero motu based on the fact that one of the jurors had been sleeping during the trial, defendant waived his right to assign error on appeal because the trial court inquired (after the jury was dismissed for lunch following closing arguments) about whether defendant would object to that juror sleeping through almost the whole trial, and defendant stated he wanted to keep her.

Appeal by defendant from judgment entered 17 May 2006 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 15 November 2007.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Jonathan Babb, for the State.

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

STROUD, Judge.

Defendant Gregory Jamar Lee appeals from judgments entered upon a jury verdict finding him guilty of first degree murder, attempted robbery with a dangerous weapon, and first degree burglary. Defendant contends that the trial court erred by: (1) admitting extrinsic evidence that defendant had lied to a witness about an unrelated matter, (2) denying defendant's motion to dismiss a juror for cause, and (3) failing to declare a mistrial on the grounds that one of the jurors had been sleeping during the trial. After careful review of the record, we conclude that defendant received a fair trial, free of prejudicial error.

I. Background

At trial, the State presented the following evidence: On 5 June 2002, defendant met Ricky Morris, Jerome Freeman, Marcus Hawley and Michael Sullivan at Sullivan's Durham County home. They traveled to Roxboro, Person County, armed with a .410 shotgun and an SKS rifle ("chopper"), where defendant announced a plan to forcibly enter an auto customizing shop owned by Adam Wolfe, shoot everyone in the shop and take a Cadillac Escalade belonging to Wolfe that defendant had earlier inquired about purchasing. Defendant abandoned that plan when he determined "it was getting too late and . . . there [were] too many people over there." Defendant, Freeman and Hawley went into the Wal-Mart near Wolfe's shop, where defendant purchased ammunition for the .410 shotgun and Freeman purchased ammunition for the chopper.

They drove back to Durham where defendant and Sullivan fired shots at a Cadillac Escalade belonging to a person who allegedly had stolen a large sum of money from defendant. They then drove to defendant's home in Durham County, right across the street from the home of Mrs. Lois Cannady. Morris armed himself with a shotgun from defendant's home at defendant's request. Defendant armed him-

self with the .410 shotgun, and Sullivan armed himself with the chopper. Defendant kicked open the backdoor of Mrs. Cannady's home and entered with his four accomplices. Freeman "peeked" into the room occupied by Mrs. Cannady, and she fired a shot at him. Sullivan returned fire with the chopper, fatally wounding Mrs. Cannady. Defendant and his four accomplices fled from Mrs. Cannady's home and returned to Sullivan's home.

On 3 February 2003, the Durham County Grand Jury indicted defendant for first degree murder, attempted robbery with a dangerous weapon, first degree burglary, misdemeanor larceny, and felonious possession of a stolen vehicle. Defendant was tried before a jury in Superior Court, Durham County, with the jury returning verdicts on 7 September 2005. The jury found defendant guilty of larceny and possession of a stolen vehicle, but did not reach a verdict on the charges of attempted robbery with a dangerous weapon, first degree burglary, or first degree murder. Judgment was continued on the convictions.

Defendant was tried again on the charges of attempted robbery with a dangerous weapon, first degree burglary, and first degree murder from 24 April to 17 May 2006 in Superior Court, Durham County. Defendant testified at trial, asserting as his defenses that he was not armed when the group entered Mrs. Cannady's home, and that he lacked *mens rea*, or criminal intent, on the basis that he had been forced to participate in the crime under duress.

On 17 May 2006, the jury found defendant guilty of first degree murder, attempted robbery with a dangerous weapon,[1] and first degree burglary. Upon the jury's verdicts, the trial court sentenced defendant to life imprisonment without parole for first degree murder and continued judgment on the other two convictions. Defendant appeals.

II. Analysis

A. Admission of Evidence

[1] Defendant first assigns error to the following testimony, elicited on redirect examination by the State from Adam Wolfe, who owned the Roxboro auto customizing shop that defendant had planned to forcibly enter before going to the home of Mrs. Cannady:

---

1. The judgment for attempted robbery with a dangerous weapon contains an obvious typographical error. It states, "def[endant] found not guilty by a jury."

[The State:] Did you say that [defendant] was calling you every day?

[Witness:] Several times [a day].

. . . .

[The State:] About what?

[Witness:] Just kept trying to get me to meet him and talk to his dad [about buying my Escalade].

. . . .

Somebody had called me and said it was [defendant's father] on the phone and that he was trying to see my Escalade and that he was flying out of town and that he wanted to see me before he went out of town so he could make a decision on the truck.

[The State:] Did you end up making that meeting?

[Witness:] I went, and that's when I met [defendant] at Northern [High School] that day, early that morning, and he took me to a—down some gravel road, and nobody was there. It was like an old farmhouse. Then we turned around and came back out. I don't know the name of that road, but we came back out to the intersection and took anther left and went down to another gravel road, and I felt that—I didn't feel right about the situation, because I knew he had been lying on several occasions, so—

[Defense Counsel:] I'll object and move to strike that.

[The Court:] Overruled. Overruled. Go ahead.

. . . .

[Re-cross examination by defendant.]

. . . .

[Defense counsel:] [Why did you let him in your shop after hours if] you thought that you knew he was lying?

[Witness:] I knew he was lying. There's no doubt about that. Now, that doesn't mean he couldn't get a[n] Escalade. I just knew he was lying about who he was . . . and who his dad was.

Defendant contends that admission of this testimony violated Rule 608(b) of the North Carolina Rules of Evidence. The State contends that defendant waived his objection by eliciting the same infor-

mation on re-cross examination, and therefore this assignment of error is not properly before this Court for review. Alternatively, the State contends that the testimony did not violate Rule 608(b), because the testimony was first elicited by the State on re-direct examination and Rule 608 applies only to exclude testimony elicited on cross examination. As a third alternative, the State contends the testimony was admissible under Rule 404(b).

> The well established rule in this State is that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost[. However], [t]he rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence upon peril of losing the benefit of his exception.

State v. Van Landingham, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973) (citations and quotation marks omitted). The record indicates that defendant questioned Wolfe on re-cross examination about his statement that defendant was lying only for the purpose of attempting to contradict it. He did not thereby waive his objection. We will therefore review this assignment of error.

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b). Extrinsic evidence within the meaning of Rule 608 is "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness." *Black's Law Dictionary* 597 (8th edition, 2004).

The State's argument that Rule 608(b) operates to exclude only testimony which is elicited on cross examination is nonsensical. In fact, a careful reading reveals Rule 608(b) excludes all evidence of "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility" *other than* conviction of a

crime and two specific types of testimony elicited on cross examination of the witness. N.C. Gen. Stat. § 8C-1, Rule 608(b); *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986); *State v. Johnson*, 161 N.C. App. 504, 510, 588 S.E.2d 488, 492 (2003) ("North Carolina [Rule 608(b)] prohibits the use of extrinsic evidence, i.e., the testimony of another witness, to attack a witness' credibility."). The foregoing testimony was not admissible under Rule 608(b).

Next we consider the State's contention that Wolfe's testimony was admissible under Rule 404(b). Specifically, the State contends that taken as a whole, Wolfe's testimony was admissible under Rule 404(b) because it showed intent or motive. However, defendant assigned error not to the whole of Wolfe's testimony, but to the specific statement that "I knew [defendant] had been lying." We discern no other purpose for this testimony than to attack defendant's credibility, which brings it squarely within the prohibition of Rule 608(b) as discussed above. The admission of this testimony was error.

However, an error is reversible, entitling defendant to a new trial, N.C. Gen. Stat. § 15A-1447(a) (2005), only " 'where there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial.' " *State v. Williams*, 322 N.C. 452, 456-57, 368 S.E.2d 624, 627 (1988) (quoting N.C. Gen. Stat. § 15A-1443(a)). Examining the entire record, we find that the State presented testimony from two of the individuals, Jerome Freeman and Ricky Morris, who were present with defendant when Mrs. Cannady was murdered.

Freeman and Morris were also present with defendant in the hours before the crime when defendant went to Wolfe's shop armed with the .410 shotgun and declared his intention to kill everyone at Wolfe's shop in order to take Wolfe's Escalade, which defendant said belonged to him. Freeman and Morris testified that after deciding not to carry out the plan to take Wolfe's Escalade, defendant entered the Wal-Mart near Wolfe's shop to purchase ammunition for the .410 shotgun. They also testified that defendant led the group to Mrs. Cannady's house and that defendant kicked in the door.

This evidence, which directly contradicted defendant's statement that he was not armed when he entered Mrs. Cannady's home, was highly probative circumstantial evidence of defendant's state of mind at the time of the crime and was therefore indirectly more damaging to defendant's credibility than the testimony of Wolfe. We cannot say as a matter of law that absent the erroneous admission of extrinsic

evidence of the specific incident which attacked defendant's character for truthfulness, there is a reasonable possibility that the jury's verdict would have been different. *State v. Graham*, 186 N.C. App. 182, 192-93, 650 S.E.2d 639, 647 (2007). This assignment of error is overruled.

B. Juror Number 3

[2] Defendant next assigns error to the trial court's denial of his motion to dismiss Juror Number 3 for cause. Defendant argues that because Juror Number 3 was once the next-door neighbor of Deputy Sheriff Barnes, and also the accountant who prepared annual tax returns for Deputy Barnes, Juror Number 3 improperly gave extra weight to the testimony of Deputy Barnes.

> We review a trial court's ruling on a challenge for cause for abuse of discretion. A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record. Our review is deferential because the trial court holds a distinct advantage over appellate courts in determining whether to allow a challenge for cause.

State v. Lasiter, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (citations, ellipses, brackets and quotation marks omitted).

In reviewing whether a juror's personal relationship with a witness deprives the defendant of a fair trial, we consider: (1) the degree of relationship between the juror and the witness, (2) the statements of the witness as to whether or not he could be impartial, and (3) the importance of the witness to the case. *Id.* at 304, 643 S.E.2d at 912; *State v. Lee*, 292 N.C. 617, 625, 234 S.E.2d 574, 579 (1977).

In the case *sub judice*, Juror Number 3 had known Deputy Barnes about five years because Deputy Barnes was a tax preparation client of Juror Number 3, who was an accountant. For the first two years of their relationship, Juror Number 3 and Deputy Barnes had also been neighbors who chatted about once a month. Juror Number 3 and Deputy Barnes did not have regular social contact at the time of the trial and interacted about once a year for tax preparation purposes. Additionally, each time Juror Number 3 was asked if he could impartially weigh the evidence and render a verdict accordingly, he unequivocally answered yes.

Deputy Barnes' testimony in the trial was not crucial to the State's case. He testified that he assisted the lead investigator by asking questions during a pre-arrest interview with defendant and producing a tape of the interview which was played during the State's case-in-chief. He also testified on cross examination about filling out the arrest report, serving a search warrant, and accompanying other officers when defendant was being transported during the investigation. He did not testify as to any of the elements in the crimes for which defendant was being tried, either directly or by corroboration.

On this record, we perceive no abuse of discretion by the trial court in denying defendant's challenge of Juror Number 3 for cause. This assignment of error is overruled.

C. Sleeping Juror.

[3] Finally, defendant contends that the trial court committed reversible error *per se* when it did not conduct an investigation and remove Juror Number 12 *ex mero motu*. He contends that evidence that Juror Number 12 was asleep during part of the trial resulted in violation of his constitutional right to a unanimous verdict of twelve jurors.

Defendant did not move for a mistrial or request an investigation of jury misconduct during the trial. In fact, after the jury was dismissed for lunch following closing arguments, the following colloquy ensued:

> [The Court:] We have a note from a juror. . . . It says . . . "Juror Number 12 has been asleep the whole trial almost. . . ." I'm assuming that the defendant would object to that through counsel, or do you want to talk to your client about that?
>
> . . . .
>
> [Defense Counsel:] May I [step outside and talk with my client] for a minute?
>
> [Defendant confers with counsel outside the courtroom.]
>
> [Defense Counsel:] We just want to keep her, Your Honor.

"Under these circumstances, defendant has waived his right to assign error on appeal." *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993); *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994); *but see State v. Hill*, 179 N.C. App. 1, 25, 632 S.E.2d 777, 792 (2006) (holding that defendant waived appellate review by failing to

object or move for a mistrial on the basis of jury misconduct, but noting that no prejudice appeared in the record); *and State v. Hinton*, 155 N.C. App. 561, 564, 573 S.E.2d 609, 612 (2002) ("Notwithstanding defendant's failure to properly preserve this issue for review, in the interests of justice and pursuant to our authority under N.C.R. App. P. 2, we elect to review the merits of defendant's argument."). This assignment of error is therefore dismissed.

III. Conclusion

We conclude that defendant waived appellate review of allegations that Juror Number 12 was asleep during the trial. We further conclude that the trial court did not err when it denied defendant's motion to excuse Juror Number 3 for cause. Further, defendant failed to show prejudice resulting from the trial court's erroneous admission of evidence relating to his character for truthfulness. Accordingly, defendant received a fair trial, free of prejudicial error.

No prejudicial error.

Judges TYSON and JACKSON concur.

CYNTHIA CLAY, ADMINISTRATOR, ESTATE OF ELSIE CLAY, PLAINTIFF v. ROBERT E. MONROE, GUARDIAN, ESTATE OF ELSIE CLAY, DEFENDANT

No. COA07-1136

(Filed 1 April 2008)

1. Guardian and Ward— sale of property—no independent appraisal—no breach of fiduciary duty

A guardian did not breach his fiduciary duties in the sale of a ward's property in not obtaining an independent appraisal of the properties before the sale. Comparative market analysis (used here) and the tax value assessed by the county are also allowed as evidence of value.

2. Guardian and Ward— sale of property—value of property—no deception

There was no genuine issue of fact as to whether a guardian breached his fiduciary duty where plaintiff presented an appraisal, prepared years later, which opined that the properties

were worth more than the court-approved sale price. Plaintiff wholly failed to present evidence that defendant practiced a deception by false allegations and false evidence, or by industriously concealing material facts.

3. Fraud— constructive—sale of property by guardian—summary judgment for guardian

The trial court properly granted a guardian's motion for summary judgment on a claim for constructive fraud arising from the sale of the ward's property. The claim that defendant sought to benefit himself through attorney fees has been expressly rejected, and there is no evidence that defendant had any relationship with the respective purchasers before or after the sale of the property.

Appeal by plaintiff from orders entered 28 September 2006 and 29 May 2007 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 March 2008.

Hairston, Lane, Brannon, P.L.L.C., by Anthony M. Brannon, for plaintiff-appellant.

Troutman Sanders, L.L.P., by Gary S. Parsons, Hannah G. Styron and Whitney Waldenberg, for defendant-appellee.

TYSON, Judge.

Cynthia Clay ("plaintiff") appeals from order granting Robert Monroe's ("defendant") motion for summary judgment. We affirm.

I. Background

On 30 March 1999, the Wake County Clerk of Superior Court appointed defendant as the guardian of the estate of Elsie Clay ("Clay"). On 20 August 1999, defendant petitioned the Clerk of Superior Court for Wake County ("the superior court") for the sale of a 1.33 acre tract of property owned by Clay. Defendant's petition was based upon Clay's inability to pay her monthly expenses and past debts. On 30 November 1999, the superior court entered an order granting defendant's petition and the property was sold for $52,500.00 after upset bids.

In March 2000, defendant petitioned the superior court for the sale of a 22.23 acre tract of property owned by Clay. The superior court entered an order directing the sale of the property. Defendant

accepted an initial bid for $225,000.00, but after multiple upset bids and approval by the superior court, the property sold for $410,000.00. Defendant remained the guardian of Clay's estate until her death in April 2002.

On 4 January 2005, plaintiff, as administrator of the estate of Clay, filed an amended complaint against defendant seeking damages for breach of fiduciary duty and constructive fraud. On 28 December 2005, defendant filed an answer denying all material allegations therein and affirmatively pled the defenses of statute of limitations, truth, best interest, and reasonableness.

Subsequently, both parties filed motions for summary judgment. On 28 September 2006, the trial court entered an order granting defendant's motion for summary judgment and dismissing all of plaintiff's claims with prejudice. On 6 October 2006, plaintiff filed a motion for a new hearing pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. On 22 December 2006, defendant moved for costs. On 29 May 2007, the trial court entered orders denying plaintiff's motion for a new hearing and granting defendant's motion for costs. Plaintiff appeals from all orders entered.

II. N.C.R. App. P. 28(b)(6)

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states, in relevant part, "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2007). Here, plaintiff assigned error to the trial court's orders: (1) granting defendant's motion for summary judgment; (2) denying plaintiff's motion for a new summary judgment hearing; and (3) granting defendant's motion for costs. Plaintiff's brief only addresses the trial court's order granting defendant's motion for summary judgment. Plaintiff's remaining unargued assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

III. Issue

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment.

IV. Summary Judgment

A. Standard of Review

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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

B. Analysis

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment because genuine issues of material fact existed regarding whether defendant breached his fiduciary duties or, in the alternative, committed constructive fraud by failing to have Clay's property appraised before its sale. We disagree.

1. Fiduciary Duty

[1] The requirements for the sale of a ward's property by a guardian are set out in N.C. Gen. Stat. § 35A-1301(b):

> A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings . . . The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms

> as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:
>
> (1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or
>
> (2) The ward's personal estate has been exhausted or is insufficient for his support and the ward is likely to become chargeable on the county, or
>
> (3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for his maintenance or for the discharge of debts unavoidably incurred for his maintenance or
>
> (4) Any part of the ward's real estate is required for public purposes, or
>
> (5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale of only so much of the real estate as may be sufficient to discharge such debt or demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

N.C. Gen. Stat. § 35A-1301(b) (2005). When an order for sale has been issued by the clerk and approved by the court, a presumption arises that the statutory requirements have been met. *In re Quick and Yeoman v. Bank*, 208 N.C. 562, 568, 181 S.E. 746, 749 (1935).

Here, defendant determined that Clay's income was inadequate to meet her monthly expenses and filed two separate Petitions for Sale of Real Property with the Clerk. After numerous upset bids, the superior court approved defendant's petition and entered two orders authorizing and directing the sale of the respective properties. Plaintiff argues defendant breached his fiduciary duty by failing to procure an independent appraisal of the value of the properties prior to sale.

N.C. Gen. Stat. § 35A-1301(b) does not require a guardian to obtain an appraisal or to submit the appraised value to the court. No North Carolina statutory or case law supports the proposition that

an appraisal is the only valid method of determining the value of property. On the contrary, this Court has permitted expert testimony based on a comparative market analysis as evidence of property value. *City of Wilson v. Hawley*, 156 N.C. App. 609, 615, 577 S.E.2d 161, 165 (2003). The comparative market analysis used by the defendant in valuing the property is an acceptable method in North Carolina. *Id.*

Also, the *ad valorem* tax value assessed by a county is also allowed as evidence of the value of real property. N.C. Gen. Stat. § 105-283 (2005). Defendant was not statutorily required to obtain an appraisal value nor did the superior court request such documentation prior to the approval of the sales. We hold defendant complied with the statutory requirements of N.C. Gen. Stat. § 35A-1301(b).

[2] Having determined defendant complied with the statutory requirements, we address whether defendant can be held accountable for any alleged loss sustained from the sale of his ward's property. This issue was first addressed over 160 years ago in *Harrison v. Bradley*, 40 N.C. 136 (1847). Our Supreme Court stated:

> It was incumbent on the court to direct an inquiry as to the suitableness of the sale at the price, taking into view the income from the land, the ward's age, and the condition of her estate. Certainly, a guardian is not to answer for error in the court in those respects; for he cannot undertake to set himself above the court, whose advice he asks. *To make him responsible, if he be so at all, for a loss to the ward, something more than a loss and an error of a court must be made to appear. It ought, at least, to be established, that he practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts.* However, it is not our purpose at present to lay down any rule as to the liability of guardians for losses to wards from sales of their land. It will be sufficient to do so when a case of such injury shall come up.

Id. at 144-45 (emphasis supplied). Since *Harrison*, no other claimants have attempted to challenge on appeal the reasonableness of the price received by a guardian for property sold after express approval and confirmation by the clerk of superior court and a superior court judge. This procedural safeguard exists for two reasons: (1) to protect the ward from unscrupulous practices by a court-appointed fiduciary, and (2) to protect the fiduciary from the venality of heirs who did not see fit to participate in the ward's care during his or her life,

but who later emerge and attack the guardian's work after the ward's death in an effort to increase their inheritance.

Although the Court in *Harrison* did not set out a bright line rule establishing the liability of guardians, we hold the Court established a minimum level of culpability that a guardian's conduct must reach before he or she can be held liable for discrepancies between the purported value of a ward's property and the sale price. 40 N.C. at 144-45. Here, plaintiff wholly failed to present any evidence that defendant practiced a "deception on the court by false allegations and false evidence, or by industriously concealing material facts." *Id.* at 145. Plaintiff's only evidence to show a higher value was an appraisal, prepared years later, which opined the properties were worth more than the court-approved sale price. The fact that defendant's comparative market analysis and asserted tax value tended to show a lower value than an appraiser's *post hoc* opinion of value, standing alone, does not create a genuine issue of material fact of whether defendant breached his fiduciary duty. The trial court properly granted defendant's motion for summary judgment on plaintiff's breach of fiduciary duty claim.

2. Constructive Fraud

[3] To assert a claim of constructive fraud, plaintiff must allege:

> (1) a relationship of trust and confidence, (2) *that the defendant took advantage of that position of trust in order to benefit himself*, and (3) that plaintiff was, as a result, injured. Intent to deceive is not an element of constructive fraud. The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.

White v. Consolidated Planning, Inc., 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (emphasis supplied) (internal citations omitted), *disc. rev. denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). In order to satisfy the second element of constructive fraud, a plaintiff must allege, "the benefit sought was more than a continued relationship with the plaintiff or *payment of a fee to a defendant for work it actually performed*." *Id.* at 295, 603 S.E.2d at 156 (emphasis supplied) (citing *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003)).

Here, under her second claim for relief for constructive fraud, plaintiff alleged defendant sought to: (1) "benefit himself and/or his law office by charging attorney's fees" and (2) "benefit himself and/or

his law office from an on-going and existing relationship with the purchasers of the property. . . ."

Plaintiff's first allegation has been expressly rejected by this Court. *See White*, 166 N.C. App. at 295, 603 S.E.2d at 156; *Sterner*, 159 N.C. App. at 631-32, 583 S.E.2d at 674. Regarding plaintiff's second allegation, the record is wholly devoid of any evidence that defendant had any relationship with the respective purchasers prior to or after the sale of Clay's property. Plaintiff failed to establish a *prima facie* case of constructive fraud. *White*, 166 N.C. App. at 294, 603 S.E.2d at 156. The trial court properly granted defendant's motion for summary judgment on plaintiff's constructive fraud claim. This assignment of error is overruled.

V. Conclusion

Plaintiff failed to show any genuine issues of material fact existed regarding defendant's approved sale of Clay's property. The trial court properly granted defendant's motion for summary judgment. The trial court's order is affirmed.

Affirmed.

Judges McGEE and STEPHENS concur.

MICHAEL J. GRATZ, Employee, Plaintiff-Appellant v. JASON B. HILL, Employer, and ST. PAUL TRAVELERS INSURANCE COMPANY, Carrier, Defendants-Appellees

No. COA07-872

(Filed 1 April 2008)

1. Workers' Compensation— denial of benefits—intoxication

The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee roofer benefits based on its finding as fact and concluding as a matter of law that plaintiff was intoxicated at the time he fell off a roof while working because: (1) N.C.G.S. § 97-12 relieves an employer of the obligation to pay compensation to an employee when the accident giving rise to the employee's injuries is proximately caused by his intoxication provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee;

(2) the full Commission found as fact that plaintiff was intoxicated at the time of his fall, there was competent evidence in the record that plaintiff's blood alcohol level five to seven hours after the fall was 0.11 which was greater than the legal limit established for driving a motor vehicle, and there was competent evidence that at the time of the fall plaintiff's blood alcohol level was likely 0.22 or more; and (3) there was a rebuttable presumption that plaintiff was intoxicated, and plaintiff failed to rebut this presumption with competent evidence to the contrary.

2. Workers' Compensation— causation—intoxication

The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff employee roofer's intoxication was a cause in fact of the injuries he sustained after falling from a roof while working because: (1) the employer only needs to demonstrate that it was more probable than not that intoxication was a cause in fact of the injury; and (2) the full Commission's finding that plaintiff's fall was caused by his intoxication was supported by competent evidence including the testimony of a coworker and a doctor, and the findings in turn supported its conclusions of law.

Appeal by plaintiff from the Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 24 April 2007 by Commissioner Danny Lee McDonald. Heard in the Court of Appeals 16 January 2008.

The Vincent Law Firm, P.C., by Branch W. Vincent, III, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Dana C. Moody and Kyla Block, for defendants-appellees.

JACKSON, Judge.

Michael J. Gratz ("plaintiff") appeals the 24 April 2007 Opinion and Award of the Full Commission denying him workers' compensation benefits. For the reasons stated below, we affirm.

On 18 February 2002, plaintiff was working as a roofer for Jason B. Hill ("defendant"). A co-worker, Oscar Ray Plasencio ("Plasencio"), picked him up in a company van and drove a group of workers to the day's jobsite. On their way to the jobsite, they stopped at a convenience store to purchase breakfast items—biscuits, soda,

orange juice, "anything to get going." Plaintiff purchased a beer. Plasencio did not notice that plaintiff had purchased beer until he looked in his rearview mirror and saw plaintiff "chugging away."

It was a cold, windy day and plaintiff's co-workers did not want to go onto the steep roof. Of the four or five workers at the jobsite, plaintiff was the only one who attempted to work on the roof. Plaintiff's co-workers advised against getting on the roof, but "he thought he was tough."

Plaintiff climbed a piece of equipment used to send loads of shingles up and down—equipment which specifically says "do not climb" on it. Although safety equipment was available, plaintiff did not use it because such equipment was "for pansies." Within five to ten minutes, plaintiff fell off the roof.

No one saw plaintiff's actions immediately before he fell. Plaintiff testified that he began to staple down the first course of roofing paper, but when he rolled it out, it fell down a few inches. He was squatting down near the bottom of the fourth floor roof. He put down his stapler to pull the paper back up. As soon as he pulled the roll, he lost his footing and began to slide off the roof. Although he attempted to prevent himself from falling by trying to "scoot" back up the roof, the roof was still damp and he was unable to prevent his fall.

Plaintiff fell to the ground, landing on his feet. As a result of the fall, plaintiff sustained injuries to his left arm, both feet, pelvis, and lower spine. Plaintiff was hospitalized for two weeks following the accident.

Plasencio noted the smell of alcohol when he approached plaintiff after the fall. Responding paramedics and hospital personnel also smelled alcohol on plaintiff's breath. Glenn S. Simon, Ph.D. ("Dr. Simon")—an expert witness qualified in toxicology—explained that alcohol on the breath indicated that alcohol was still fresh in the body, that the consumption had occurred recently.

Tests done at the hospital five to seven hours after the accident revealed that plaintiff's blood alcohol level was 0.11 percent. Cannabinoids and cocaine also were found in plaintiff's urine. Dr. Simon opined that at the time of the accident, plaintiff's blood alcohol level was likely at or above 0.22 percent.

Dr. Simon explained that the legal limit for driving a motor vehicle is set at 0.08 because, for the vast majority of people, there are

no visible signs of impairment below that level, but increasingly visible signs above that level. Above 0.08, reflexes are slowed and judgment becomes impaired. Psychotropic substances also affect the way the mind thinks and the way the brain controls the body. Combining drugs makes the effects of any one of the drugs less predictable.

Plaintiff filed a Form 18 with the Industrial Commission on 25 March 2002, initiating his claim for workers' compensation benefits. On 5 August 2002, plaintiff's claim was denied by defendant's claim representative based in part on plaintiff's intoxication. Plaintiff requested a hearing, which was held before a deputy commissioner on 27 September 2005. An Opinion and Award denying plaintiff benefits was filed on 28 February 2006, from which plaintiff appealed to the Full Commission. The Full Commission also denied benefits in its Opinion and Award filed 24 April 2007. Plaintiff appeals.

[1] Plaintiff first argues that the Full Commission erred in finding as fact and concluding as a matter of law that he was intoxicated at the time of the accident. We disagree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). Although the Commission is the "sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony, findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (alteration in original) (citations and internal quotation marks omitted). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

"It is generally conceded by all courts that the various [C]ompensation [A]cts were intended to eliminate the fault of the work[er] as a basis for denying recovery." *Chambers v. Oil Company*, 199 N.C. 28, 33, 153 S.E. 594, 596 (1930). Courts also generally hold "that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). However, North

Carolina General Statutes, section 97-12 "is an integral part of our Workers' Compensation Act and evidences the Legislature's intention to relieve an employer of the obligation to pay compensation to an employee when the accident giving rise to the employee's injuries is proximately caused by his intoxication." *Anderson v. Century Data Systems*, 71 N.C. App. 540, 547, 322 S.E.2d 638, 642 (1984), *disc. rev. denied*, 313 N.C. 327, 327 S.E.2d 887 (1985).

Pursuant to North Carolina General Statutes, section 97-12, "[n]o compensation shall be payable if the injury . . . to the employee was proximately caused by . . . [h]is intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee[.]" N.C. Gen. Stat. § 97-12 (2001).

In 2005, the General Assembly amended the statute to provide:

> "Intoxication" . . . shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.
>
> A result consistent with "intoxication" . . . from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance.

N.C. Gen. Stat. § 97-12 (2005). The legal standard established by the General Assembly for intoxication sufficient to convict a person of impaired driving is an alcohol concentration of 0.08 or more, "at any relevant time after the driving[.]" N.C. Gen. Stat. § 20-138.1(a)(2) (2001).

The Full Commission found as fact that plaintiff was intoxicated at the time of his fall. There is competent evidence in the record that plaintiff's blood alcohol level five to seven hours after the fall was 0.11—greater than the legal limit established for driving a motor vehicle. There also is competent evidence in the record that at the time of the fall, plaintiff's blood alcohol level was likely 0.22 or more. Therefore, there was a rebuttable presumption that plaintiff was intoxicated. Plaintiff failed to rebut that presumption with competent evidence to the contrary. Because this finding of fact is supported by

competent evidence of record, and in turn supports the Full Commission's conclusions of law, this argument is without merit.

[2] Plaintiff next argues that the Full Commission erred in finding as fact and concluding as a matter of law that his intoxication was a cause in fact of the injuries he sustained. We disagree.

Mere intoxication is insufficient to deny benefits; "only if the injury . . . 'was occasioned by the intoxication' " will benefits be denied. *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 101, 189 S.E.2d 769, 771 (1972), *overruled in part on other grounds by Anderson*, 71 N.C. App. at 546, 322 S.E.2d at 641. "The employer is not required to come forward with evidence disproving all possible causes other than intoxication. Nor is he required to prove that intoxication was the *sole* . . . cause of the employee's injuries." *Anderson*, 71 N.C. App. at 545, 322 S.E.2d at 641 (emphasis in original) (citing *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E.2d 458 (1982)). The employer only needs to demonstrate "that it is more probable than not that intoxication was *a* cause in fact of the injury." *Sidney v. Raleigh Paving & Patching, Inc.*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993) (emphasis added) (citing *Anderson*, 71 N.C. App. 540, 322 S.E.2d 638).

The Full Commission found as fact that plaintiff's fall was caused by his intoxication. This finding of fact is supported by the testimony of both Plasencio and Dr. Simon.

Plasencio testified that based on plaintiff's extensive roofing experience, he believed plaintiff fell off the roof because of the alcohol that plaintiff used that day. Plasencio previously had seen plaintiff on rooftops and observed that he was sure-footed. Plaintiff "didn't have his head straight" and no one was with him to help him do his work. All the other workers had decided it was too windy to work that day. Plasencio stated that plaintiff would have been safe had he not been drinking. According to Plasencio, alcohol "impairs everything."

Dr. Simon testified that in his opinion, "alcohol was very clearly a principal factor in [plaintiff's] fall that day." The cannabinoids and cocaine that were found in his urine, in whatever amount, also could have contributed to the effects of the high level of alcohol in plaintiff's system. Dr. Simon believed plaintiff showed the type of judgment that one would attribute to someone who is intoxicated in that he chose to go up on the roof when his co-workers refused to do so.

This decision placed him on the roof in a position to fall off of it. He stated that, for the majority of the population, the level of alcohol plaintiff must have had in his system at the time of the fall would cause slowed reflexes, intermittent loss of balance, and loss of coordination. In Dr. Simon's opinion, that would be sufficient to have an accident such as plaintiff's. As further evidence of impaired judgment, Dr. Simon noted that plaintiff decided to purchase alcohol early in the morning on the way to a roofing job, and that given his blood alcohol content, this purchase could not have been the only alcohol plaintiff had consumed that morning.

The Full Commission's finding of fact that plaintiff's fall was caused by his intoxication is supported by competent evidence of record. This finding of fact in turn supports the Full Commission's conclusions of law. Therefore, this argument also is without merit.

Because the Full Commission's findings of fact and conclusions of law support its denial of workers' compensation benefits to plaintiff, its Opinion and Award is affirmed.

Affirmed.

Judges HUNTER and BRYANT concur.

CAROL ROBERTS, EMPLOYEE, PLAINTIFF v. DIXIE NEWS, INC., EMPLOYER, HARLEYSVILLE, CARRIER, DEFENDANTS

No. COA07-687

(Filed 1 April 2008)

1. Workers' Compensation— temporary total disability—sufficiency of findings of fact

The Industrial Commission did not err in a workers' compensation case by giving plaintiff employee temporary total disability from 4 November 2004 through 2 January 2005 and from 25 January 2005 forward even though defendants contend two findings are not supported by the evidence because: (1) none of the findings was completely lacking in foundation in the record, and the Commission's findings must have absolutely no basis in the record in order to be overturned; (2) defendants presented no evi-

dence on these two points to the Industrial Commission, and now point to nothing more than a recitation of accepted facts that they now attempt to cast in a sinister light; and (3) although defendants contend the Commission's order did not explain in enough detail how it concluded the second injury was an aggravation of the first rather than an independent cause, the order goes through a chronology of plaintiff's treatment and injuries, and references plaintiff's medical records, the reports of the doctors, and plaintiff's own testimony.

2. Workers' Compensation— authorization to stop payment of benefits—request for late penalty for failure to make payments

The Industrial Commission did not err in a workers' compensation case by concluding that defendants were authorized to stop payment of plaintiff employee's benefits and that a 10% penalty should not be assessed based on an alleged improper delay in paying the benefits owed to plaintiff because: (1) defendant employer was authorized to stop making payments under Workers' Compensation Rule 404A(5) and N.C.G.S. §§ 97-83 and -84 as a result of the 17 November 2005 opinion and award; and (2) defendants were not required to pay a late penalty since the Court of Appeals did not hold that defendants should have resumed payments after the 17 November 2005 order.

Appeal by plaintiff from an order entered 2 February 2006 and and by defendants from an opinion and award entered 12 March 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2007.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellant.

Allen, Kopet & Associates, PLLC, by Scott J. Lasso, for defendant-appellants.

HUNTER, Judge.

Dixie News, Inc., and Harleysville ("defendants") appeal from an opinion and award by the Full Industrial Commission entered on 12 March 2007. Carol Roberts ("plaintiff") cross-appeals from an order by the Chairman of the Industrial Commission entered on 2 February 2006. After careful review, we affirm as to both.

I.

In 2003, plaintiff was employed by defendant Dixie News as a magazine route distributor, warehouse manager, and inventory specialist and controller. These positions required her to lift up to 100 pounds on a daily basis, usually bins or racks of magazines. On 7 May 2003, plaintiff sustained an admittedly compensable injury while moving a large magazine rack in the course of her employment. Defendants began paying periodic compensation to plaintiff for total disability starting on 8 May 2003.

Plaintiff was treated by a neurosurgeon and, later, a rehabilitation therapist for her injuries, completing a rehabilitation program on 11 May 2004. According to her doctor, she retained a ten percent (10%) permanent partial disability and was assigned permanent work restrictions of lifting no more than twenty-five pounds.

Plaintiff was not assigned a vocational rehabilitation specialist and so began to seek work on her own. From 31 August 2004 through 3 November 2004, plaintiff worked for a catering company in what was touted as an office job but in fact required her to lift up to ninety pounds on a regular basis. She was terminated from this position on 3 November 2004 because she could not perform the job's required physical tasks. Defendants did not reinstate her disability compensation after she lost this position on 3 November 2004.

On 3 January 2005, plaintiff began work for Kerhules News in Union County, South Carolina, apparently performing tasks very similar to her work for defendant Dixie News. Plaintiff testified that Kerhules News was aware of the restrictions on how much she could lift, but she was required to lift bins weighing twenty-eight to seventy-one pounds. On 14 January 2005, while lifting a bin of magazines, plaintiff re-injured her back and subsequently lost her job at Kerhules. After this incident, defendants refused to authorize doctors' visits, claiming that plaintiff had sustained a new injury and, since it was sustained in the course of her employment for Kerhules News, any workers' compensation claim she might have was against that company.

On 15 June 2005, plaintiff made a motion to Deputy Commissioner Adrian Phillips to compel defendants to reinstate plaintiff's total disability compensation. Plaintiff argued that her physician had completed a Form 28U (Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work), pursuant to

which defendants were required by the Industrial Commission's rules to resume payment of compensation. The motion further stated that defendants, through counsel, had informed plaintiff that they would not honor the form, though there is no explanation as to why. Plaintiff noted that defendants may contest the reinstatement but, per the rules, must first reinstate it.

On 16 June 2005, Deputy Commissioner Phillips ordered that defendants reinstate plaintiff's compensation before a hearing scheduled for 28 June 2005. Defendants did so. On 17 November 2005, Deputy Commissioner Phillips issued his ruling from that hearing, holding that the second injury constituted a new injury and cut off defendants' liability from 14 January 2005 forward. Plaintiff immediately appealed the ruling to the Full Commission. From the time of this ruling on 17 November 2005 until the Full Commission's ruling on 12 March 2007, defendants made no payments to plaintiff.

Between the two rulings, on 7 December 2005, plaintiff made a motion to the Commission requesting that defendants be required to continue payments until the appeal was resolved. On 2 February 2006, an order by Deputy Commissioner Buck Lattimore was entered ("the February order") "hold[ing] plaintiff's motion to immediately reinstate disability compensation in abeyance until consideration by the Full Commission at the hearing of this matter."

On 12 March 2007, the Full Commission issued an opinion and award giving plaintiff temporary total disability from 4 November 2004 through 2 January 2005 and from 25 January 2005 forward. Defendants were also ordered to pay for medical treatment for plaintiff's injury. Defendants appeal from this order; plaintiff cross-appeals, arguing that defendants stopped payment of her benefits after Deputy Commissioner Phillips's November 2005 order without authorization and that Commissioner Lattimore's February order holding the motion in abeyance was error.

II. Defendants' Appeal

[1] Defendants argue that the following findings made by the Industrial Commission are not supported by competent evidence:

> 24. Defendants have presented no evidence of an intervening event that interrupts their admissions of compensability and liability with respect to plaintiff's compensable May 7, 2003 injury. Further, there is no evidence that plaintiff intentionally tried to

re-injure herself by performing heavy work activities for a new employer.

. . .

32. Plaintiff's increase in pain following the January 14, 2005 incident was a manifestation of plaintiff's prior compensable injury, and thus, was not an independent, intervening cause. Further, there is no evidence that the incident was attributable to plaintiff's own intentional conduct.

All of these arguments are without merit.

As defendants note, on appeal, the Industrial Commission's findings of fact "are conclusive where supported by competent evidence" and may be set aside only " 'when there is a complete lack of competent evidence to support them.' " *Flynn v. EPSG Mgmt. Servs.*, 171 N.C. App. 353, 356, 614 S.E.2d 460, 462 (2005) (citation omitted). None of the disputed findings is completely lacking in foundation in the record.

As to the first disputed finding of fact, defendants argue that the Commission ignored evidence they presented of an intervening event between plaintiff's two injuries. This argument blends into their argument as to the second disputed finding of fact, in that the claimed intervening event was plaintiff's second injury, which they claim she inflicted on herself. Defendants argue the Commission erred in finding that they did not present evidence on these points. This argument is without merit.

The evidence to which defendant points is: Plaintiff's taking two new jobs after her injury, her apparent lack of need for medical attention before each, her ensuing claims that she was physically unfit for them, and her intentionally lifting a bin that she may or may not have known was too heavy for her. However, as noted, the Commission's findings must have absolutely no basis in the record for this Court to overturn them. Here, the Commission's conclusion that defendants presented no evidence on these two points seems to this Court entirely accurate; the evidence to which they now point is nothing more than a recitation of accepted facts which they attempt to cast in a sinister light. The Commission recited all of these facts in its findings. This assignment is overruled.

As to the final disputed finding of fact, defendants argue simply that the Commission's order did not explain in enough detail how it

concluded that the second injury was an aggravation of the first rather than an independent cause. However, the order goes through a chronology of plaintiff's treatment and injuries and, in making findings on this point, references plaintiff's medical records, the reports of her doctors, and plaintiff's own testimony.

Thus, because the Industrial Commission's findings in this order were supported by competent evidence, we affirm on this issue.

III. Plaintiff's Appeal

[2] We first address defendants' argument that this appeal is moot and find it to be without merit. Although the situation has been resolved by the Industrial Commission's order, there is still the question of the ten percent (10%) penalty to be addressed (see below) if it is determined that there was an improper delay in paying the benefits owed to plaintiff.

Plaintiff argues that neither the order by Deputy Commissioner Phillips (the opinion and award entered 17 November 2005 revoking her benefits) nor the ensuing order by Chairman Lattimore (the February order holding the motion to reinstate compensation in abeyance) was a final, enforceable award allowing defendants to cease payments. This argument is without merit.

Where a party appeals a decision of the Industrial Commission to this Court, that appeal acts as a *supersedeas* to maintain the status quo as between the parties. *See* N.C. Gen. Stat. § 97-86 (2007). Plaintiff has cited to no case law, and this Court has found none, suggesting that the same holds true for an appeal of a decision of a deputy commissioner to the Full Commission. Indeed, such a holding would mean that, essentially, a decision by a deputy commissioner would have little to no meaning. As such, plaintiff's argument is without merit.

Further, defendants have complied with the procedure required for ceasing benefits after a trial return to work. Per Industrial Commission Workers' Compensation Rule 404A(5):

> When the employer . . . has received a properly completed Form 28U and contests the employee's right to reinstatement of total disability compensation, it may suspend or terminate compensation only as provided in N.C. Gen. Stat. § 97-18.1 and/or pursuant to the provisions of N.C. Gen. Stat. § 97-83 and N.C. Gen. Stat. § 97-84.

Workers' Comp. R. of N.C. Indus. Comm'n 404A(5), 2008 Ann. R. N.C. 1069, 1070. Having received a Form 28U from plaintiff, defendant could cease making payments only on the basis of N.C. Gen. Stat. § 97-18.1, N.C. Gen. Stat. §§ 97-83 and -84, or both. The latter statutes, §§ 97-83 and -84, provide for a hearing before a member of the Industrial Commission and give guidelines for the administration of that hearing. Once that hearing has been held, "the deputy shall cause to be issued an award pursuant to such determination." N.C. Gen. Stat. § 97-84 (2007). Such a hearing was held in this case on 28 June 2005 before Deputy Commissioner Phillips. The opinion and award entered on 17 November 2005 as a result of that hearing authorized defendant employer to cease making payments to plaintiff. Thus, per Rule 404A(5) and N.C. Gen. Stat. §§ 97-83 and -84, defendant was authorized to stop making payments.

Plaintiff further asks that a late penalty be assessed against defendants for the payments that defendants should have made. Such a penalty is authorized by N.C. Gen. Stat. § 97-18(g) (2007), which states: "If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment[.]" Because this Court does not hold that defendants should have resumed payments after the 17 November order, we overrule this assignment of error.

IV.

As to defendants' appeal, because the Industrial Commission's findings in this order were supported by competent evidence, we affirm. As to plaintiff's appeal, because no law suggests that defendants improperly ceased payments to plaintiff on the basis of the individual commissioner's order, we affirm.

Affirmed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. JERRELL ANTWAN JENKINS

No. COA07-498

(Filed 1 April 2008)

Criminal Law— verdict form—not guilty option omitted

The instructions in an assault prosecution did not cure the omission of a not guilty option from the jury verdict form. The trial court emphasized the not guilty mandate in relation to the defense of others charge, but the mandate was not clear enough to support a verdict sheet that omits a not guilty option. Additionally, the trial court did not specifically instruct the jury how to complete the verdict form to include a not guilty verdict.

Appeal by defendant from judgment entered 6 December 2006 by Judge Donald M. Jacobs in Martin County Superior Court. Heard in the Court of Appeals 14 November 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.

Robert W. Ewing, for defendant-appellant.

CALABRIA, Judge.

Jerrell Antwan Jenkins ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury. We reverse.

On 12 August 2005, John Griffin, Jr. ("the victim") attended defendant's family reunion. The victim and O'Darrin Jenkins ("O'Darrin") were close friends and attended the reunion for the past four or five years. The victim "bumped into" the defendant who was with his brother Marquail Mouring ("Mouring"), and his cousin Victor Dunbar. Defendant spoke with O'Darrin, but did not speak to the victim. As the victim and O'Darrin walked toward the others in the crowd, a basketball was thrown and landed near them. O'Darrin and the victim turned around and saw the defendant laughing. O'Darrin told the victim he wanted to show him a new shirt that was in his mother's truck. The victim and O'Darrin started walking down a path leading to his mother's truck when the victim noticed the defendant and Mouring approaching them. As the victim started to walk back toward the crowd, he was hit on the back of the head. He

and Mouring fought for about thirty seconds. When Mouring stopped, defendant started fighting the victim. During the time the victim and defendant struggled, the victim felt a burning sensation in his left side. The victim slammed the defendant to the ground until someone intervened. The victim was bleeding from his chest, and sustained injuries to his side, neck, back and finger. Subsequently, defendant was charged with assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury.

At trial in Martin County Superior Court on 4 December 2006, the State presented Martin County Sheriff's Deputy Officer Stalls' ("Officer Stalls") testimony. Officer Stalls responded to a call that either a fight or a stabbing had occurred. He arrived at the family reunion to investigate. Officer Stalls testified he found a knife lying on the ground in the general vicinity of the victim.

The victim testified he suffered nine stab wounds. An ambulance transported the victim to the hospital where the treatment for his wounds included surgery to repair his punctured lungs.

According to the defendant's testimony, he saw the victim with O'Darrin, Rod Dickens ("Dickens") and some others. He did not see anyone throw a basketball at the victim or O'Darrin and he did not see them go to the truck. The defendant was eating with his girlfriend when a fight broke out between Mouring and the victim. Defendant testified that three other people, including Dickens, attacked Mouring. Defendant's brother told defendant that Dickens had a knife. As defendant turned toward Dickens, Dickens swung the knife at him and cut defendant's fourth and fifth fingers. The knife severed his flexor tendons so defendant cannot completely straighten out his fingers. Defendant denied stabbing the victim or possessing a knife.

Mouring testified the victim instigated the fight. According to Mouring, his uncle pulled him away from the fight and told him Dickens had a knife. Mouring then warned defendant that Dickens had a knife.

The jury returned a verdict finding defendant guilty of assault with a deadly weapon inflicting serious injury and did not render a verdict as to the assault inflicting serious bodily injury charge. The Honorable Donald M. Jacobs sentenced defendant to a minimum term of twenty (20) months for a maximum term of thirty-three (33) months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues the trial court committed reversible error by submitting an incomplete verdict form under Count I. The jury verdict form did not include an option of finding the defendant not guilty under Count I, nor did it include an option to find defendant guilty of simple assault.

Since we agree the omission of "not guilty" on the verdict form is reversible error, we do not reach defendant's second argument regarding simple assault.

This Court addressed a similar issue in *State v. McHone*, 174 N.C. App. 289, 620 S.E.2d 903 (2005). In *McHone*, the trial court not only omitted the option of not guilty of first-degree murder in its final mandate to the jury, but also omitted "not guilty" as an option on the verdict sheet. *Id.*, 174 N.C. App. at 291, 620 S.E.2d at 906. "Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *Id.*, 174 N.C. App. at 295, 620 S.E.2d at 907-08 (citing *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 584 (1980)). The trial court failed to state that the jury could find defendant not guilty nor did it state that it was the jury's duty to do so should they conclude the State failed to meet its burden of proof. *Id.*, 174 N.C. App. at 296, 620 S.E.2d 908.

In *State v. McArthur*, 186 N.C. App. 373, 377, 651 S.E.2d 256, 258 (2007), this Court reversed and ordered a new trial where the trial court instructed the jury to find the defendant not guilty if they found defendant had acted in self-defense, but did not give the instruction that if the State failed to meet its burden as to one of the elements of the offense, the jury was required to find the defendant not guilty. *McArthur* relied upon *State v. Dallas*, 253 N.C. 568, 569, 117 S.E.2d 415, 416 (1960). In *Dallas*, the Supreme Court granted a new trial where the trial court failed to instruct the jury that the defendant must be acquitted if the State failed to prove each element of the offense charged and also for limiting the charge of not guilty to a finding of not guilty by self-defense. *Id.*

In the instant case, the jury verdict form contained a blank line under Count I further described as:

> _____ guilty of assault with a deadly weapon inflicting serious injury

(Whether or not you find him guilty of assault with a deadly weapon inflicting serious injury, you will consider felonious assault inflicting serious bodily injury.)

OR

Count II:

_____ guilty of assault inflicting serious bodily injury

(If you find him guilty of either or both of the above offenses, you will not consider whether the defendant is guilty of simple assault.)

OR

_____ guilty of simple assault

OR

_____ not guilty

At the charge conference, defense counsel requested the trial court amend the verdict form to insert a "not guilty" option that was missing under Count I. The trial court denied the request.

The State argues the verdict form was sufficient because "[a] verdict is deemed sufficient if it can be properly understood by reference to the indictment, evidence, and jury instructions." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citation omitted). The State further argues that any error was cured by polling the jury and cites *State v. Smith*, 299 N.C. 533, 535, 263 S.E.2d 563, 565 (1980), in support of this argument.

We find *Smith* distinguishable. In *Smith*, the defendant challenged the jury verdicts on the grounds they were improper in form. The defendant was charged with two counts. The jury responded "yes" on the verdict forms for each count instead of "guilty." When polled, the jury confirmed the verdict. The Supreme Court held no error. *Smith*, 299 N.C. at 537, 263 S.E.2d at 565. Here, although the jury was polled, the error of omitting a "not guilty" option from the verdict form is more serious than using the word "yes" instead of "guilty."

The State further cites *State v. Hicks*, 86 N.C. App. 36, 43, 356 S.E.2d 595, 599 (1987), where a verdict sheet did not include a not guilty option. On appeal, this Court found no reversible error since

the trial court specifically instructed the jury to write either guilty or not guilty in the blanks provided and properly polled the jury. *Id.*

We conclude that the instructions in this case did not cure the omission of a "not guilty" option from the jury verdict form. In the instant case, the trial court's instructions were essentially split into three parts. The first part explained the State's burden of proof for the elements of the offense.

> In count one of the indictment the defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant assaulted the victim by intentionally and without justification or excuse striking the victim, John Griffin, Jr., second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. A knife is a deadly weapon and third, that the defendant inflicted serious injury upon the victim. A stab wound in the chest injuring the lung would be a serious injury.
>
> Thus, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally struck the victim with a knife, thereby inflicting serious injury upon the victim, nothing else appearing, it would be your duty to return a verdict of guilty.

In the second part, the court instructed if the State failed to prove one of the elements the jury could not return a guilty verdict of assault with a deadly weapon inflicting serious injury. However, if the State did prove all the elements, defendant could still be found not guilty if he acted in lawful defense of another and defendant's belief was reasonable.

> *If you do not so find or you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of assault with a deadly weapon inflicting serious injury, but you must clearly understand as to this charge if the defendant assaulted the victim, John Griffin, Jr., in lawful defense of another person his actions would be excused, and he would not be guilty.*
>
> The State has the burden of proving from the evidence, beyond a reasonable doubt, that the defendant did not act in the lawful defense of another person.

> If from the evidence you find, beyond a reasonable doubt, that the defendant assaulted the victim and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect a family member from death or great bodily harm or bodily injury or offensive physical conduct—contact and the circumstances then create such belief in the defendant's mind at the time he acted, such assault would be justified by defense of a family member.
>
> You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to him at the time.

(Emphasis added).

The last determination was for the jury to find whether defendant used excessive force or was the aggressor. If they had a reasonable doubt that defendant was the aggressor, their duty would be to return a verdict of not guilty.

> But although you are satisfied beyond a reasonable doubt that the defendant assaulted the victim, John Griffin, Jr., you may return a verdict of guilty only if the State has satisfied you, beyond a reasonable doubt, that the defendant did not act in the lawful defense of a family member, that is he did not reasonably believe that assaulting the victim was necessary or apparently necessary to protect his family member from death or great bodily harm or injury or offensive physical contact or that he used excessive force or was the aggressor. *If you do not so find or have a reasonable doubt, then the defendant would be justified by defense of a family member. Your duty would be, under those circumstances, to return a verdict of not guilty.*

(Emphasis added).

The trial court emphasized the not guilty mandate in relation to the defense of others charge. However, this mandate is not clear enough to support a verdict sheet that omits a "not guilty" option under Count I. *McHone*, *supra*. In addition, the trial court did not specifically instruct the jury how to complete the verdict form to include a not guilty verdict as to Count I. Instead the trial court instructed:

> You may not return a verdict until all twelve jurors agree unanimously. You may not render a verdict by majority vote. Whether

you have—when you have agreed on a unanimous verdict, your foreperson may so indicate on the verdict sheet by checking the appropriate blanks.

The "appropriate blanks" under Count I did not include the option to find the defendant not guilty.

We reverse and remand for a new trial. We need not reach defendant's second issue on appeal. Finally, we note defendant asserted assignments of error that were not argued in his brief. Those assignments of error not argued are abandoned pursuant to N.C. R. App. P. 28(b)(6) (2007).

New trial.

Judges STEPHENS and ARROWOOD concur.

BLAYLOCK GRADING COMPANY, LLP, PLAINTIFF v. NEAL EVERETT SMITH AND NEAL SMITH ENGINEERING, INC., DEFENDANTS

No. COA07-615

(Filed 1 April 2008)

1. Contracts— breach—risk allocation provision—limited liability clauses—land surveying not within public service exception

The trial court erred in a breach of contract and negligence case arising out of improper land surveying services by holding that the risk allocation provision (limited liability clause) in the contract was void as against public policy and by denying defendants' motion for judgment notwithstanding the verdict to limit damages to $50,000 because: (1) plaintiff stipulated that there were no formation irregularities in the contract, thus acknowledging that the contract was not unconscionable and that there was no inequality in bargaining position between the two parties; (2) plaintiff and defendants are sophisticated professional parties who conducted business at arms' length, and the result of the contract did not elicit a profound sense of injustice; and (3) defendants are not common carriers or providers of a public utility. Further, land surveying services do not fall within the public service exception. A breach of contract between two parties in-

volves only economic loss and does not implicate the health and safety of the public.

2. Contracts— breach—clause limiting party's liability instead of indemnity clause

N.C.G.S. § 22B-1 was not applicable in a breach of contract and negligence case when the pertinent contract involved a clause that limited a party's liability instead of being an indemnity clause whereby one party agrees to be liable for the negligence of the other party. The statute only limits a promisee from recouping damages paid to a third party as a result of personal injury or property damages when the damages were caused by the promisee, and it does not apply to contracts between a promisor and promisee limiting the amount of damages recoverable by one from the other like in the present case.

Appeal by defendants from orders entered 12 September 2006, 27 November 2006, and 11 December 2006, and judgment entered 27 November 2006 by Judge James F. Ammons, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 14 January 2008.

Bain, Buzzard & McRae, LLP, by L. Stacy Weaver, III, Edgar R. Bain, and Robert A. Buzzard, for plaintiff-appellee.

Hamilton, Moon, Stephens, Steele & Martin, PLLC, by David B. Hamilton, David G. Redding, Adrianne Huffman, and Erik R. Rosenwood, for defendants-appellants.

MARTIN, Chief Judge.

On 20 September 2004 Blaylock Grading Company, LLP ("plaintiff") and Neal Smith and Neal Smith Engineering, Inc. ("defendants") entered into a contract pursuant to which defendants would provide land surveying services for plaintiff. The contract contained a "Risk Allocation" provision which stated:

> [Defendants' liability to plaintiff] for any and all injuries, claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of $50,000, the amount of [defendants'] fee (whichever is greater) or other amount agreed upon when added under Special Conditions. Such causes include, but are not limited to, [defendants'] negligence, errors, omissions, strict liability, breach of contract or breach of warranty.

Pursuant to this contract, defendants performed land surveying for plaintiff on a military housing site for which plaintiff was providing grading services. Defendants mistakenly set the benchmarks for the complex 1.66 to 1.7 feet higher than specified in the design plan, requiring plaintiff to import fill to raise the elevation of the site.

On 13 January 2006 plaintiff filed a complaint against defendants alleging breach of contract and negligence. Defendants moved for partial summary judgment, claiming that the Risk Allocation provision limited damages to $50,000. The trial court denied the motion. Plaintiff made an oral motion to bifurcate the trial into two phases: one dealing with the issues of negligence, breach of contract, and damages, and the other dealing with the validity of the Risk Allocation provision. The trial court granted the motion and ruled that the Risk Allocation provision could not be introduced into evidence in the first phase of the trial and that the Risk Allocation provision would be redacted from the contract before it was shown to the jury.

At the close of the first phase of the trial, the jury found that defendants breached the contract with plaintiff and were negligent in their performance of the surveying duties, and the jury returned a verdict for plaintiff in the amount of $574,714. Defendants moved for judgment notwithstanding the verdict. The trial court denied this motion. Plaintiff stipulated that there were no formation irregularities in the contract and asked the trial court to determine the validity of the Risk Allocation provision as a matter of law. On 27 November 2006 the trial court held that the Risk Allocation provision was void as against public policy and entered judgment on the jury verdict, eliminating the need for the second phase of the trial. Defendants appeal.

[1] Defendants argue that the trial court erred in finding the Risk Allocation provision to be void and unenforceable. Therefore, defendants argue, the trial court should have granted their motion for judgment notwithstanding the verdict and should have limited damages to $50,000. We agree. Reviewing these assignments of error requires us to examine two issues: 1) whether North Carolina law allows a professional engineer/land surveyor to limit its liability when contracting with another party; and 2) whether the Risk Allocation provision violated N.C.G.S. § 22B-1 (2007).

Our Supreme Court has addressed the validity of limited liability clauses. In *Gas House, Inc. v. Southern Bell Telephone & Telegraph*

Company, 289 N.C. 175, 176-77, 221 S.E.2d 499, 500-01 (1976), *overruled on other grounds by State ex rel. Utils. Comm'n. v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983), the plaintiff gas company filed a breach of contract and negligence action against the defendant telephone company for mistakenly classifying its advertisement in the telephone company's Yellow Pages under the classification "Gas—Industrial & Medical—Cylinder & Bulk" instead of under "Gas—Liquefied Petroleum—Bottled & Bulk." *Id.* The plaintiff did not sell any industrial and medical gases, and as a result of the mistake it suffered approximately $100,000 in lost profits. *Id.* at 176, 221 S.E.2d at 500. The defendant claimed that its liability was limited by a clause in the contract signed by plaintiff, which stated:

> The Telephone Company's liability on account of errors in or omissions of such advertising shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in the then current directory issue and such liability shall be discharged by an abatement of the charges for the particular listing or advertising in which the omission occurred.

Id. at 177, 221 S.E.2d at 501.

This Court held that the limited liability clause was void as against public policy. *Id.* at 178, 221 S.E.2d at 501-02. The Supreme Court reversed, holding that the limitation on liability was not contrary to public policy and stating:

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

Id. at 182, 221 S.E.2d at 504 (quoting 14 Samuel Williston, *A Treatise on the Law of Contracts* § 1632 (Walter H.E. Jaeger ed., 3d ed. 1961). The Court also distinguished the facts in *Gas House* from a situation where a common carrier or public utility attempts to limit its liability, holding that:

> [A] limitation upon the right of the common carrier, or other public utility, to contract applies, however, only to its undertakings to render services which fall within its public service business. For example, a telephone company leasing office space to a tenant, or an electric power company selling an electric stove, is as free to contract with reference to those matters as is any other owner of a building or dealer in electric stoves. The business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business.

Id. at 184, 221 S.E.2d at 505.

In the present case, plaintiff stipulated that there were no formation irregularities in the contract; thus, it acknowledged that the contract was not unconscionable and that there was no inequality in bargaining position between the two parties. Plaintiff and defendants are sophisticated, professional parties who conducted business at arms' length, and the "result" of the contract does not elicit a "profound sense of injustice." *Id.* at 182, 221 S.E.2d at 504. In addition, defendants are not common carriers or providers of a public utility. The parties here are similar to "a telephone company leasing space to a tenant or an electric power company selling an electric stove[.]" *Id.* at 184, 221 S.E.2d at 505; *see also Reed's Jewelers, Inc. v. ADT Co.*, 43 N.C. App. 744, 747, 260 S.E.2d 107, 109-10 (1979) (holding that a limitation on liability for stolen property in a contract between a jeweler and a burglar alarm company was valid and did not invoke the public service exception where "[t]he contractual provision in question was set out in the contract in bold print" and "[n]either party contend[ed that] the contract in question was not signed by it nor does the plaintiff deny its contents"). Therefore, the Risk Allocation provision was not void as against public policy.

The trial court held, and plaintiff argues, that land surveying services fall within the public service exception because they are "extensively regulated" industries. We disagree. While it is true that surveying is regulated by statute in North Carolina and that engineers and land surveyors in our State must be licensed, *see* N.C.G.S. § 89C-23 (2007), these facts alone do not automatically convert a profession into a public service. Further, when a breach of contract between two parties involves only economic loss, as in the present case, the health and safety of the public are not implicated. A third party who might be affected by negligence of an engineer or surveyor can still bring a negligence suit against the engineer or surveyor. *See Davidson &*

Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 666-67, 255 S.E.2d 580, 584 (1979) (holding that "the law imposes on every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence[,]" that "a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions . . . [,]" and that architects may be held liable for a breach of the duty of care and breach of contract that "results in foreseeable injury, economic or otherwise"). Thus, the limitation on liability in the contract at issue does not implicate the public health or safety.

[2] Turning to the second issue, N.C.G.S § 22B-1 (2007), titled "Construction indemnity agreements invalid[,]" states:

> Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, *purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees* against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.

N.C. Gen. Stat. § 22B-1 (2007) (emphasis added).

This statute is not applicable in the present case. The contract at issue involves a clause that limits a party's liability, not an indemnity clause whereby one party agrees to be liable for the negligence of the other party. *See Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d 553, 555 (1989) (holding that "[t]he indemnity provisions to which G.S. § 22B-1 apply are those construction indemnity provisions which attempt to hold one party responsible for the negligence of another"). Further, the language of the statute only limits a promisee from recouping damages paid to a third party as a result of personal injury or property damages when the damages were caused by the promisee. *See id.;* N.C. Gen. Stat. § 22B-1 (2007). The statute does not apply to contracts between a promisor and promisee limiting the amount of damages recoverable by one from the other, as does the contract in the

present case. Thus, the Risk Allocation provision did not violate N.C.G.S § 22B-1 (2007).

For the reasons stated above, the trial court erred in holding that the Risk Allocation provision was void and in denying defendants' motion for judgment notwithstanding the verdict. We thus reverse and remand to the trial court for entry of judgment consistent with the limitation on liability in the Risk Allocation provision. In light of this disposition we need not consider defendants' remaining assignments of error.

Reversed.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. JOSE MANUEL VIERA

No. COA07-968

(Filed 1 April 2008)

1. Sexual Offenses— battery—massage therapist

The trial court correctly denied defendant's motion to dismiss charges of sexual battery for insufficient evidence where defendant was a masseur who was accused of inappropriately touching his clients. Sexual battery is defined in terms of sexual contact rather than a sexual act, and there was evidence of force in defendant's abuse of his position of trust and relative authority as a professional massage therapist. Furthermore, both victims testified that they were afraid to say anything to defendant after the touching began.

2. Administrative Law— practicing massage therapy without a license—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of practicing massage therapy without a license arising from events in 2004 and 2005 where the administrator of the Board testified that the Board's files had been examined, that defendant's license was revoked in 2002, and that it was never reissued.

3. Appeal and Error— reinstatement of charges—failure to object at arraignment

Defendant waived any error in the reinstatement of charges against him after a dismissal with leave where he did not object at arraignment.

Appeal by defendant from judgments entered 13 December 2005 by Judge Howard E. Manning in Wake County Superior Court. Heard in the Court of Appeals 3 March 2008.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Terry F. Rose for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from judgments imposing active terms of imprisonment following his conviction by a jury of two counts of sexual battery and one count of practicing massage therapy without a license. At trial, the State offered evidence tending to show that from June 2004 until early January 2005, defendant provided massage services as an independent contractor at a Raleigh salon and spa. At the inception of his relationship with the salon, he exhibited a copy of his massage license to the salon's owner, who made no further inquiry. In fact, defendant's massage license had been revoked by the North Carolina Board of Body Work and Massage (the "Board") in 2002 following a hearing by the Board after it had received complaints about the defendant. He applied for reinstatement in 2004, but his application was denied by the Board.

On or about 14 December 2004, R.K. arrived at the spa after making an appointment for a one-hour massage. She was introduced to defendant as the person who would perform the massage. She told defendant that she would like him to work on her back, shoulders, and neck. Defendant left the room and R.K. undressed, put on a pair of disposable panties furnished by the salon, lay facedown on the massage table, and pulled the sheet over her. After massaging R.K.'s legs, defendant spent a lot of time massaging her buttocks. He then instructed her to turn onto her back, and started massaging her legs and inner thigh until his fingers touched her labia. Defendant touched her there repeatedly, and also rubbed her breasts in a way that she characterized as "fondling." During this time, defendant also pressed his erect penis against her arm. When defendant

touched R.K. inappropriately, she was petrified and she froze, fearing what defendant might do next. Her massage was the last appointment of the evening, and she did not hear anyone else in the building. At the end of the encounter, defendant massaged R.K.'s face and then slapped her face. She dressed quickly and left the building. R.K. was frightened and reluctant to tell anyone until early January after she began having panic attacks. She then told her husband and coworkers what had happened and reported the incident to the police. By that time, the police were already investigating another complaint against defendant.

The second complaint was made by J.E. She reported to police, and testified at trial, concerning an incident which occurred on 4 January 2005, when she went to the salon for a facial and massage. Defendant gave J.E. a short terry cloth wrap to wear during the facial. When the facial was complete, defendant told J.E. to turn over and lie facedown so he could begin the massage. When she complied, he "ripped" the wrap off of her, leaving her completely naked. Without draping her, defendant began massaging J.E.'s entire body. While he was massaging her buttocks and upper thighs, he came within millimeters of penetrating her with his fingers. J.E. became tense and completely froze, afraid of what else defendant might do. Defendant then instructed her to turn over onto her back, and he began rubbing her stomach and breasts, including her nipples. Defendant rubbed down her stomach until his fingers went into her pubic hair. J.E. was too frightened to move. Finally, defendant worked on her neck and ended the massage by running his fingers through her hair. As soon as the massage was over, J.E. confronted the salon owner about what had occurred.

Defendant was tried in district court and was found guilty. He appealed to superior court. When he failed to appear for trial in superior court, for reasons later determined to be beyond his control, he was called and failed in superior court, and the charges were dismissed with leave. On 12 December 2005, the State filed notices of reinstatement for the two charges of sexual battery and placed all of the charges on the trial calendar. At the conclusion of the trial, the jury found defendant guilty of all three charges.

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[1] Defendant argues that the trial court erred in denying his motion to dismiss the charges of sexual battery because the State offered insufficient evidence of his guilt of each element of those crimes. His argument is without merit.

> In ruling on a motion to dismiss at the close of evidence made pursuant to G.S. § 15A-1227, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied.

State v. Williams, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002) (citation omitted).

Defendant first contends that the State failed to present any evidence of the "sexual act" element of sexual battery because there was no evidence that defendant penetrated either victim. Contrary to defendant's contention, sexual battery is not defined in terms of a sexual act, but rather in terms of "sexual contact." In North Carolina, sexual battery occurs when "the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in *sexual contact* with another person . . . [b]y force and against the will of the other person." N.C. Gen. Stat. § 14-27.5A(a) (2007) (emphasis added). " 'Sexual contact' means (i) touching the sexual organ, anus, breast, groin, or buttocks of any person, [or] (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks." N.C. Gen. Stat. § 14-27.1(5) (2007). Accordingly, touching without penetration is sufficient to support the element of sexual contact necessary for the crime of sexual battery.

Defendant also argues that the motion to dismiss the charges of sexual battery should have been granted because the State failed to present evidence of the element of force required for the crime. Sexual battery must occur "[b]y force and against the will of the other person." N.C. Gen. Stat. § 14-27.5A(a)(1). Our Supreme Court has noted:

> The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.

State v. Etheridge, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (citations omitted). This Court has subsequently noted: "Constructive force . . . may be demonstrated by proof that the defendant acted so as, in the totality of the circumstances, to create the reasonable infer-

ence that the purpose of such acts was to compel the victim to submit to [the sexual contact]." *State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344 (2003).

In the present case, the defendant held himself out to be a professional, licensed massage therapist, bound by the statutes and rules governing the profession. At the time when the victims sought treatment from defendant, the administrative rules specifically prohibited "sexual activity with a client in a location where the practice of massage and bodywork therapy is conducted" and explicitly stated "[l]icensees shall not use the therapist-client relationship to engage in sexual activity with any client." 21 N.C. Admin. Code 30.0505 (2004) (current version at 21 N.C. Admin. Code 30.0509 (2006)). "Sexual activity" has been defined as "any direct or indirect physical contact . . . which is intended to erotically stimulate either person, [including] manipulation of any body tissue with the intent to cause sexual arousal." 21 N.C. Admin. Code 30.0102(8) (2004) (current version at 21 N.C. Admin. Code 30.0508 (2006)). According to these rules, a professional massage therapist is specifically prohibited from making sexual contact for the purpose of sexual arousal, gratification, or abuse, the same conduct which constitutes sexual battery under N.C.G.S. § 14-27.5A(a). Based on these rules, a client expects professional boundaries when choosing to receive massage services from a licensed massage therapist. In fact, one of the victims testified,

> he . . . told me the areas that he would massage and if there was anyplace . . . that [I] didn't want [him] to massage, and I said no, because, I [sic] you know, there's certain boundaries that are just accepted when you have a professional massage. . . . [T]hat they're not going to touch you where they shouldn't.

Defendant utilized his apparent status as a licensed, professional massage therapist to induce his victims to lie naked on the massage table, putting them in a position of complete vulnerability. Through this coercion, he forced them to submit to the unwanted sexual contact. Defendant's implicit threat was delivered through his abuse of his position of trust and relative authority as a professional massage therapist.

Furthermore, both victims testified they were afraid to say anything to defendant after he began touching them inappropriately because, as one stated, "I felt petrified. . . . I didn't know what this man would do. I did not, do not know him, did not know him then, I had no idea what he might do if I said something," and as the other

stated, "I was petrified. I didn't know what he was going to do next if he was—I was supposedly in a professional salon, and thought he was a professional masseuse. And things that he was doing I knew weren't right." The fear created by the victims' feelings of vulnerability also substantiates the element of constructive force required to constitute the crime of sexual battery under N.C.G.S. § 14.27.5A(a)(1). On both theories of constructive force, the State presented sufficient evidence for the jury to reasonably infer that defendant was guilty of sexual battery, and the trial court properly denied the motion to dismiss.

[2] Defendant next argues that the trial court erred in failing to grant defendant's motion to dismiss the charge of practicing massage therapy without a license. Defendant argues that the trial court should have granted the motion because the State failed to offer evidence of the element of the crime that defendant was unlicensed on 14 December 2004 and 4 January 2005. N.C. Gen. Stat. § 90-634(a) (2007) ("It is unlawful for a person not licensed or exempted . . . to engage in . . . [the p]ractice of massage and bodywork therapy."). The State presented testimony of the administrator for the Board, after examining the Board's files on defendant, that defendant's license was revoked in 2002 and was never reissued at any time. In light of this evidence, defendant's argument is without merit.

[3] Defendant ultimately argues that it was error for the trial court to submit to the jury the charge of practicing massage therapy without a license because the State did not sign the notice of reinstatement of the charge after it had been dismissed with leave. Defendant reasons that by failing to sign the notice, the State did not reinstate the charge, and therefore the trial court lacked jurisdiction to submit the charge to the jury. Under our General Statutes, after charges against a defendant have been dismissed with leave, "the prosecutor may reinstitute the proceedings by filing written notice with the clerk." N.C. Gen. Stat. § 15A-932(d) (2007). In order to preserve for appeal the State's failure to make proper written notice, a defendant must object at the arraignment hearing. *State v. Patterson*, 332 N.C. 409, 421-22, 420 S.E.2d 98, 104-05 (1992). Defendant does not argue, and the record does not reflect, that defendant objected to the lack of notice at his arraignment. Therefore, defendant waived any error that may have occurred. *See id.*

No error.

Judges CALABRIA and GEER concur.

DEONDRA SEXTON HENTZ, PLAINTIFF v. ASHEVILLE CITY BOARD OF EDUCATION AND ROBERT LOGAN IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF ASHEVILLE CITY SCHOOLS, DEFENDANTS

No. COA07-808

(Filed 1 April 2008)

1. Schools and Education— assignment of student—administrative remedy

There was an administrative remedy available to a parent who filed an action regarding student assignment after a disciplinary problem where plaintiff's complaint expressly alleged actions contrary to contract, statute, defendant's policies, and state and federal constitutions.

2. Schools and Education— school assignment—exhaustion of administrative remedies

The trial court properly dismissed plaintiff's claim (involving a pupil assignment) due to lack of subject matter jurisdiction where plaintiff attempted to pursue a breach of contract action in superior court while appealing the decision of the superintendent of schools through administrative channels. Plaintiff failed to exhaust her administrative remedies and failed to carry her burden of demonstrating that the administrative remedies available under N.C.G.S. § 115C-45(c) were inadequate.

Appeal by plaintiff from judgment entered 13 February 2007 by Judge C. Phillip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 2008.

Howard McGlohon for plaintiff appellant.

Roberts & Stevens, P.A., by Christopher Z. Campbell, for defendant appellees.

McCULLOUGH, Judge.

Plaintiff appeals the trial court's order granting defendants' motion to dismiss for lack of subject matter jurisdiction. The court determined plaintiff failed to exhaust her effective administrative remedies and dismissed her action. We affirm the ruling of the trial court.

The relevant background information and procedural history is as follows: Plaintiff, Deondra Sexton Hentz, is the mother of two minor

children, TaKayla and Tamequa Sexton ("the Sexton children"). Plaintiff and the Sexton children are domiciled in the Buncombe County School Board District. The Sexton children had been enrolled at TC Robertson High School ("TC Robertson"), where they were bullied by other students. Pursuant to Asheville City Board of Education's Discretionary Admission Policy 4130, on 7 August 2006, plaintiff submitted an application and a $300 application fee to have the Sexton children admitted to the Asheville City School District for the 2006-2007 school year. On 7 August 2006, the Asheville City School Board ("the BOE") approved plaintiff's request to admit the students.

The Sexton children were enrolled in Asheville High School during the Fall Semester of 2006, during which time, TaKayla Sexton was involved in a fight with another student at a school basketball game. On 9 January 2007, Robert Logan, Superintendent of Asheville City Schools ("Logan"), notified plaintiff of a decision to remove the Sexton children from Asheville High School's attendance roll for the Spring Semester of 2007. Logan cited two reasons for this decision: (1) plaintiff and the Sexton children resided outside of the Asheville City School District and (2) TaKayla Sexton had violated Asheville High School's student code of conduct.

Sometime between 9 January 2007 and 18 January 2007, plaintiff notified Logan that she was appealing the decision to revoke the Sexton children's discretionary admission to Asheville High School. Then, on 25 January 2007, before the BOE issued a final decision regarding the Sexton children's admission to Asheville High School, plaintiff initiated this action in the Buncombe County Superior Court, claiming that the actions of the BOE and Logan, in his official capacity (collectively "defendants"), in revoking the Sexton children's discretionary admission to Asheville High School constituted a breach of contract, violated school board policy, and violated the minor children's constitutional rights under state and federal law.[1] Plaintiff sought special damages as well as injunctive relief.

On 29 January 2007, a panel of the BOE held a hearing to review Logan's decision to revoke the Sexton children's admission to Asheville High School, and on 31 January 2007, the BOE issued a final agency decision upholding Logan's decision.

On 7 February 2007, defendants moved to dismiss plaintiff's action pursuant to Rule 12(b)(1) for lack of subject matter jurisdic-

1. On 5 February 2007, appellant filed an amended complaint, which does not reference the BOE's decision or seek judicial review of such decision.

tion. The trial court granted that motion, and plaintiff appeals. Defendant has moved to dismiss plaintiff's appeal, arguing that plaintiff's appeal is moot. We disagree and summarily deny this motion.

A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be raised at any time. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *cert. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979). Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667-68, 353 S.E.2d 673, 675 (1987). An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust his administrative remedies. *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352-53, 444 S.E.2d 636, 638-39 (1994), *disc. review improvidently allowed*, 340 N.C. 357, 457 S.E.2d 599 (1995). "[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979).

A. Administrative Remedy Under N.C. Gen. Stat. § 115C-45(c)

[1] First, we note the administrative remedy available to plaintiff. Pursuant to N.C. Gen. Stat. § 115C-45, an aggrieved person has a right of appeal to the local board of education and then, under specified conditions, to the superior court, following a final administrative decision in the following matters:

> (1) The discipline of a student under G.S. 115C-391(c), (d), (d1), (d2), (d3), or (d4);
>
> (2) **An alleged violation of a specified federal law, State law, State Board of Education policy, State rule, or local board policy,** including policies regarding grade retention of students;
>
> (3) The terms or conditions of employment or employment status of a school employee; and
>
> (4) Any other decision that by statute specifically provides for a right of appeal to the local board of education and for which there is no other statutory appeal procedure.

N.C. Gen. Stat. § 115C-45(c) (2007) (emphasis added).

In her brief, plaintiff contends that her complaint "has nothing to do [with an] alleged violation of a specified federal law, State law, [or] State Board of Education policy, State rule, or local board policy[.]" However, plaintiff's complaint expressly alleges that defendants' actions were "contrary to the terms of the contract, the provisions of N.C.G.S. §§ 115C, and with defendants' policies" and "constitute[d] a violation of the Sexton Children's[] procedural and substantive due process rights under the Federal Constitution and the North Carolina State Constitution[.]" Therefore, we conclude that N.C. Gen. Stat. § 115C-45(c) provides plaintiff with a right to have Logan's decision reviewed and potentially reversed through administrative channels. Because the BOE had not yet issued a final decision at the time that plaintiff filed her action in superior court, plaintiff had not exhausted all administrative remedies.

B. Adequacy of Plaintiff's Administrative Remedy

[2] Next, we consider whether plaintiff could pursue her breach of contract claim in superior court without exhausting administrative remedies. Plaintiff contends that the superior court's jurisdiction to hear the claim was not limited to the appellate jurisdiction conferred by N.C. Gen. Stat. § 115C-45, but rather, that the superior court had original jurisdiction to hear the claim pursuant to N.C. Gen. Stat. § 7A-240 (2007). We disagree, as we find that plaintiff both: (1) failed to exhaust her administrative remedies; and (2) failed to carry her burden of demonstrating that the administrative remedies available under N.C. Gen. Stat. § 115C-45(c) were inadequate.

When the only remedies available from the agency are shown to be inadequate, a party may seek redress in a court without exhausting administrative remedies. *Huang v. N.C. State University*, 107 N.C. App. 710, 715-16, 421 S.E.2d 812, 815-16 (1992). However, "[t]he burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy[.]" *Id.* at 715, 421 S.E.2d at 815. The party making such a claim must include such allegation in the complaint, and the complaint should be " 'carefully scrutinized to ensure that the claim for relief [is] not inserted for the sole purpose of avoiding the exhaustion rule.' " *Id.* (citation omitted).

We find the facts before us analogous to those in *Huang*. In *Huang*, a college professor who was suspended and dismissed from his teaching position at a state university attempted to pursue a breach of contract action in superior court while also appealing his dismissal through administrative channels. We affirmed the trial

court's dismissal of the plaintiff's breach of contract action for lack of subject matter jurisdiction. Although the plaintiff in *Huang* sought compensatory damages in his complaint, we concluded that his mere request for monetary damages was insufficient to establish that the administrative remedies available were inadequate.

Here, plaintiff attempted to pursue a breach of contract action in superior court while appealing Logan's decision through administrative channels. Plaintiff failed to allege in her complaint that the available administrative remedies were inadequate or that pursuit of those remedies would be futile. *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 373, 595 S.E.2d 773, 777 (2004) (affirming dismissal when "plaintiffs' complaint fails to allege either the inadequacy or the futility of the administrative remedy"). Accordingly, the trial court properly dismissed plaintiff's claim due to lack of subject matter jurisdiction. We, therefore, affirm.

Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. BRANDON DEWAYNE BRIDGES

No. COA07-1109

(Filed 1 April 2008)

Probation and Parole— revocation hearing—continued—not an adjudication

The trial court did not adjudicate defendant's probation violation when it granted a continuance, at defendant's request, and the subsequent revocation was proper.

Appeal by defendant from judgment entered 13 March 2007 by Judge Franklin F. Lanier in Lee County Superior Court. Heard in the Court of Appeals 31 March 2008.

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

Eric A. Bach, for defendant-appellant.

STEELMAN, Judge.

The granting of defendant's motion for a continuance on 15 February 2007 was not an adjudication of the defendant's probation violation. The trial court properly revoked defendant's probation on 13 March 2007.

I. Factual and Procedural Background

On 21 September 2005, Brandon Dewayne Bridges ("defendant") pled guilty to the felonies of financial identity fraud and financial card fraud. The trial court suspended a sentence of twenty to twenty-four months' imprisonment and placed defendant on supervised probation for thirty-six months. On 30 January 2007, defendant was served with a probation violation report alleging the following violations of his probation: (1) testing positive for cocaine use on 8 May 2006 and 6 July 2006; (2) failing to report to his probation officer on 18 August 2006 and failing to maintain monthly contact with his probation officer; (3) failing to pay monies due under the probationary judgment and having an arrearage of $970; (4) failing to pay his monthly supervision fee and having an arrearage of $300; (5) failing to complete the TASC program; and (6) leaving his residence in Sanford without notifying his probation officer of his current address.

On 15 February 2007, the case was continued until 12 March 2007 upon the payment of $500.00 by defendant. This was upon the motion of defendant:

> [COUNSEL]: Probation violation, your Honor. My motion for a continuance. I think it's going to be consented to on the condition my client pays $500 towards a significant amount of restitution . . . .
>
> THE COURT: All right. Is that the agreement?
>
> [PROSECUTOR]: Yes, your Honor.
>
> THE COURT: All right. Does he admit willful violations?
>
> [DEFENSE COUNSEL]: I don't even think we're addressing that. We're just continuing it. We're paying money.
>
> THE COURT: Okay. Continuing it until?
>
> [DEFENSE COUNSEL]: March 12.
>
> THE COURT: All right. The matter is continued until 3-12, . . .

(Emphasis added). The court entered an order modifying the conditions of defendant's probation to require him to "pay $500 within 10 days." The order specified that the court was acting pursuant to "a motion to modify the conditions of the defendant's probation for good cause without charge of violation." (Emphasis added).

On 13 March 2007, defendant admitted to the willful violations of testing positive for cocaine on 8 May 2006 and 6 July 2006, failing to report to his probation officer on 18 August 2006, and being in arrears in his monthly supervision fee, as alleged in the 30 January 2007 violation report. Defendant denied the remaining violations. The court found that defendant had willfully violated each of the terms of his probation as set forth in the violation report, and that each violation constituted a basis for revocation. The court revoked defendant's probation and activated his suspended sentence. Defendant appeals.

II. Analysis—Trial Court's Jurisdiction

In defendant's only argument, he contends that the trial court lacked jurisdiction to revoke his probation after the trial court continued his case on 15 February 2007. We disagree.

Citing N.C. Gen. Stat. § 15A-1344 (2007), he argues "that at the violation hearing the superior court must choose to revoke the probation, continue the defendant on probation without modification or continue [him] on probation after modifying the terms and conditions of probation." He further argues that once a court elected to modify his probation, it could not subsequently revoke his probation for violations that occurred prior to the modification.

Under N.C. Gen. Stat. § 15A-1344(d) (2007), the trial court may modify the conditions of a defendant's probation "after notice and hearing and for good cause shown[,]" without an allegation or finding of a violation. Both the hearing transcript and the order modifying defendant's probation clearly reflect that the court did not adjudicate the allegations contained in the 30 January 2007 violation report at the hearing on 15 February 2007. Rather, the court granted defendant's motion for a continuance of the revocation hearing until March of 2007, and modified the conditions of his probation at the parties' request "for good cause [and] without charge of violation."

Because the modification order entered on 15 February 2007 was not based upon an adjudication of the violations alleged in the 30 January 2007 violation report, we hold that the trial court retained

jurisdiction on 13 March 2007 to proceed with the revocation hearing. This argument is without merit.

The record on appeal contains additional assignments of error not addressed by defendant in his appellant's brief. Pursuant to N.C. R. App. P. 28(b)(6), they are deemed abandoned.

AFFIRMED.

Judges HUNTER and McCULLOUGH concur.

JAMES EDWARD GRAY, Plaintiff v. BILLY BRYANT, CAPTAIN LAKE, and LIEUTENANT WHITAKER, Defendants

No. COA07-840

(Filed 1 April 2008)

Prisons and Prisoners— inmate's pro se complaint alleging failure to follow court order—abuse of discretion standard

The trial court abused its discretion by dismissing plaintiff inmate's pro se complaint as frivolous when it alleged defendants failed to follow a court order that required him to be committed to Dorothea Dix Hospital for examination and treatment because: (1) plaintiff, by alleging that defendants failed to follow a court order or took actions detrimental to his health, could have a cause of action if his allegations were proven; and (2) although plaintiff failed to support the allegations with either defendant Whitaker's letter to plaintiff stating he and the other defendants did not feel as thought they needed to comply with the court order, or the court order itself, a finding that the case was frivolous for failure to provide supporting documents was inappropriate at this preliminary stage. N.C.G.S. § 1-110(b).

Appeal by plaintiff from an order entered 9 March 2007 by Judge Franklin F. Lanier in Lee County Superior Court. Heard in the Court of Appeals 6 February 2008.

James Edward Gray, plaintiff-appellant, pro se.

No brief for defendant-appellees.

HUNTER, Judge.

James Edward Gray ("plaintiff") is currently an inmate at the Pamlico Correctional Institution in Bayboro, North Carolina. Plaintiff filed a civil complaint, which was verified, against Billy Bryant, Sheriff of Lee County, Captain Lake, and Lieutenant Whitaker ("defendants"), alleging that they had failed to comply with a court order.[1] Because plaintiff is an inmate filing a *pro se* complaint as an indigent *in forma pauperis*, the trial court was required to determine "whether the complaint is frivolous." N.C. Gen. Stat. § 1-110(b) (2007). The trial court made a determination the complaint was frivolous and exercised its discretion to dismiss the action. Plaintiff then received permission from the trial court to appeal its order. After careful consideration, we reverse the ruling of the trial court.

Plaintiff alleges that defendants failed to follow a court order that required him to be committed to Dorothea Dix Hospital for examination and treatment. Plaintiff also alleges that defendants were in possession of such order and willfully, knowingly, and purposefully disregarded that order. According to plaintiff, defendant Whitaker wrote a letter to plaintiff, stating that he and the other defendants did not feel as though they needed to comply with the court order.

Defendant presents one issue for this Court's review: Whether the trial court erred in dismissing his complaint as frivolous. A claim "is frivolous if 'a proponent can present no rational argument based upon the evidence or law in support of [it].' " *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (alteration in original) (quoting Black's Law Dictionary 668 (6th ed. 1990)), *affirmed*, 358 N.C. 160, 594 S.E.2d 1 (2004). In determining whether a complaint is frivolous, the standard is not the same as in a ruling on a motion under Rule 12(b)(6). *Richards v. State's Attorneys Office*, 40 F. Supp. 2d 534, 536 (D. Vt. 1999). Instead, we " 'look with a far more forgiving eye' in examining whether a claim rests on a meritless legal theory." *Id.* (citation omitted). We review such dismissals for abuse of discretion. N.C. Gen. Stat. § 1-110.

Plaintiff, by alleging that defendants failed to follow a court order or took actions detrimental to his health, could have a cause of action if his allegations were proven. *See, e.g.*, *Gillespie v. Crawford*, 833 F.2d 47, 49 (5th Cir. 1987) (plaintiff-prisoners' allegations that defendant-prison failed to comply with a court order to remedy living con-

1. Plaintiff has not included the first name of defendants Lake and Whitaker.

ditions in violation of Eighth Amendment constituted a cause of action). Although plaintiff has failed to support these assertions with either defendant Whitaker's letter or the court order, a finding that the case was frivolous for failure to provide supporting documents would be inappropriate at this preliminary stage. *See id.* We therefore reverse the trial court's order which found plaintiff's complaint to be frivolous.

Reversed and remanded.

Judges BRYANT and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 APRIL 2008

BACKMAN v. BACKMAN No. 07-1055	Watauga (03CVD392)	Affirmed
BRYANT v. TAYLOR KING FURN. No. 07-720	Indus. Comm. (I.C. No. 463589)	Affirmed
COVINGTON v. TRIAD FIN. CORP. No. 07-1172	Lincoln (06CVS1484)	Dismissed
CRUTCHFIELD v. CAROLINA FOOTBALL ENTERS. No. 07-748	Indus. Comm. (I.C. No. 383296) (I.C. No. 383297)	Affirmed in part; Vacated in part; Remanded
DOTSON v. DAVIS No. 07-789	Watauga (06CVS183)	Reversed
FOOD LION, LLC v. FINAZZLE CORP. U.S.A. No. 07-1029	Wake (05CVS13455)	Affirmed
GOINES v. MCAVOY No. 07-895	Onslow (06CVS4699)	Affirmed
HARRINGTON v. GERALD No. 07-1070	New Hanover (07CVS1172)	Affirmed
HARRISON v. HARRISON No. 07-869	Lenoir (03CVD212)	Affirmed
IN RE A.B.K. No. 07-1082	Wilkes (04JT117)	Affirmed
IN RE J.B.R. No. 07-1251	Rutherford (06JB112)	Dismissed
IN RE P.R., H.R. No. 07-1432	Orange (06JA179-80)	Reversed in part; affirmed in part
IN RE R.A.T. No. 07-688	Sampson (06JB85)	Affirmed
IN RE T.R.S. & B.T.S. No. 07-1447	Wilkes (04JT23) (04JT25)	Affirmed
JACK v. MOUNT ZION CHRISTIAN CHURCH No. 07-1221	Durham (03CVS477)	Dismissed
JOINT REDEVELOPMENT COMM'N v. JACKSON-HEARD No. 07-1167	Pasquotank (00CVS641)	Affirmed

LYNCH v. PARKS No. 07-698	Cabarrus (06CVS3357) (01SP286)	Affirmed
PACE v. WAKE FOREST BAPTIST CHURCH No. 07-755	Wake (05CV12289)	Affirmed
PARNELL v. PARNELL No. 07-844	Guilford (03CVD1725)	Remanded
QUEEN v. QUEEN No. 07-1207	Lincoln (04CVD186)	Affirmed
STATE v. BAILEY No. 07-1141	Durham (05CRS46927) (05CRS16295)	No error
STATE v. BARLOWE No. 07-646	Bertie (06CRS50458)	No error
STATE v. BRISTOL No. 07-1018	Rutherford (06CRS3214-15)	No error
STATE v. BROWN No. 07-1073	Mecklenburg (06CRS212105-06)	No error
STATE v. CARNEY No. 07-1078	Pitt (03CRS65084) (03CRS65086)	No error
STATE v. CLARK No. 07-1151	Robeson (01CRS56719-21)	No error
STATE v. COSEY No. 07-672	Pender (05CRS52824)	No error
STATE v. DRAYTON No. 07-943	New Hanover (04CRS68461) (05CRS10875-76)	No prejudicial error
STATE v. GAY No. 07-927	Mecklenburg (05CRS240920)	No error
STATE v. HANKINS No. 07-1100	Brunswick (02CRS56816-18)	Affirmed
STATE v. HARRIS No. 07-864	Mecklenburg (04CRS249877-78)	No error
STATE v. HUGHES No. 07-1227	Stokes (06CRS50859)	No error

STATE v. HUNTLEY No. 07-1241	Mecklenburg (05CRS252663)	Affirmed
STATE v. JAMES No. 07-670	Forsyth (05CRS63846) (05CRS42539)	Affirmed
STATE v. JEFFRIES No. 07-1128	Buncombe (06CRS59766)	Affirmed
STATE v. LUTHER No. 07-1166	Randolph (05CRS50988)	No error
STATE v. LYNCH No. 07-512	Wake (01CRS3370-71) (01CRS1327) (01CRS3376) (01CRS799)	No error
STATE v. MARTIN No. 07-528	Guilford (05CRS24383) (05CRS24711) (04CRS101913) (05CRS88951)	No error
STATE v. MIZELLE No. 07-970	Beaufort (04CRS52697) (06CRS3925)	No error
STATE v. MOORE No. 07-1048	Edgecombe (06CRS51988)	No Error in part; No Prejudicial Error in Part
STATE v. MURPHY No. 07-1164	Wake (05CRS122232)	No error
STATE v. PAGE No. 07-699	Caldwell (04CRS52497-98)	No error
STATE v. PEOPLES No. 07-1011	Davidson (05CRS50617)	Affirmed
STATE v. PERCHALSKI No. 07-1390	Buncombe (04CRS63455)	Affirmed
STATE v. RODGERS No. 07-1179	Beaufort (05CRS54903) (06CRS1351)	No error
STATE v. SINGLETON No. 07-726	Guilford (06CRS24228) (06CRS70333-34)	No error
STATE v. SMITH No. 07-997	Haywood (06CRS52164)	No error

STATE v. STONE No. 07-708	Guilford (03CRS90007) (03CRS90394)	No error
STATE v. VAUGHAN No. 07-677	Northampton (05CRS1722) (05CRS1811-12) (05CRS51023)	No error
STATE v. WELCH No. 07-721	Forsyth (06CRS52930) (06CRS52882)	No error
STATE v. WHITESIDE No. 07-892	Guilford (05CRS96152)	No error
STATE v. WILLIAMS No. 07-877	Cleveland (06CRS54899)	No error
STATE v. WILLIAMS No. 07-1208	Halifax (06CRS55679-80)	No error

GOOD HOPE HEALTH SYSTEM, L.L.C., PETITIONER, AND THE TOWN OF LILLINGTON, PETITIONER-INTERVENOR v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BETSY JOHNSON REGIONAL HOSPITAL, INC., AND AMISUB OF NORTH CAROLINA, INC., D/B/A CENTRAL CAROLINA HOSPITAL, RESPONDENT-INTERVENOR

No. COA05-123-2

(Filed 15 April 2008)

1. Hospitals and Other Medical Facilities— certificates of need—new institutional health service

The North Carolina Department of Health and Human Services, Division of Facility Services did not exceed its authority by failing to treat the 2003 certificate of need (CON) application as a change in an existing project under N.C.G.S. § 131E-176(16)e and reviewing it for conformity with criteria in N.C.G.S. § 131E-183(a) that applies only to a new institutional health service because: (1) appellant's argument that a "non-binding" agreement, making no reference to the 2001 Settlement Agreement, was effective to assign any rights under that agreement to appellant, including rights to three operating rooms, was rejected; (2) although appellants contend that GHHS is the successor and assign of Good Hope by virtue of the Term Sheet appended to the 2003 CON application, this argument need not be reached since the express language of the statute limits the validity of a CON to "the defined scope, physical location, and the person named in the application; (3) appellant changed the location and scope of the project and made no showing of development of the 2001 CON to bring its proposal within the provision of N.C.G.S. § 131E-176(16)e; (4) appellant proposed a relocation of operating rooms to a site over ten miles away, which is subject to CON review under N.C.G.S. § 131E-176(16)u; and (5) neither appellant nor Good Hope sought an adjustment under the procedures outlined by the 2003 State Medical Facilities Plan.

2. Hospitals and Other Medical Facilities— certificates of need—no-need determination for operating rooms

The North Carolina Department of Health and Human Services, Division of Facility Services did not err as a matter of law in subjecting appellant to the no-need determination for operating rooms under the provisions of the 2003 State Medical Facilities Plan (SMFP), by concluding that Good Hope presently

has two operating rooms rather than three, or by concluding that appellant failed to meet its burden of demonstrating conformity with Criterion 1, because: (1) appellant now seeks to do through a theory of assignment of the 2001 Settlement Agreement what it could not do through the attempted transfer of the 2001 CON, and appellant's argument that a "non-binding" agreement, making no reference to the 2001 Settlement Agreement, was effective to assign any rights under that agreement to appellant, including rights to three operating rooms, was rejected; (2) the pertinent findings of fact support DHHS's conclusion that there were only two operating rooms at Good Hope at the time of the 2003 CON Application; and (3) appellant failed to demonstrate that the provisions of the 2003 SMFP and Criterion 1 did not apply to its 2003 CON application.

3. Hospitals and Other Medical Facilities— certificates of need—Criterion 3

The North Carolina Department of Health and Human Services, Division of Facility Services did not err by applying N.C.G.S. § 131E-183(a)(3) ("Criterion 3") even though appellant contends the common numbering indicates that Criteria 3 and 3(a) are alternative and not independent criteria, and the 2003 CON application did not propose new services, because: (1) Criterion 3(a) requires the applicant to show that the needs of the population *presently served* will continue to be adequately met even though the applicant proposes to reduce or eliminate a service, whereas Criterion 3 requires the applicant to show that the population that it *proposes to serve* has a need for the services offered, and the extent to which minority populations will have access to those services; (2) appellant cited no authority for its argument that Criteria 3 and 3(a) are alternative criteria, and none was found; (3) DHHS properly applied both Criteria 3 and 3(a) under the facts of this case because appellant proposed both to relocate and reduce the number of acute care beds and psychiatric beds, to which Criterion 3(a) applied, and to expand the various departments of the hospital, including ten observation beds and an operating room, to which Criterion 3 applied; (4) there was substantial evidence to support DHHS's findings regarding nonconformity with Criterion 3; and (5) the burden rests with appellant to demonstrate that *all* of the CON review criteria have been met.

4. Hospitals and Other Medical Facilities— certificates of need—reasonableness of design, size, and cost of replacement facility

The North Carolina Department of Health and Human Services, Division of Facility Services (DHHS) did not exceed its authority by requesting evidence demonstrating the reasonableness of the design, size, and cost of the replacement facility outside the scope of the CON statute, allegedly disregarding certain CON licensure rules, relying upon unpromulgated rules to secure information not required by statute, and disregarding evidence contained in the 2003 CON application and DHHS files that demonstrated the reasonableness of its proposal, because: (1) N.C.G.S. § 131E-183(a)(4) states that where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed; (2) upon the unique facts of this case, the request for evidence explaining the vast difference in size and cost between the 2001 CON, the 2002 proposal, and the 2003 CON application was within DHHS's statutory authority; (3) although appellants argue DHHS erred by disregarding its own licensure rules and that DHHS "penalized" appellant for not explaining the need for space that is required by DHHS's own licensure requirements, appellants failed to cite any authority for these propositions as required by N.C. R. App. P. 28(b)(6); and (4) the Chief of the CON section testified in great detail as to why cost comparisons between the proposed project and other replacement hospitals were not particularly relevant to the reasonableness of the size and cost outlined in the 2003 CON application, and such testimony provided a rational basis for the DHHS's disregard of such evidence.

5. Hospitals and Other Medical Facilities— certificates of need—failure to consider written comments and oral arguments at public hearing

The North Carolina Department of Health and Human Services, Division of Facility Services (DHHS) did not violate N.C.G.S. § 131E-185 by failing to consider written comments and oral arguments made at a public hearing pertaining to the 2003 CON application because: (1) there was evidence before DHHS that many of those who spoke in favor of the proposed hospital were unfamiliar with the relevant criteria, the 2003 CON application or the CON review process; (2) under N.C.G.S. §§ 131E-175 *et*

seq., DHHS's obligation was to hear the public's arguments, whether in favor of or opposed to an application, then decide, in light of all the evidence before it, whether appellant has met its burden of proving that the relevant statutory review criteria have been met; (3) public support was not one of those criteria; and (4) DHHS may hear comments supporting an application yet find that the burden of satisfying the CON criteria has not been met.

6. Hospitals and Other Medical Facilities— certificates of need—substantive due process—application of review criteria

The North Carolina Department of Health and Human Services, Division of Facility Services (DHHS) did not violate appellant's substantive due process rights by its application of the CON review criteria because: (1) appellants' reliance upon a September 2003 DHHS survey was untimely as it occurred after DHHS's initial review; (2) the record before DHHS was silent on the issue of non-compliance; (3) the issue of appellant's exemption request was resolved in DHHS's favor, and the 2003 declaratory ruling that resolved the issue of appellant's rights to a transfer of the existing CON has not been overturned on appeal; and (4) Good Hope was not a party to this appeal, and the record provides no support for appellant's claim that its rights have been constitutionally infringed.

Judge TYSON dissenting.

This case originally came before this Court on 14 September 2005, upon the appeal of petitioner, Good Hope Health Systems, L.L.C. ("appellant"), and petitioner-intervenor, Town of Lillington (together, "appellants"), from a Final Agency Decision issued on 10 September 2004, by the North Carolina Department of Health and Human Services, Division of Facility Services. On 3 January 2006, this Court filed an opinion holding that, in light of petitioner's 2005 Certificate of Need application, the appeal was moot and dismissing the appeal. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 296, 623 S.E.2d 307 (2006). Upon appeal, the Supreme Court reversed the dismissal and remanded the matter to this Court. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 360 N.C. 635, 637 S.E.2d 517 (2006). Neither the granting of a 2005 CON to respondent-intervenor Betsy Johnson nor the closing of Good Hope's Erwin facility rendered the matter moot. *Id.* at 637, 637 S.E.2d at 518. Because the 2003 CON application process

was non-competitive and the 2005 CON application process was competitive, petitioner's appeal deserved consideration on the merits. *Id.*

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Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for petitioner-intervenor appellant, Town of Lillington.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for respondent-appellee N.C. Department of Health and Human Services, Division of Facility Services.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Kathleen A. Naggs, and Nelson Mullins Riley & Scarborough, L.L.P., by Noah H. Huffstetler, III, and Denise M. Gunter, for respondent-intervenor appellee Betsy Johnson Regional Hospital, Inc.

Bode Call & Stroupe, L.L.P., by Robert V. Bode and S. Todd Hemphill, for respondent-intervenor appellee Amisub of North Carolina, Inc. d/b/a Central Carolina Hospital.

STEELMAN, Judge.

The North Carolina Department of Health and Human Services, Division of Facility Services ("Agency") correctly treated appellant Good Hope Health System's 2003 CON application for a Certificate of Need ("CON") as one for a new institutional health service. The Agency did not err in determining that appellant had failed to meet its burden of showing compliance with the relevant statutory review criteria.

I. Factual Background

A. Good Hope Hospital's 2001 CON

Good Hope Hospital ("GHH" and "Good Hope") is licensed as an acute care hospital and had been in operation since 1921 in Erwin, North Carolina. Respondent Betsy Johnson Regional Hospital, Inc. ("Betsy Johnson"), is located in Dunn, North Carolina. Both hospitals are located in Harnett County.

In 2001, pursuant to N.C. Gen. Stat. Chapter 131E, Good Hope applied for a CON from the Agency's Certificate of Need Section,

seeking to partially replace its existing facility. The 2001 CON application proposed to replace the existing acute care facility by constructing a replacement facility on a nearby site in Erwin while utilizing the existing campus for outpatient services and administrative support. Good Hope's proposal reduced the number of acute care beds from forty-three to thirty-four, reduced the number of psychiatric beds from twenty-nine to twelve, for a total of forty-six beds, and included three operating rooms, at a cost of $16,159,950. Following conditional Agency approval and Good Hope's subsequent petition for a contested case hearing, Good Hope and the Agency settled disputed matters in a written agreement ("2001 Settlement Agreement").

Among the terms of the 2001 Settlement Agreement was a "Successors and Assigns" clause; a "Modification or Waiver" clause, requiring that any modifications be in writing, signed by the parties, and adopted and approved by the Director of the Agency; and a timetable by which Good Hope committed itself to secure financing by 1 March 2002 and open the replacement facility by 1 December 2003. On 14 December 2001, the Agency issued a CON to Good Hope ("2001 CON") for a forty-six bed hospital with three operating rooms.

Good Hope sought funding from the United States Department of Housing and Urban Development ("HUD") and funding approval from the North Carolina Medical Care Commission ("MCC"), which must approve all HUD financing for non-profit hospitals in North Carolina. Upon MCC's recommendation, Good Hope entered merger discussions with Betsy Johnson. In June 2002, Good Hope advised MCC that a merger was not possible, and MCC unanimously denied Good Hope's request for HUD funding approval.

B. The Formation of Good Hope Health System, L.L.C.

In August 2002, seeking financing for the proposed replacement facility, Good Hope entered into a Letter of Intent with Triad Hospitals, Inc. ("Triad") to develop a 46-bed acute care hospital in or around Lillington, North Carolina, to replace Good Hope Hospital. Seeking a more centrally-located site, Good Hope and Triad settled on Lillington, over ten miles from the current facility in Erwin. Triad would own 90% of the new hospital and Good Hope would own 10%, with an option to sell out its interest to Triad at an agreed upon price or to acquire an additional 5%. On 10 October 2002, the two entities formed Good Hope Health System, L.L.C. ("appellant" and "GHHS") upon these terms.

GHHS sought Agency approval for its plans for a proposed Lillington hospital in three separate ways: (1) in November 2002, Good Hope and GHHS filed a motion for declaratory ruling seeking a "good cause" transfer of the 2001 CON from Good Hope to appellant; (2) in April 2003, GHHS filed a "full acute care" application with the Agency, hereinafter referred to as the "2003 CON application"; and (3) in August 2003, Good Hope and GHHS filed for exemption under N.C. Gen. Stat. § 131E-184 for "a proposal to replace all seventy-two" beds in a new hospital. The second of these is the subject of this appeal. We briefly discuss the first and third of these approaches prior to discussing the second.

C. GHHS' Lillington Proposal

1. Request for "Good Cause" Transfer

On 12 November 2002, appellant and Good Hope filed a motion for declaratory ruling, seeking (1) a "good cause" transfer of the 2001 CON from Good Hope to appellant, (2) permission to change the proposed location from Erwin to Lillington or Buies Creek, and (3) permission to increase the size of the replacement facility from 61,788 square feet to 67,874 square feet. The revised cost was $18,523,942. The Agency denied this request on 12 February 2003. The Final Agency Decision in the case *sub judice* noted that the Agency rejected the request for the following reasons:

> GHH and GHHS had failed to demonstrate good cause for the transfer of the CON under G.S. 131E-189(c); the transfer would be impermissible because Triad would own 90% of GHHS; the relocation of the project from Erwin to either Lillington or Buies Creek would constitute a material change in the location; and the increase in the size of the proposal of 6,086 square feet would constitute a material change in the defined scope of the project.

Appellant appealed the denial to Wake County Superior Court. The appeal was subsequently stayed by consent.

2. The Exemption Request

On 21 August 2003, appellant and Good Hope gave notice to the Agency, seeking exemption from CON review of "a proposal to replace all seventy-two" beds, pursuant to N.C.G.S. § 131E-184. Upon the Agency's denial of the exemption request, and prior to exhausting its administrative remedies, appellant sought judicial review in the Superior Court of Harnett County. The trial court's dismissal of the

action was appealed to this Court and affirmed in *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 620 S.E.2d 873 (2005). The denial of the exemption request by the Agency was appealed to this Court and affirmed in *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 309, 623 S.E.2d 315, *rev. denied*, *cert. denied*, 360 N.C. 480, 632 S.E.2d 172, *aff'd per curiam*, 360 N.C. 641, 636 S.E.2d 564 (2006).

3. The 2003 CON application

After the "good cause" transfer was denied, but before seeking the exemption, appellant and Good Hope sought to file an amendment to Good Hope's 2001 CON in accordance with the Agency's review schedule for changes in previously approved CON projects and relocations of existing facilities.

On 1 April 2003, two weeks before the scheduled review date under the State Medical Facilities Plan, appellant participated in a pre-application conference with the Chief of the Certificate of Need Section, during which appellant proposed relocating all of the functions from the existing Good Hope facility to the Lillington site and increasing the size of the proposed facility from 67,874 to 112,945 square feet. The CON Section Chief advised appellant that: (1) "a project with a different person, a different location, and a different scope would by definition be a [new] project;" (2) appellant "must complete the full acute care application form;" (3) appellant "could not rely on the representations" made by Good Hope in its 2001 application; (4) appellant "would have to justify all aspects of the services proposed in the new CON application, including the demonstration of need for a third operating room[;]" and (5) appellant "must demonstrate under Criteria 4 why the new proposal was a more effective alternative" than the replacement facility already approved.

On 14 April 2003, appellant filed a "full acute care" application to build a new replacement hospital in Lillington. The application proposed forty-six acute care beds, the relocation of all acute care and inpatient psychiatric services from the existing Erwin facility, plus the development of ten observation beds and three operating rooms in a 112,945 square foot facility, at a cost of $33,488,750. The 2003 CON application sought to relocate all hospital departments to the new facility and abandon Good Hope's existing campus, in what appellant termed "a more effective alternative" than that approved in the 2001 CON.

Page One of the 2003 CON application included the following statement:

> Please see Exhibit 1 for a copy of the executive summary of the draft master agreement between Triad Hospitals Inc. and Good Hope Hospital Inc. that relates to formation of Good Hope Health System, LLC. This document constitutes a prior notice to the CON Section that [GHHS] intends to lease the existing hospital, which is an acquisition by lease that is exempt from CON review.

Exhibit 1 was a non-binding "Term Sheet," dated 14 April 2003, which set forth the "material terms" of mutual intentions for a short-term lease of Good Hope Hospital and development and ownership of a replacement facility. The agreement was signed by representatives of the two parties to the agreement, appellant and Good Hope, and required that any "definitive agreements" be "satisfactory to both Triad and GHH." The agreement was silent as to the 2001 Settlement Agreement and was not executed by the Agency.

Pursuant to N.C.G.S. § 131E-185(a1)(2), the Agency held a public hearing on 12 June 2003, and respondents Betsy Johnson and Central Carolina Hospital submitted written comments to the Agency, setting forth reasons why the Agency should not approve appellant's 2003 CON application. At the public hearing, speakers spoke for and against the proposal.

II. Procedural History

On 26 September 2003, the Agency's CON Section found that the 2003 CON application was non-conforming with numerous regulatory and statutory review criteria and denied appellant's application. On 23 October 2003, appellant filed a petition for a contested case hearing with the Office of Administrative Hearings. Betsy Johnson and Central Carolina Hospital moved to intervene as respondents in support of the Agency's decision. The Administrative Law Judge ("ALJ") granted motions to intervene by respondent-intervenors (together with the Agency, "appellees") and also by petitioner-intervenor Town of Lillington. On 9 July 2004, the ALJ recommended that the Agency's decision be reversed. On 10 September 2004, finding that the ALJ's recommended decision was largely based on factors that were immaterial under the CON statutes, the Agency rejected the ALJ's recommended decision and denied appellant's 2003 CON application. GHHS and the Town of Lillington appeal from the Final Agency Decision,

making 616 separate assignments of error. Good Hope is not a party to this appeal.

III. Standard of Review

A. Dictated by Issues Raised

The standard of review of an administrative agency's final decision is dictated by the substantive nature of each assignment of error. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (detailing the standard of review for reversing or modifying an agency's decision under the six grounds specified by N.C.G.S. § 150B-51(b) and classifying those grounds into "law-based" or "fact-based" inquiries); *Total Renal Care of N.C., L.L.C. v. N.C. HHS*, 171 N.C. App. 734, 737-39, 615 S.E.2d 81, 83-84 (2005) (detailing the interplay of the CON statutes with the 1999 Administrative Procedures Act).

B. Law-based Inquiries

Where the appellant asserts an error of law in the final agency decision, this Court conducts *de novo* review. *Christenbury Surgery Ctr. v. N.C. HHS*, 138 N.C. App. 309, 311-12, 531 S.E.2d 219, 221 (2000); *see also Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency . . . ." *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) (quoting *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981)).

C. Fact-based Inquiries

Fact-intensive issues, such as sufficiency of the evidence or allegations that a decision is arbitrary or capricious, are reviewed under the whole record test. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95.

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (internal citations omitted). " 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C.G.S. § 150B-2(8b) (2005); *see also Watkins*, 358 N.C. at 199, 593 S.E.2d at 769, *Total Renal Care*, 171 N.C. App. at 739, 615 S.E.2d at 84. However, "the 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Hospital Group of Western N.C., Inc. v. N.C. Dept of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (quoting *In re Rogers*, 297 N.C. 49, 65, 253 S.E.2d 912, 922 (1979)).

D. Deference under *Britthaven* and *Total Renal Care*

In *Britthaven* and *Total Renal Care*, this Court applied a standard of deference first described by the United States Supreme Court in *Skidmore v. Swift & Company*, 323 U.S. 134, 89 L.Ed. 124 (1944), regarding agency interpretations of enabling statutes.

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' *Skidmore v. Swift & Company*, 323 U.S. 134, 140, 89 L.Ed. 124, 129 (1944).

Britthaven, 118 N.C. App. at 384, 455 S.E.2d at 460 (citation omitted); *see also Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85 (citation omitted). In *Total Renal Care*, this Court added: "If appropriate, some deference to the Agency's interpretation is warranted when we are operating under the 'traditional' standards of review . . ." *Id.*

IV. The Final Agency Decision

After setting forth the ALJ's findings of fact, including those it rejected, and stating its reasons for rejecting those findings, the Final Agency Decision concluded that (1) the Agency's denial of a "good cause" transfer was binding on GHHS, (2) the 2001 Settlement Agreement could not alter statutory restrictions on transfers of an undeveloped CON, and (3) the 2001 CON held by Good Hope did not relieve GHHS of the requirements that it comply with the 2003 State

Medical Facilities Plan and statutory criteria for a new institutional health service. *Inter alia*, the Agency made the following conclusions of law:

> 6. The Department's Declaratory Ruling that good cause did not exist for the transfer to GHHS of GHH's undeveloped CON rights is binding on GHHS. G.S. 150B-4. ("A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court.")
>
> 7. The [2001] CON, by law, is valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned except as provided in G.S. 131E-189(c). G.S. 131E-181(a). The Settlement Agreement between the Agency and GHH which led to the issuance of the 2001 CON did not, and properly could not, alter the restriction the CON law imposes upon transfer of undeveloped CONs.
>
> 8. The CON law does not permit either the transfer of the [2001] CON to develop the 2001 project with its third operating room from GHH to GHHS nor does it permit the development of an operating room in violation of the 2003 SMFP no-need determination. Even if the CON were transferable, the relocation of an approved, but not yet developed, operating room is subject to the CON requirement set in G.S. 131E-176(16)u for relocation and thus subject to the current SMFP need determination. . . .
>
> 9. The prior CON to GHH did not relieve GHHS of the requirement that it comply in this application with Criterion 1 and specifically with the 2003 SMFP need determination regarding addition of a third operating room. G.S. 131E-181(a).
>
> 10. While a completed health service facility may be transferred without meeting the review criteria or being subjected to further CON review under the exemption provision of the CON law, G.S. 131E-184, the CON law generally prohibits a CON for an uncompleted project to be transferred. G.S. 131E-181(a).

Among its findings of fact, the Agency included, as ultimate findings of fact, *see Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951), the following:

> 37. Development of new or additional operating rooms are a new institutional health service, the need for which is subject to any

> determinative limitations set in the State Medical Facilities Plan ("SMFP"). G.S. 131E-176(16)u, 131E-183(a)(1). (GHHS Ex. 29, 2003 SMFP, pp. 29-52.) In addition, *the relocation of any operating room to a new different [sic] campus is also subject to CON review and must satisfy the criteria in place at the time of the application*. The CON law was amended to this effect after the 2001 application of GHH and before the 2003 CON application of GHHS. G.S. 131E-176(u) [sic]. The application is subject to the statutes, rules, criteria, standards and SMFP in place at the time the review begins. *See* 10A NCAC 14C.0207(a).
>
> . . .
>
> 42. The Agency was aware during its review of GHHS' application that GHH had been granted the 2001 CON with the third operating room. However, the Agency concluded correctly that GHHS would have to nevertheless show a need for the third operating room, since that room had not been developed by GHH, and since the project proposed by GHHS in [the 2003 application] proposed a different applicant, location and scope of services than the project proposed by GHH in [the 2001 CON]. G.S. 131E-181(a). (Hoffman, Tr. Vol. 8, pp. 2450-2451).

(emphasis added).

Applying N.C. Gen. Stat. §§ 131E-176(16) and 131E-181(a), the Agency determined that, because the 2003 CON application proposed doubling the size of the facility and the 2001 CON's approved capital expenditure, a change in ownership from Good Hope to Good Hope Health System, L.L.C., and a change in location from Erwin to Lillington, the 2003 CON application could not be treated as an amendment to the 2001 CON. *See* N.C.G.S. § 131E-181(a) (2003). Moreover, because the 2003 CON application proposed the relocation of two operating rooms and added a third, the 2003 CON application was deemed to provide a "new institutional health service" under N.C.G.S. § 131E-176(16)u, which required GHHS to comply with the 2003 State Medical Facilities Plan ("SMFP"). *See* N.C. Gen. Stat. §§ 131E-176(16)u, 131E-183(a) (2003). As noted in the Final Agency Decision, "The 2001 CON was not approved for GHHS, nor for this location in Lillington, nor for this project."

Applying the review criteria for a new institutional health service, the Final Agency Decision affirmed the conclusions and findings of the CON Section and rejected the ALJ's contrary findings as erro-

neous and unsupported by the evidence. The Agency concluded that appellant did not meet its burden of showing that its application met the relevant criteria or that the Agency had acted outside its authority, acted erroneously, arbitrarily or capriciously, used improper procedure, or failed to act as required by law or rule in finding the application non-conforming with relevant statutory review criteria or in disapproving the 2003 CON application.

The Agency rejected the ALJ's conclusion that "the agency substantially prejudiced [appellant's] rights when it denied the 2003 CON application for a CON to build a much needed, centrally located, replacement hospital in Lillington, North Carolina." The ALJ had based his conclusion upon a finding that appellant "is not seeking to replace any operating room which does not already exist or has not already been approved by the CON section for Harnett County." The Agency rejected this finding as contrary to the law and the facts, and rejected the conclusion as "not supported by the evidence and [as] contrary to the CON law. An applicant has no vested right to the approval of a CON application, but must meet the requirements set forth in the statute."

V. Analysis

A. Agency Authority to apply N.C.G.S. § 131E-183(a)

[1] In their first argument, appellants contend that the 2003 CON application sought modification of Good Hope's existing 2001 CON, and that the Agency exceeded its authority by (1) failing to treat the 2003 CON application as a change in an existing project under N.C.G.S. § 131E-176(16)e and (2) reviewing the 2003 CON application for conformity with criteria in N.C.G.S. § 131E-183(a) that applies only to a "new institutional health service." We disagree.

1. New Institutional Health Services under N.C.G.S. § 131E-176

Appellants argue that the Agency "exceeded its authority" in classifying its 2003 CON Application as a new institutional health service by ignoring its own statutes, the Agency's 2001 Settlement Agreement with Good Hope, the State Medical Facilities Plan, and prior Agency decisions. Appellants further contend that the Agency erred in applying the statutory review criteria for a new institutional health service because: (1) under the provisions of the 2001 Settlement Agreement, there was not a change in applicant; (2) under N.C.G.S. § 131E-176(16)e, a change of more than fifteen percent of

the approved capital expenditure amount constituted a change to the 2001 CON; and (3) the same capital asset is at issue in both the 2001 CON and the 2003 CON application.

N.C. Gen. Stat. Chapter 131E, Article 9 governs certificates of need for health care facilities. N.C.G.S. §§ 131E-175 *et seq.* (2003). A CON is "valid only for the defined scope, physical location, *and* person named in the application." N.C.G.S. § 131E-181(a) (2003) (emphasis added). A "person" is defined as "an individual, a trust or estate, a partnership, a corporation, including associations, joint stock companies, . . ." N.C.G.S. § 131E-176(19) (2003). As this argument involves an alleged error of law, we review the matter *de novo*. *Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85.

The Agency relied upon N.C.G.S. § 131E-176(16)u in its determination that the 2003 CON application mandated review as a new institutional health service. This provision includes in its definition of "[n]ew institutional services:"

> (u) The construction, development, establishment, increase in the number, or relocation of an operating room or gastrointestinal endoscopy room in a licensed health service facility, other than the relocation of an operating room or gastrointestinal endoscopy room within the same building or on the same grounds or to grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room or gastrointestinal endoscopy room is currently located.

N.C.G.S. § 131E-176(16)u (2003).

Good Hope was awarded the 2001 CON for the construction of a sixteen million dollar facility totaling 61,788 square feet in Erwin, North Carolina. At the time of the 2003 CON application, Good Hope had entered into a joint venture with Triad, forming appellant. Appellants argue that there was no change in the applicant for the 2003 CON application because the Agency's 2001 Settlement Agreement with Good Hope provided that "[t]his agreement shall be binding upon the Parties and their successors and assigns." Appellants contend that GHHS is the successor and assign of Good Hope by virtue of the Term Sheet appended to the 2003 CON application. We need not reach this argument because the express language of the statute limits the validity of a CON to "the defined scope, physical location, *and* the person named in the application." N.C.G.S.

§ 131E-181(a) (emphasis added). Even assuming *arguendo* that there was no material change in either the scope or location of the proposed hospital, appellant's argument that it has rights under the 2001 Settlement Agreement is unpersuasive, as discussed in Section V.A.2.a.ii below.

The evidence before the Agency, presented in appellant's 2003 CON application, proposed: (1) a thirty-three million dollar facility totaling 112,945 square feet, (2) with three operating rooms, ten observation beds, private rooms, and other expanded services, (3) located in Lillington rather than Erwin, (4) owned by appellant GHHS, rather than Good Hope, the holder of the 2001 CON. Good Hope would instead be a minority shareholder, owning only ten percent of the facility. Moreover, appellant made no showing of "development of the [2001 CON]," which is requisite to treatment as a change in project under N.C.G.S. § 131E-176(16)e.

Appellant changed the location and scope of the project and made no showing of development of the 2001 CON to bring its proposal within the provision of N.C.G.S. § 131E-176(16)e. Appellant proposed a relocation of operating rooms to a site over ten miles away, which is subject to CON review under N.C.G.S. § 131E-176(16)u. Under these circumstances, we hold that the Agency acted within its authority to treat the 2003 CON application as one for a new institutional health service rather than as a modification to the 2001 CON. *See* N.C.G.S. §§ 131E-181(a), 131E-176(16) (2003).

2. Burden of Proof on Applicant for CON

N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be "consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued." N.C.G.S. § 131E-183(a) (2003). A certificate of need may not be granted which would allow more medical facilities or equipment than are needed to serve the public. *See* N.C.G.S. §§ 131E-175(4), 131E-183(a)(1) (2003). Each CON application must conform to all applicable review criteria or the CON will not be granted. N.C.G.S. § 131E-183(a) (2003); *see also Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Resources*, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996). The burden rests with the applicant to demonstrate that the CON review criteria are met. *See Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834.

a. Criterion One

N.C.G.S. § 131E-183(a)(1) ("Criterion 1") provides:

> (1) The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

N.C.G.S. § 131E-183(a)(1) (2003).

For purposes of appellant's 2003 CON application, the 2003 SMFP controlled. The 2003 SMFP applied the need methodology of the 2002 SMFP while the Agency developed a new methodology to reflect amendments made to the CON statute to include regulation of operating rooms. The determinative limitation for operating rooms in Harnett County's service area, based upon the 2002 SMFP need methodology, was that the service area *had no need for additional operating rooms*. In fact, including the adjustment for the approved but as yet undeveloped operating room under Good Hope's 2001 CON, the 2003 SMFP showed a *surplus* of four operating rooms for that service area. Based upon Good Hope's 2002 License Renewal Application, the 2003 SMFP inventory of operating rooms reflected that there were two operating rooms at Good Hope Hospital.

The 2003 SMFP also provided a mechanism for seeking adjustments to the need and no-need determinations given in the draft SMFP. Neither appellant nor Good Hope sought an adjustment under the procedures outlined by the 2003 SMFP.

i. Contentions of Appellant

[2] Appellants contend that the Agency erred as a matter of law in subjecting it to the no-need determination for operating rooms under the provisions of the 2003 SMFP. Appellants further argue that the Agency's conclusion that the 2003 CON application was nonconforming with Criterion 1 must be set aside as contrary to the 2001 Settlement Agreement because (1) under the 2001 Settlement Agreement, Good Hope was entitled to three operating rooms; (2) because appellant is "a successor or assignee" under the terms of the 2003 Term Sheet, the Final Agency Decision "fails to abide" by the terms of its 2001 Settlement Agreement with Good Hope; and (3) interpretation of the language of the 2001 Settlement Agreement is a

question of law. Appellants then argue in the alternative that the Agency exceeded its authority in concluding that Good Hope had only two operating rooms.

ii. GHHS Has No Rights under the 2001 Settlement Agreement

We review *de novo* appellants' argument that the Agency exceeded its authority and erred as a matter of law by ignoring the provisions of the 2001 Settlement Agreement. We note initially that Good Hope was not a named applicant on the 2003 CON application and is not a party to this appeal. Appellant asserts that the 2001 Settlement Agreement is a binding contract and that Good Hope's rights were transferred to GHHS under the express language of the Term Sheet attached to the 2003 CON application, then requests this Court to interpret, as a question of law, the "plain language of the Settlement Agreement."

In 2002, appellant sought a declaratory ruling from the Agency that "good cause" existed for a transfer of the 2001 CON from Good Hope to GHHS. *See* N.C.G.S. § 131E-189(c). This request was denied by the Agency. This ruling has not been overturned, and the appeal of this decision has been stayed.

Appellant now seeks to do through a theory of assignment of the 2001 Settlement Agreement what it could not do through the attempted transfer of the 2001 CON. In its brief, appellant relies solely upon the Term Sheet as the basis for its argument that it is a successor or assignee of Good Hope. This document expressly states that "this non-binding Term Sheet merely constitutes a statement of mutual intentions and any and all obligations of the parties shall be memorialized in definitive agreements reflecting the terms set forth herein." The Term Sheet contains provisions that GHHS would lease the existing facility from Good Hope; that Good Hope would acquire land in Harnett County that would be leased to GHHS; and that GHHS would construct "an acute care replacement hospital" on the site.

We reject appellant's argument that a "non-binding" agreement, making no reference to the 2001 Settlement Agreement, was effective to assign any rights under that agreement to appellant, including rights to three operating rooms.

iii. Good Hope had Two, not Three, Operating Rooms

We review *de novo* appellants' argument that the Agency erred as a matter of law in concluding that Good Hope presently has two oper-

ating rooms rather than three. *See Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. However, we review the Agency's findings of fact supporting its conclusions of law under a whole record test review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95. Where substantial evidence exists to justify the Agency's decision, we may not substitute our judgment for the Agency's as between two conflicting views, *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769, but are limited to determining whether the Agency's decision had a rational basis in the evidence. *Hospital Group of Western N.C.*, 76 N.C. App. at 268, 332 S.E.2d at 751.

In its 2003 CON Application, appellant sought to justify the three proposed operating rooms as follows:

> The 2003 State Medical Facilities Plan (SMFP) inventory of operating rooms reflects the hospital[']s two share[d] operating rooms *plus the third operating room that is CON approved for development by Good Hope Hospital. Therefore, Good Hope Hospital already has a total of three shared operating rooms that are allocated in the [2003] SMFP.*

(emphasis added).

At the time of the 2003 CON Application, Good Hope had two operating rooms. A third operating room was approved under the 2001 CON. This was reflected in the 2003 SMFP, which was based upon Good Hope's 2002 License Renewal Application and agency files reflecting the 2001 CON. The Agency made the following specific findings of fact concerning a room that appellant now contends was a third, active operating room:

> 49. GHHS also contends that the proposed third operating room is not an additional operating room subject to the SMFP no-need determination on the ground that Good Hope Hospital had identified in some of its licensing renewal applications filed in the 1980's and early 1990's, a third room in its operating suite used for cystoscopy and endoscopy procedures, which room subsequently had been used as a storage room for a number of years, and which GHHS now contends should have been considered by the Agency as a third operating room. (GHHS Ex. 16, 52-57, 1988-1994 Hospital License Renewal Applications).
>
> 50. There was no evidence that this room was in use as an operating room at the time of the [2003] CON application nor at any

relevant time in the past. The evidence that emerged was that this room is used as a storage room and has been so used for a number of years. Certainly, representatives of neither the CON Section, GHH, nor GHHS had any awareness at the time of the review of the possible past use for an endoscopy or cystoscopy procedure room of what is now a storage room. (Annis, Tr. Vol. 3, p. 934; French, Tr. Vol. 12, p. 3530).

51. The 2003 SMFP reflected that Good Hope Hospital had two existing operating rooms. In addition, the 2003 SMFP listed one approved operating room for Harnett County, reflecting the operating room approved (but not yet developed) in GHH's [2001] CON. (GHHS Ex. 29, 2003 SMFP at p. 63, 73; Keene, Tr. Vol. 15, pp. 4402-4403, 4451.) Based on the record, this is correct.

52. GHH did not contest the inventory as reported in the 2003 SMFP, as that inventory was based on GHH's own license renewal forms.

53. GHH's 2000, 2001, and 2002 Hospital License Renewal Applications report that Good Hope Hospital had two shared operating rooms (shared means used for both inpatient and outpatient or ambulatory procedures), no endoscopy procedure rooms, and no operating rooms or endoscopy procedure rooms which were not in use. (GHHS Ex. 8-10.)

54. GHH's 2001 and 2003 replacement hospital CON applications represented that Good Hope Hospital had two shared operating rooms and no endoscopy procedure rooms. (GHHS Ex. 5, 2001 CON application, p. 28; GHHS Ex. 1, CON application, p. 28.)

We hold that each of these findings is supported by substantial evidence in the record, as carefully documented by the Agency in its decision. These findings of fact in turn support the Agency's conclusion that there were only two operating rooms at Good Hope at the time of the 2003 CON Application.

iv. Appellant Required to Comply with 2003 SMFP

We review *de novo* appellant's contention that the Agency misapplied the law by requiring GHHS to comply with the no-need determination for operating rooms under the 2003 SMFP.

Appellant had no rights to a third operating room under the 2001 Settlement Agreement. Good Hope had only two operating rooms.

Thus, appellant has failed to demonstrate that the provisions of the 2003 SMFP and Criterion 1 did not apply to its 2003 CON application. We hold that the Agency did not err in subjecting appellant to the no-need determination of the 2003 SMFP.

v. Conformity with Criterion 1

It was appellant's burden to demonstrate that its 2003 CON application was consistent with or not in conflict with Criterion 1. The Agency's findings support its conclusion that the application was non-conforming with Criterion 1. Accordingly, we hold that the Agency did not err in concluding that appellant failed to meet its burden of demonstrating conformity with Criterion 1.

Appellants make no further argument regarding conformity with Criterion 1 other than those addressed above concerning its purported right to three operating rooms. Any additional assignments of error pertaining to Criterion 1 are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

b. Criterion Three

i. Contentions of Appellant

[3] Appellant contends that the Agency erred in applying N.C.G.S. § 131E-183(a)(3) ("Criterion 3") because the "common numbering indicates that Criteria 3 and 3(a) are alternative and not independent criteria" and the 2003 CON application did not propose new services. In the alternative, appellant contends that the Agency erred in finding its 2003 CON application non-conforming with Criterion 3, in part because conformity with Policy AC-5 requires the Agency to recognize that the 2003 CON application established the need for the number and appropriate occupancy or utilization of acute care beds under Criterion 3.

ii. Mixed Question of Law and Fact

We review the Agency's statutory interpretation and legal conclusions under a *de novo* standard of review. *See Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. However, we review the Agency's findings of fact supporting its conclusions of law under a whole record test review. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95. Where substantial evidence exists to justify the Agency's decision, we may not substitute our judgment for the Agency's as between two conflicting views. *See Watkins*, 358 N.C. at 199, 593 S.E.2d at 769.

iii. Criteria 3 and 3(a)

Criterion 3(a) requires the applicant to show that the needs of the population *presently served* will continue to be adequately met even though the applicant proposes to reduce or eliminate a service. *See* N.C.G.S. § 131E-183(a)(3a) (2003). Criterion 3 requires the applicant to show that the population that it *proposes to serve* has a need for the services offered, and the extent to which minority populations will have access to those services:

> 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, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C.G.S. § 131E-183(a)(3) (2003). As previously discussed, the burden rests with appellant to demonstrate that all of the CON review criteria have been met. *See Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834.

Appellant cites no authority for its argument that Criteria 3 and 3(a) are alternative criteria, and we have found none.

The Agency properly applied both Criteria 3 and 3(a) under the facts of this case because appellant proposed both to relocate and reduce the number of acute care beds and psychiatric beds, to which Criterion 3(a) applied, and to expand the various departments of the hospital, including ten observation beds and an operating room, to which Criterion 3 applied. The Agency found that appellant's 2003 CON application was consistent with Criterion 3(a), but not with Criterion 3. For the reasons set forth in our discussion of Criterion 1, we reject appellant's argument that it need not conform to Criterion 3 because it had rights to three operating rooms under the 2001 Settlement Agreement.

iv. Conformity with Criterion 3

Appellant argues that the Agency ignored public support and evidence in its 2003 CON Application and in Agency files that demonstrated conformity with Criterion 3. Under the appropriate standard of review, we first determine whether there was substantial evidence supporting the Agency's findings related to Criterion 3, and, where

substantial evidence exists, we cannot substitute our judgment for that of the Agency. *See Total Renal Care*, 171 N.C. App. at 739, 615 S.E.2d at 84.

The Agency found that GHHS had demonstrated the need to replace the existing facility, but had not adequately demonstrated that the population projected to be served needed the scope of services proposed by the application, then documented in detail its findings related to Criterion 3.

Despite historical declines in inpatient utilization, appellant projected double-digit inpatient utilization rate increases in 2005-2008 (19.5%, 20.68%, and 13.4%). These projections followed years of no change, decreases (-12.7% in 2000-2001, -6.7% in 2002-2003), and a single increase (10.5% in 2001-2002). The Final Agency Decision included these numbers in chart form, then made the following findings:

> 67. The evidence shows that, in finding that GHHS had not justified these projected increase in utilization of its licensed acute care beds in the first three operating years of the new facility, the Agency found as follows:
>
> > The above projected increases in utilization were dependent on the applicant increasing its market share in the proposed service area through recruitment of additional physicians who GHHS predicted would increase the number of admissions above and beyond population growth.
> >
> > GHHS did not provide current or projected market share data for existing facilities in the area to demonstrate the basis for its projected increase in admissions due to physician recruitment.
> >
> > The only market share data provided in the application is based on Good Hope's discharges in FY 99 as reported to HCIA (*see* Exhibit 10).
> >
> > GHHS assumed that the patient origin for the new replacement hospital would remain the same as historical patient origin even though the hospital is moving farther away from the population it currently serves in Sampson and Cumberland Counties. Since geographic access affects patient origin (or more simply put, the distance of the patient from the hospital helps determine to which hospital a patient will be sent), it was not reasonable to project the same patient origin

or market share from these counties. There was no evidence to demonstrate that such an assumption would be reasonable in the circumstances of this project.

GHHS's application projected that it would recruit 11 additional physicians and assumes an average of 86 to 97 admissions per year per physician. However, the application did not state any basis for assuming this number of patient admissions per new physician. (GHHS Ex. 2, Agency File, p. 1176-1176; Phillips, Tr. Vol. 6, p. 1780-1786; Hoffman, Tr. Vol. 16, pp. 4866-67.)

68. The application does not show any percentages of Harnett County patients who are now going to other hospitals, but who would come to Good Hope Hospital if it built a new hospital in Lillington. (Annis, Tr. Vol. 3, p. 997.)

69. The Agency found that GHHS did not adequately document in the application the reasonableness of its assumptions regarding increase in inpatient admissions. (GHHS Ex. 2, Agency File, p. 1176).

70. GHHS' application cited and relied upon a physician recruitment plan to justify its projection of an increase in utilization, but did not include the recruitment plan. (GHHS Ex. 1, p. 63-64.) GHHS' application projected a net increase of 11 admitting physicians to the staff by 2008. (*Id.*)

71. GHHS justified the projected increase in staff in part on the fact that GHHS [sic] had added 15 physicians to its staff in the past five years. (*Id.*) GHHS' application, however, failed to show how many physicians it had lost during that same five year period. The projection implicitly assumed that GHHS would not lose any physician staff in the future. (*Id.*; Annis, Tr. Vol. 5, p. 1411; French, Tr. Vol. 12, p. 3559).

72. This assumption is unreasonable. The chart used in the application to describe the stable medical staff demonstrated that Good Hope had experienced a *net loss* of two medical professionals from the time of the 2001 CON application to the time of the 2003 CON application. (GHHS Ex. 1, p. 225; French, Tr. Vol. 12, p. 3561.)

73. . . . GHHS' application includes a projection that each physician will admit 85 to 100 patients per year. (GHHS Ex. 1, CON

application, p. 64.) However, the application does not include the assumptions upon which this projection is based and provides no reasonable basis upon which the Agency may accept this assumption.

74. GHHS's application does not identify which physicians are or will be admitting physicians. (French, Tr. Vol. 12, p. 3571.) There was no showing in the GHHS application that GHHS intended to retain any physicians as employees of the hospital. (*Id.*; French, Tr. Vol. 12, p. 3569).

We hold that each of these findings is supported by substantial evidence in the record, as carefully documented by the Agency in its Decision.

Although appellant did not include its physician recruitment plan in the 2003 CON application, the plan was offered as evidence by another party, and in its Decision, the Agency included the following findings related to the plan:

77. The physician recruitment plan referred to in the application was not included in the application. (Annis, Tr. Vol. 5, p. 1403.). The recruitment plan contains information that undercuts the assumptions used in the projections. GHHS' physician recruitment plan, which GHHS cited as the basis for projections in the application, included the following statements:

> With this relocation, mostly [sic] likely the residents of Dunn that would utilize Good Hope Hospital as opposed to Betsy Johnson Hospital will for a short time . . . continue to use Good Hope, but ultimately with medical staff change Dunn residents will depend more on Betsy Johnson Hospital. With this anticipated change, Good Hope will need to depend more on a new medical staff than it will upon those physicians holding privileges at both Good Hope and Betsy Johnson.
>
> By 2006[,] of the currently active admitting physicians at Good Hope Hospital, almost 30 will be—have ages in the sixties and most likely either retired or limiting their practice in anticipation of retirement. Half this group will be past retirement age. This age group of physicians currently makes up more than 65 percent of the admissions at the hospital, including all admissions to the psychiatric service. . . . Annualizing FY03 activity indicated admissions this year continue a three-year decline. Inpatient activity is down over 20

> percent from 2000 levels in part due to physician deaths and resignations. The heavy dependence on the more elderly physicians, recent physician deaths and resignations all combine to suggest the hospital is quickly approaching a crisis situation.
>
> (CCH Ex. 10, p. 3; Annis, Tr. Vol. 5, pp. 1404-1411.)
>
> 78. GHHS did not contest the accuracy of the[] conclusions [in Finding of Fact no. 77].

The Agency indicated that GHHS' omission of the recruitment plan, containing this information, "shows that the application omitted material facts of which GHHS was or should have been aware which would reduce the patient utilization that could reasonably be projected to arise from recruit[ing] new physicians."

We hold that there was substantial evidence to support the Agency's findings regarding non-conformity with Criterion 3. These findings support the Agency's conclusion that appellant failed to meet its burden of demonstrating conformity with Criterion 3.

We find no error in the Agency's interpretation of Criterion 3 to require the applicant to demonstrate that the proposal and all its components, not just the number of replacement beds,[1] are needed by the particular population that the applicant seeks to serve. As noted above, because the Agency's findings are supported by substantial evidence and those findings support its conclusions of law regarding Criterion 3, the Agency did not err in concluding that it was non-conforming with Criterion 3.

3. The Agency Acted Within Its Authority

We hold that the Agency's interpretation of its enabling statutes is reasonable and due "some deference." *Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. The Agency demonstrated great thoroughness in its consideration, and we find no flaws in its reasoning. *Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460; *Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. Its rulings in this matter are consistent with its earlier rulings involving these parties. *Id.* Accordingly, we hold that the Agency did not exceed its authority in

1. Without citing any authority, appellant argues that the Agency's finding of conformity with Policy AC-5 of the 2003 SMFP renders its finding of non-conformity with Criterion 3 (as well as Criteria 5, 6, and 18(a)) erroneous as a matter of law. Appellant contends that conformity with Policy AC-5 establishes the need for the number of acute care beds proposed in the 2003 CON Application.

finding appellant's application non-conforming with Criteria 1 and 3, *see Watkins*, 358 N.C. at 199, 593 S.E.2d at 769, and that the Agency's decision has a rational basis in the evidence. *Hospital Group of Western N.C.*, 76 N.C. App. at 268, 332 S.E.2d at 751.

The burden rests with appellant to demonstrate that *all* of the CON review criteria have been met. *See Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834. Given our holdings regarding Criteria 1 and 3, we need not reach appellants' arguments as to criteria 4, 5, 6, 12, or 18a.

This argument is without merit.

B. Agency Review of the GHHS Proposal

[4] In their second argument, appellants contend that the Agency exceeded its authority by requesting evidence demonstrating the reasonableness of the design, size, and cost of the replacement facility outside the scope of the CON statute, disregarding certain CON licensure rules, relying upon unpromulgated rules to secure information not required by statute, and disregarding evidence contained in the 2003 CON application and Agency files that demonstrated the reasonableness of its proposal. We disagree.

1. Agency Authority under the CON Statute

Appellants first contend that the language in N.C.G.S. § 131E-182(b) precludes the Agency from asking for justification for the great increase in square footage and cost in the 2003 CON application when appellant was required to file a new CON application and precluded from exemption of a CON review. *See Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 309, 623 S.E.2d 315, *rev. denied*, *cert. denied*, 360 N.C. 480, 632 S.E.2d 172, *aff'd per curiam*, 360 N.C. 641, 636 S.E.2d 564 (2006). Appellants contend that the Agency relied upon "unpromulgated rules" to circumvent the statutory provisions by requiring market share data, projections of admissions in physician's letters, and particularized square footage requirements by department to demonstrate conformity with the statutory criteria.

Appellants maintain that the scope of the Agency's authority is limited to that under N.C.G.S. § 131E-182(b), which states:

> An applicant shall be required to furnish only that information necessary to determine whether the proposed new institu-

> tional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

N.C.G.S. § 131E-182(b) (2003). However, N.C.G.S. § 131E-183(a)(4) states "[w]here alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." N.C.G.S. § 131E-183(a)(4) (2003).

Good Hope notified the Agency in May 2003 that it was "pursuing legitimate, alternative avenues to obtain any needed government approvals of its replacement hospital project." Good Hope has not relinquished its 2001 CON for a 61,788 square foot replacement facility, maintaining that if the 2003 CON application were not approved, it would "consider at that time whether to reopen the declaratory ruling appeal, to continue to develop [the 2001 CON] or to pursue appeal" of the 2003 CON application. Appellant and Good Hope together represented to the Agency in the November 2002 request for a "good cause" transfer that their proposal for a single-story, slightly enlarged facility was the "least costly and most effective" alternative. Upon the unique facts of this case, we hold that the request for evidence explaining the vast difference in size and cost between the 2001 CON, the 2002 proposal, and the 2003 CON application was within the Agency's statutory authority. *See* N.C.G.S. § 131E-183(a)(4).

2. Appellant's Burden to Show Compliance

Appellants next contend that, because appellant provided all the information requested by the application form, as well as a chart comparing categories of space between the 2001 and 2003 CON applications and reasons for the differences, the Agency's determination that it was non-conforming should be set aside as improperly based upon unpromulgated rules.

Specifically, appellants contend that the 2003 CON application demonstrated the reasonableness of the size and cost of the proposed replacement hospital and supported the ALJ's findings of conformity with Criteria 3, 4, 5, 6, 12, and 18a. As appellants' argument does not address Criterion 1, and we have already addressed the Agency's conclusion that the 2003 CON application was non-conforming with Criterion 1, we need not address these arguments.

3. Space Required by Licensure Regulations

Appellants next argue that the Agency erred by disregarding its own licensure rules and that the Agency "penalized" appellant for not explaining the need for space that is required by the Agency's own licensure requirements.

Appellants cite no authority for these propositions. Failure to cite authority is a violation of N.C. R. App. P. 28(b)(6) and subjects this argument to dismissal. *Atchley Grading Co. v. W. Cabarrus Church*, 148 N.C. App. 211, 212-13, 557 S.E.2d 188, 189 (2001); *Wilson v. Wilson*, 134 N.C. App. 642, 643, 518 S.E.2d 255, 256 (1999).

4. Evidence from the Agency's Files

Finally, appellants argue that the Agency disregarded evidence in its own files showing that appellant's proposal was reasonable compared to other hospital construction projects. The Chief of the Certificate of Need section testified in great detail as to why cost comparisons between the proposed project and other replacement hospitals were not particularly relevant to the reasonableness of the size and cost outlined in the 2003 CON application. Such testimony provides a rational basis for the Agency's disregard of such evidence.

5. Non-Conformity with Statutory Criteria

Accordingly, we conclude that the Agency did not exceed its authority in determining that appellant failed to demonstrate that its application met the CON review criteria. *See Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834.

This argument is without merit.

C. N.C.G.S. § 131E-185: The Public Hearing

[5] In their third argument, appellants contend that the Agency violated N.C.G.S. § 131E-185 by failing to consider written comments and oral arguments made at a public hearing pertaining to the 2003 CON application. We disagree.

We review this argument *de novo* as a matter of statutory interpretation. *See Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460; *Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. Specific findings are not required on each piece of evidence presented. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993) (stating that the tribunal "need only find those facts which are material to the resolution of the dispute").

N.C.G.S. § 131E-185 sets forth procedures and requirements for the CON review process, allowing any interested party to submit written comments or make oral comments at the scheduled public hearing. The provisions of N.C.G.S. § 131E-185 provide no support for appellants' conclusion that because the Agency denied appellant's CON application, and there were arguments made at the public hearing in favor of its application, *ergo* the Agency failed to consider those comments. There was evidence before the Agency that many of those who spoke in favor of the proposed hospital were unfamiliar with the relevant criteria, the 2003 CON application, or the CON review process.

Under N.C.G.S. §§ 131E-175 *et seq*., the Agency's obligation is to hear the public's arguments, whether in favor of or opposed to an application, then decide, in light of *all* the evidence before it, whether appellant has met its burden of proving that the relevant statutory review criteria have been met. Public support is not one of those criteria. *See* N.C.G.S. §§ 131E-183(a). The Agency may hear comments supporting an application yet find that the burden of satisfying the CON criteria has not been met. We hold that the Agency's application of the statute is without error. *See Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460.

This argument is without merit.

D. Constitutionality of the Agency's Action

[6] In their fourth argument, appellants contend that the Agency unconstitutionally applied the CON review criteria, thus violating appellant's substantive due process rights. We disagree.

Appellants argue that the Agency's "improper" denial of the 2003 CON application deprives them of a "vested right" to continue operating as a hospital. We find appellants' reliance upon a September 2003 Agency survey to be untimely as it occurred after the Agency's initial review. The record that was before the Agency is silent on the issue of non-compliance. Moreover, the issue of appellant's exemption request was resolved in the Agency's favor, and the 2003 declaratory ruling that resolved the issue of appellant's rights to a transfer of the existing CON has not been overturned on appeal. Good Hope is not a party to this appeal, and the record provides no support for appellant's claim that its rights have been constitutionally infringed.

This argument is without merit.

VI. Conclusion

On remand, this Court was directed by the Supreme Court to review this case "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). Had the Supreme Court intended for this Court to reverse the decision of the Agency based upon treating GHHS' application as a modification under N.C. Gen. Stat. § 131E-176(16)(e), it would have simply adopted Judge Tyson's dissent. The Supreme Court did not do this. *Id.*

This case has been reviewed upon the arguments presented and the voluminous record in this case, and not by construing statements of counsel in oral arguments as "stipulations."

The Agency did not err in its conclusion that appellant failed to carry its burden of demonstrating compliance with the relevant statutory review criteria. *See Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534-35, 470 S.E.2d at 834. Accordingly, we conclude that the Agency did not err in the Final Agency Decision by concluding as a matter of law that appellant should be denied a certificate of need. *Id.* The Final Agency Decision is affirmed.

Having thoroughly reviewed the record before the Agency, we find appellants' remaining arguments to be without merit. Further, assignments of error listed in the record but not argued in appellants' brief or for which no authority is cited are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

Because we affirm the Final Agency Decision, we need not address the Agency's or respondent-intervenor Betsy Johnson's cross-assignments of error. N.C. R. App. P. 10(d) (2007); *see also Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982).

AFFIRMED.

Judge GEER concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

This appeal initially came before this Court over two and one-half years ago on 14 September 2005. Good Hope Hospital System,

L.L.C. ("GHHS") appealed from the North Carolina Department of Health and Human Services, Division of Facility Services's ("Agency") Final Decision denying GHHS's 2003 Certificate of Need ("CON") application. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 296, 623 S.E.2d 307 (2006). A divided panel of this Court dismissed GHHS's appeal as moot based upon GHHS's submission of its 2005 CON application. *Id.* The North Carolina Supreme Court *per curiam* reversed and remanded this case to this Court eighteen months ago on 17 November 2006 "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). Our Supreme Court stated:

> Our decision is primarily directed by the fundamental differences between the criteria used to evaluate GHHS's 2003 and 2005 CON applications. The 2003 CON review process was non-competitive in that GHHS was the sole applicant proposing that particular project, *which was ostensibly intended to replace an existing facility*. In contrast, the 2005 CON application process, which arose out of an amended State Medical Facilities Plan designating a need for a new hospital in Harnett County, involved additional applicants.

Id. (emphasis supplied).

The majority's opinion misinterprets our Supreme Court's instructions on remand and erroneously holds the Agency correctly analyzed GHHS's 2003 CON application as one for a competitive new project and not as a non-competitive replacement of a respected and long-existing, but physically deteriorated, hospital. I disagree with the analysis and conclusion of the majority's opinion and vote to reverse the Agency's Final Decision. I respectfully dissent.

I. Standard of Review

When reviewing the decision of an agency, this Court has stated:

> The proper standard of review by the [appellate] court depends upon the particular issues presented by the appeal. *If appellant argues the agency's decision was based on an error of law, then de novo review is required.* If appellant questions whether the agency's decision was supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test.

> The reviewing court must determine whether the evidence is substantial to justify the agency's decision. A reviewing court may not substitute its judgment for the agency's, even if a different conclusion may result under a whole record review.

Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs., 175 N.C. App. 265, 269, 623 S.E.2d 629, 633 (2006) (internal citations and quotations omitted) (emphasis supplied).

"The whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine *whether an administrative decision has a rational basis in the evidence.*" *Hospital Group of Western N.C., Inc. v. N.C. Dep't of Human Resources*, 76 N.C. App 265, 268, 332 S.E.2d 748, 751 (1985) (emphasis supplied) (citation and quotation omitted). If the Agency's decision misinterprets or misapplies the law under *de novo* review or has no "rational basis in the evidence," under whole record review, it must be reversed. *See generally In re Appeals of Southern Railway Co.*, 313 N.C. 177, 187, 328 S.E.2d 235, 242 (1985).

II. Legislative Policy

The fundamental purpose and legislative intent of the CON Act is set forth in N.C. Gen. Stat. § 131E-175 (2003). The General Assembly listed ten findings of fact used to regulate health care and service facilities in North Carolina. These legislative findings are particularly relevant to this appeal, as they address equal access to health care facilities for all citizens and rising health care costs.

Monopolistic concentrations in the allocation and delivery of health care services by a sole provider diminishes the availability of health services, threatens the health and welfare of citizens, who need economical and readily available health services, and violates the public policy as articulated by the General Assembly. *Id.* N.C. Gen. Stat. § 131E-175(3a) (2003) states, "access to health care services and health care facilities is critical to the welfare of rural North Carolinians, and to the continued viability of rural communities, and that the needs of rural North Carolinians should be considered in the [CON] review process."

Here, it is undisputed that Harnett County's rural population has significantly increased since 2000 and is anticipated to do so in the foreseeable future. The United States Census Bureau confirmed on 20 March 2008 that Harnett County is 13th fastest growing out of North Carolina's 100 counties with a population of 108,721 residents.

Jennifer Calhoun, *Hoke, Harnett Growing Quickly: Counties Near Top in Population Boom*, Fayetteville Observer, March 21, 2008 § B at 1. The great majority of this growth is occurring in the western portions of Harnett County toward Lillington, south of Raleigh along U.S. Highway 401, and north of Fayetteville along N.C. Highways 210 and 27. *Id.*

Other facts are also undisputed: (1) Good Hope Hospital Inc., ("Good Hope") has provided Harnett County and other residents with needed and life-saving health services for nearly a century and (2) the existing Good Hope hospital does not and cannot meet current requirements and certifications, is physically and "functionally obsolete," and must be replaced. The fundamental purposes and legislative intent of the CON Act must be considered and lawfully applied by the Agency when analyzing GHHS's 2003 CON application. *Id.* The Agency utterly failed to correctly apply the statute and unlawfully assumed authority over decisions not subject to CON review, and which are properly within Good Hope's Board of Trustees's discretion.

III. Analysis

GHHS argues the Agency exceeded its statutory authority and erred by ignoring or misapplying controlling statutes, plans, its prior decisions, and its 2001 Settlement Agreement. I agree.

A. Background

On 26 September 2003, the Agency's CON Section denied GHHS's 2003 CON application. The Agency concluded the application failed to conform with the requisite statutory criteria set forth in N.C. Gen. Stat. § 131E-183(a) (2003). The Agency found "that the current application submitted by [GHHS] is for a new project, not a change in scope of a previous[] project . . . [t]herefore, [GHHS] must demonstrate that *the addition of a third operating room* is consistent with the need determinations in the 2003 State Medical Facilities Plan . . . ." (Emphasis supplied).

The Agency found there was no need for any additional operating rooms in Harnett County and GHHS's application failed to conform with the operating room need determination in the 2003 State Medical Facilities Plan ("SMFP"). The Agency failed to honor and enforce Good Hope's 2001 approved CON and Settlement Agreement, which specifically authorized the relocation of the acute patient care facilities and three operating rooms.

On 23 October 2003, GHHS filed a petition for a contested case hearing in the Office of Administrative Hearings. On 9 July 2004, after hearing the evidence and making extensive findings of fact, Administrative Law Judge Gray ("Judge Gray") filed his recommended decision reversing the Agency's decision. Judge Gray found, *inter alia*, "[t]he applicant is not seeking to replace any operating room which does not already exist or had not already been approved by the CON Section for Harnett County." Judge Gray concluded, "[p]etitioner has persuaded me by the greater weight of the evidence presented that the agency substantially prejudiced its rights when it denied the 2003 application for a CON to build a much needed, centrally located, replacement hospital in Lillington, North Carolina."

On 10 September 2004, the Agency, without taking additional evidence, rejected Judge Gray's well-reasoned decision and denied GHHS's 2003 CON application. The Agency found that "[d]evelopment of new or additional operating rooms are a new institutional health service, the need for which is subject to any determinative limitations set in the [SMFP]." The Agency further found:

> [t]he operating room provided for in [Good Hope's] 2001 CON is an "approved operating room," but it retains that status only with regard to the project for which it was approved, and for the named applicant, [Good Hope], location (near Erwin), and scope authorized in the 2001 SMFP. . . . The 2001 CON was not approved for GHHS, nor for this location in Lillington, nor for this project.

B. N.C. Gen. Stat. § 131E-181

N.C. Gen. Stat. § 131E-181 (2003) states, "[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application." The Agency's Final Decision states and the majority's opinion holds that GHHS's 2003 CON application proposed a wholly new project and is not properly reviewed as a modification to the previously approved 2001 CON and Settlement Agreement because the 2003 CON application changed the scope, location and person of the proposed project. I disagree.

1. Change in Scope

The majority's opinion apparently holds that because the 2003 CON application proposed doubling the size of the facility and increased its capital expenditures, it changed the scope of the project previously approved in the 2001 CON and Settlement Agreement. I disagree.

In its 2001 CON application, Good Hope proposed to partially replace its existing facility by constructing a new hospital to house acute patient care services for a total capital cost of $16,159,950.00. The new hospital was proposed as a one-story building, totaling 61,788 square feet. All acute care and inpatient psychiatric services were to relocate to the new site. Good Hope proposed and the Agency expressly allowed Good Hope to maintain the hospital's ancillary and support services at the existing facility. The new hospital was approved to contain a total of forty-six beds: thirty-four acute care beds and twelve inpatient psychiatric beds.

The Agency approved Good Hope's 2001 CON application based upon the condition that Good Hope only develop two operating rooms. Good Hope successfully challenged that portion of the Agency's decision. Good Hope and the Agency entered into a binding Settlement Agreement, which expressly approved the development of a third operating room.

On 14 December 2001, the Agency issued a CON to Good Hope authorizing the relocation of the acute care and inpatient services of the hospital to a new facility with forty-six beds and three operating rooms, with ancillary and support services remaining at the existing facility. Good Hope was unable to raise the necessary financing to build the approved project at that time.

In 2002, Good Hope secured private financing and partnered with Triad Hospitals, Inc. to form GHHS. GHHS proposed to recombine all services and totally replace its existing facility at an estimated capital cost of $33,488,750.00. The facility was proposed as a two-story building with a total of 112,945 square feet. This facility would also contain forty-six beds and three operating rooms—exactly the same number of beds and operating rooms the Agency had approved in the 2001 CON and Settlement Agreement. The existing facility was to be used for general storage or leased as office space. CON review was not required for the relocation of these ancillary and non-medical services. None of these services are statutorily defined as "[n]ew institutional health service[s]." *See* N.C. Gen. Stat. § 131E-178 (2003) ("No person shall offer or develop a new institutional health service without first obtaining a [CON] . . . ."); *see generally* N.C. Gen. Stat. § 131E-176(16) (2003) (stating the definitions of "[n]ew institutional health services"). The 2003 CON application also included the development of ten observation beds, also not subject to CON review. N.C. Gen. Stat. § 131E-176(16).

As a sole applicant, GHHS's 2003 CON application extensively detailed the proposed changes to the previously approved 2001 partial relocation. The 2003 CON application did not change the number of beds or operating rooms contained in the facility and did not propose any new health services or equipment. The 2003 CON application modified the 2001 CON project by: (1) proposing private patient rooms; (2) changing the design of the hospital from a one-story building to a two-story building to accommodate the ancillary and support services previously planned to remain at the existing location; (3) designating additional office space for staff members; and (4) designating additional space for ancillary and support services. It is undisputed that the 2003 CON application did not alter the scope of services that are subject to CON review, and proposed exactly the same number of beds and operating rooms as were previously approved by the Agency in the 2001 CON and Settlement Agreement.

2. Change in Location

N.C. Gen. Stat. § 131E-176(24a) (2003) defines "[s]ervice area" as, "the area of the State, as defined in the [SMFP] or in rules adopted by the Department, which receives services from a health service facility." Undisputed evidence shows Good Hope's and GHHS's service area is Harnett County, as is defined by the 2003 SMFP.

The 2001 CON approved Good Hope's proposal to relocate the acute and patient care services from its existing facility to a new building located on fifty-one acres situated on Highway 421, northwest of Erwin. GHHS's 2003 CON application proposed to build the replacement facility on a thirty-five acre site also located on U.S. Highway 421, nearer to the town of Lillington.

The existing hospital, the 2001 approved site and the 2003 proposed site are all located within the same service area, Harnett County. The CON Section Chief, Lee Hoffman ("Hoffman"), testified that the Agency "did not find fault with the Lillington location." Hoffman also testified that the proposed site in Lillington "was not a factor that was used to find [GHHS] nonconforming with any of the review criteria."

Further, the following colloquy took place during oral arguments before this Court on 14 September 2005, the same day as this appeal was argued, in the companion case of *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 309, 623 S.E.2d 315 (2006):

> [The Court]: Was the fact that the application in 2003 was made by the joint venture, as opposed to Good Hope alone, was that a factor in the Agency's decision to deny?
>
> [Attorney General]: No your honor. The Agency found no fault in the applicants in this case. There is . . . I think you will find some because [sic] there are multiple parties involved you will find other evidence to the contrary but from the Agency's perspective, *the Agency had no problem with either who the applicant was in this case nor did the Agency have a problem with where the proposal was to be built.*
>
> [The Court]: So in terms of the applicant, the composition of the applicant being a joint venture, *as well as the physical location*, that the Agency agreed with both of those?
>
> [Attorney General]: Yes your honor.

(Emphasis supplied).

By the CON Section Chief's and the Attorney General's own admissions and stipulations, the physical location where the proposed replacement hospital was to be built was within the Harnett County service area and was not an issue in the Agency's Final Decision. No conflicting evidence appears in the record to support a contrary finding or conclusion. The Agency's finding that the 2003 CON application proposed a change in service area location is not supported by any evidence, and has been conceded by the Agency's CON Section Chief and counsel as irrelevant to any issue on appeal.

3. Change in Person

The majority's opinion states that the agreement attached to the 2003 CON application was ineffective to assign Good Hope's rights under the 2001 CON and Settlement Agreement to GHHS. I disagree. As noted above, the Attorney General expressly conceded that "the composition of the applicant being a joint venture" was wholly irrelevant to the Agency's decision.

The 2001 Settlement Agreement between Good Hope and the Agency explicitly states, "[t]his agreement shall be binding upon the Parties and their successors and assigns." The term "assigns" is defined as "those to whom property is, will, or *may be* assigned." *Black's Law Dictionary* 119 (6th ed. 1990) (emphasis supplied).

The 2003 CON application contained a written agreement between Good Hope and GHHS that contained the following clause:

> A. Transfer of Assets. At closing, [Good Hope] shall convey and deliver to [GHHS] all assets owned or used by [Good Hope] in connection with the operation of the Existing Hospital including without limitation, *all licenses*, *permits*, *governmental approvals*, normal operating contracts, goodwill, patient lists, records, employees, services, *beds*, *operating rooms*, *procedure rooms*, equipment, furniture, supplies and receivables.

(Emphasis supplied). This agreement is sufficient to establish that GHHS is Good Hope's "assign" to the 2001 CON and Settlement Agreement. The terms contained therein are binding upon the Agency and GHHS.

GHHS's 2003 CON application was for the same scope, location, and person named in the previously approved 2001 CON. N.C. Gen. Stat. § 131E-181. The Agency was statutorily required to analyze GHHS's 2003 CON application as a modification to the previously approved relocation in the 2001 CON and Settlement Agreement and not as a wholly new project.

C. N.C. Gen. Stat. § 131E-176(16)

GHHS argues the proposed changes to the 2001 CON were the only terms subject to review in their 2003 CON application. GHHS further argues that the Agency had statutory authority to request information and review only the proposed increases in capital expenditures for new institutional health services pursuant to N.C. Gen. Stat. § 131E-176(16)(e).

N.C. Gen. Stat. § 131E-176(16)(e) (2003) states:

> (16) "New institutional health services" means any of the following:
>
> (e) A change in a project that was *subject to certificate of need review* and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

(Emphasis supplied).

N.C. Gen. Stat. § 131E-182(b) (2003) provides, in relevant part:

> The application forms, *which may vary according to the type of proposal*, shall require such information as the [Agency], by its rules deems necessary to conduct the review. An applicant shall be required to furnish *only* that information necessary to determine *whether the proposed new institutional health service* is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

(Emphasis supplied). Based upon the preceding statutes, the Agency had authority to review only the criteria relating to the increase in capital expenditures pursuant to N.C. Gen. Stat. § 131E-176(16)(e). The additional costs were inflationary increases due to the Agency's delays. The costs to construct the ancillary and support services, originally intended to remain at the existing location, are not "new institutional health services" and are not subject to CON review. *See generally* N.C. Gen. Stat. § 131E- 176(16) (2003) (stating the definitions of "[n]ew institutional health services").

D. Review Criteria

N.C. Gen. Stat. § 131E-183 (2003) sets forth the relevant criteria the Agency is to review prior to issuing a CON. The Agency's Final Decision found that GHHS's 2003 CON application failed to conform with statutory review criteria 1, 3, 4, 5, 6, 12, 18a, and 10 N.C.A.C. 14C Section 2100. I disagree.

1. Criterion 1

N.C. Gen. Stat. § 131E-183(a)(1) (2003) states:

> The proposed project shall be consistent with applicable policies and need determinations in the [SMFP], the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

i. Third Operating Room

The majority's opinion holds that GHHS failed to demonstrate that the provisions of the 2003 SMFP and criterion 1 did not apply to its 2003 CON application. The majority's opinion states that there were only two existing operating rooms at Good Hope at the time the 2003 CON application was submitted to the Agency and that GHHS

obtained no rights to a third operating room under the 2001 Settlement Agreement. I disagree.

The Agency's Final Decision specifically states the third operating room provided for in Good Hope's 2001 CON was an "approved operating room." The Agency found that it only retained that status for the project for which it was approved and for the named applicant, location, and scope authorized in 2001. As discussed above, the Agency and its counsel conceded that GHHS's 2003 CON application was for the same scope, location, and person named in the 2001 CON and Settlement Agreement. The development and relocation of a third operating room had been previously approved by the CON Section for Harnett County. Criterion 1 does not apply to GHHS's 2003 CON application. The Agency erred in subjecting GHHS to a further need determination for operating rooms set forth in the 2003 SMFP under this criterion.

ii. SMFP Policy AC-5

There is also no need for this Court to review whether GHHS complied with criterion 1 regarding the replacement of acute care bed capacity. In its Final Decision, the Agency stated, "[b]ased upon the growth in population in Harnett County, the Agency determined that it the applicant [sic] provided sufficient evidence to demonstrate that it is reasonable to project the facility would increase utilization to reach occupancy of 65% in its 34 acute care beds by 2008." GHHS demonstrated it complied with Criterion 1 regarding acute care bed capacity. The Governor specifically amended the 2005 SMFP to create a need for 50 additional hospital beds with operating rooms over and above those approved for the existing Good Hope and Betsy Johnson hospitals in Harnett County. *See Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 188 N.C. App. 68, ——, —— S.E.2d ——, —— (2008).

2. Criteria 3 and 3(a)

GHHS argues the Agency erred by applying N.C. Gen. Stat. § 131E-183(a)(3) to their review because "the common numbering indicates criteria 3 and 3(a) are alternative and not independent criteria." I agree.

"[O]ur primary task in statutory construction is to ensure that the purpose of the Legislature in enacting the law, the legislative intent, is accomplished." *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288,

275 S.E.2d 399, 405 (1981) (citation omitted). "Legislative purpose is first ascertained from the plain words of the statute." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1994) (citation omitted). This Court is also guided by "the structure of the statute and certain canons of statutory construction." *Id.* (citations omitted). The plain language of N.C. Gen. Stat. § 131E-183(a)(3) and (3a) (2003) controls the proper analysis.

N.C. Gen. Stat. § 131E-183(a)(3) applies to new projects and provides:

> *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*, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

(Emphasis supplied).

N.C. Gen. Stat. § 131E-183(a)(3a) applies to changes in existing services and provides:

> *In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation* or by alternative arrangements, and the effect of the reduction, elimination or *relocation* of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

(Emphasis supplied).

Criterion 3(a) specifically addresses CON applications that seek approval of the relocation of an existing facility and its impact on "underserved groups and the elderly" whereas criterion 3 addresses CON applications for a wholly new project and the ability of the new applicant to serve these same "underserved groups." *Id.* Based upon the plain language of the statutes, N.C. Gen. Stat. § 131E-183(a)(3) and (3a) are alternative criteria. Criterion 3 is inapplicable to GHHS's 2003 CON application, which proposed a "relocation of a facility or a service." *Id.* In its Final Decision, the Agency expressly found that

GHHS' application conformed with criterion 3a. Further review of criterion 3a is unnecessary.

3. Remaining Criteria

The majority's opinion fails to address the remaining statutory review criteria for GHHS's 2003 CON application. Because I vote to reverse the Agency's Final Decision, it is necessary to review the Agency's decision of criteria 4, 5, 6, 12, 18a and 10 N.C.A.C. 14C Section 2100.

i. Criterion 4

N.C. Gen. Stat. § 131E-183(a)(4) (2003) states, "[w]here alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." In its Final Decision, the Agency made the following findings of fact:

> 111. GHHS in its application understood the need to demonstrate the need for the larger-sized facility proposed in the 2003 application and, as a part of that demonstration, included a comparison of the proposed facility with both the existing facility and with the facility proposed approved in the 2001 CON . . . .
>
> . . . .
>
> 115. . . . [T]he GHHS application for the most part did not explain why the specific spaces described above were needed, or why they were more effective than the space proposed in the replacement facility described in [the 2001 CON].

The Agency concluded, "[t]he Agency's conclusion that GHHS'[s] application was non-conforming with Statutory Review Criterion 4 was not erroneous, in excess of statutory authority, arbitrary and capricious, or based on improper procedure or a failure to act as required by law or rule." I disagree.

In its Final Decision, the Agency wholly failed to take into consideration that the proposed replacement facility in the approved 2001 CON relocated only portions of the hospital's services, whereas, the proposed replacement facility in the 2003 CON application was a recombination of all facilities. In the approved 2001 CON, the new facility was to be constructed as a one-story building containing all acute care and inpatient psychiatric services. Good Hope originally proposed and the Agency expressly consented in the 2001 CON for

Good Hope to maintain the existing facility for the hospital's ancillary and support services.

In GHHS's 2003 CON application, the relocated facility: (1) contained the same number of acute care and inpatient psychiatric services; (2) contained three approved operating rooms; and (3) proposed to rejoin all the hospital's ancillary and support services at one location. During the review process, other State and Federal agencies determined that the existing Good Hope facility failed to comply with life safety codes, licensure standards, and other physical and environmental requirements, to allow Good Hope's non-CON ancillary and support services to remain at the existing building.

Attached to its 2003 CON application, GHHS provided extensive information regarding the proposed facility including: (1) a complete table concerning construction costs per square foot and construction cost per bed; (2) a table comparing the square feet by department in the existing facility to the proposed facility; (3) a table containing a detailed comparison of the proposed project to the existing facility, including the rationale for each change; (4) several documents comparing GHHS's proposed facility to the Betsy Johnson Regional Hospital project plans, which tended to show that GHHS's facility plan was more efficient than the Betsy Johnson facility design; and (5) a detailed summary of why GHHS's 2003 CON application was less costly and a more effective alternative to the 2001 approved facility.

Applying the whole record test, the agency's conclusion that GHHS failed to demonstrate it had conformed with criterion 4, does not have "a rational basis in the evidence." *Hospital Group of Western N.C., Inc.*, 76 N.C. App. at 268, 332 S.E.2d at 751. GHHS presented substantial and unchallenged evidence that established GHHS's 2003 CON application conformed with criterion 4.

ii. Criterion 5

N.C. Gen. Stat. § 131E-183(a)(5) (2003) provides, "[f]inancial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of cost of and charges for providing health services by the person proposing the service."

The Agency found that GHHS's 2003 CON application did not conform with criterion 5 even though GHHS presented uncontested evidence consisting of: (1) a letter stating "Triad will meet these obliga-

tions through a combination of available cash; $68.3 million as of December 31, 2002 as evident from the enclosed financial statements and draws on an existing line of credit in the amount of $250 million[]" and (2) a Form 10-K Triad had filed with the United States Securities and Exchange Commission, referencing a line of credit. The Agency applied criterion 3, not 3(a), and concluded that GHHS "failed to adequately demonstrate that the immediate and long-term financial feasibility of the proposal is based upon reasonable projections of costs and revenues."

As noted above, the Agency improperly applied criterion 3 and not 3(a), regarding a relocation of a facility, to its determination concerning criterion 5 and committed an error of law. GHHS presented undisputed evidence of the financial feasibility to construct and operate the proposed replacement facility and demonstrated GHHS's 2003 CON application conformed with criterion 5.

iii. Criteria 6, 12, and 18a

The Agency found GHHS non-conforming with: (1) criterion 6 because it was found non-conforming with criteria 1 and 3; (2) criterion 12 because it was found non-conforming with criteria 3 and 4; and (3) criterion 18a because it was non-conforming with criteria 1, 3, and 6.

GHHS's 2003 CON application conformed with criteria 1 and 4. Only criterion 3(a) and not criterion 3 applies to an application for a modification to the relocation of an existing CON. No evidence contradicts that GHHS's 2003 CON application conformed with criteria 6, 12, and 18a.

iv. 10 N.C.A.C. 14C Section 2100

"The rules contained in 10 N.C.A.C. 14C Sect. 2100, et seq., apply to any applicant proposing to increase the number of operating rooms." This provision is inapplicable to GHHS's 2003 CON application. The 2001 CON and Settlement Agreement specifically authorized the development and relocation of three operating rooms.

IV. Conclusion

The Agency was statutorily required to analyze GHHS's 2003 CON application as a modification to the previously approved 2001 CON and Settlement Agreement to relocate an existing institutional health service. The 2003 CON application did not change the statutorily defined scope, location, or person of the proposed project. The Agency and its counsel conceded that the location of the facility and

the entity status of GHHS was not an issue to the Agency. The record clearly shows the 2003 CON proposed *exactly* the same number of beds and operating rooms approved in the 2001 CON and Settlement Agreement. The Agency had statutory authority to request information and review only the proposed increase in capital expenditures pursuant to N.C. Gen. Stat. § 131E-176(16)(e). Good Hope was not required to secure CON approval as a "new institutional health service" to recombine its ancillary and support services at one location. The Agency was aware of and consented to these services remaining at the existing facility in 2001.

GHHS's 2003 CON application demonstrated it had conformed with all applicable statutory review criteria pursuant to N.C. Gen. Stat. § 131E-183(a). The Agency committed an error of law in its interpretation and application of the CON statutes to GHHS's 2003 CON application.

Under whole record review, the Agency's Final decision does not have "a rational basis in the evidence" and should be reversed. *See* N.C. Gen. Stat. § 150B-51(b) (2003) (stating this Court can reverse or modify the agency's decision if the agency's findings, inferences, conclusions, or decisions are, *inter alia*, affected by error of law). The Administrative Law Judge's findings of fact are supported by substantial and uncontested evidence and its recommended decision should have been adopted by the Agency as its Final decision. I respectfully dissent.

SAFT AMERICA, INC., PLAINTIFF v. PLAINVIEW BATTERIES, INC., ENERGEX BATTERIES, INC., BERNIE R. ERDE, AND RUSSELL J. BLEEKER, DEFENDANTS

No. COA07-823

(Filed 15 April 2008)

1. Jurisdiction— personal—corporate officer and shareholder—insufficient minimum contacts

A nonresident corporate officer and principal shareholder had insufficient minimum contacts with this state to permit the exercise of personal jurisdiction over him in an action for breach of contract and unjust enrichment based upon unpaid purchase orders for goods delivered to the corporate defendants because: (1) personal jurisdiction over an individual officer or employee of

a corporation may not be predicated merely upon the corporate contacts with the forum; (2) corporate officers are subject to personal jurisdiction when in addition to their roles as officers, they complete an act in their individual capacities; and (3) plaintiff wholly failed to allege that any act defendant committed occurred within his individual capacity.

2. Corporations— piercing corporate veil—sufficiency of allegations

The uncontradicted allegations in plaintiff's complaint sufficiently stated a basis for piercing the corporate veil for the purpose of establishing personal jurisdiction over the corporate defendant Energex in an action for breach of contract and unjust enrichment based upon unpaid purchase orders for goods delivered under contracts with corporate defendant Plainview where plaintiff alleged: (1) the individual defendants have violated certain corporate laws and formalities; (2) the individual defendants exercised control over the finances, polices, and business practices of both corporate defendants; and (3) assets were diverted from Plainview to Energex, leaving Plainview inadequately capitalized and unable to pay outstanding amounts owed to plaintiff.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by defendants Energex Batteries, Inc. and Bernie R. Erde from order entered 5 April 2007 by Judge David S. Cayer in Burke County Superior Court. Heard in the Court of Appeals 10 January 2008.

Moore & Van Allen, PLLC, by Anthony T. Lathrop and Michael T. Champion, plaintiff-appellee.

Cameron Gilbert, Woodbury, New York, pro hac vice, for defendant-appellants Energex Batteries, Inc. and Bernie R. Erde.

No brief filed for defendants Plainview Batteries, Inc. or Russell J. Bleeker.

TYSON, Judge.

Energex Batteries, Inc., and Bernie R. Erde (collectively, "defendants") appeal from order entered denying their motions to dismiss for lack of personal jurisdiction. We affirm in part, reverse in part, and remand.

I. Background

Saft America Inc. ("plaintiff"), is a corporation engaged in the manufacture of batteries and other energy storage cells. Plaintiff conducts its business in Burke County, North Carolina. Plainview Batteries, Inc. ("Plainview"), and Energex Batteries, Inc. ("Energex"), are also involved in the battery and energy storage business. Plainview and Energex are corporations organized under the laws of the state of New York. Bernie R. Erde ("Erde") served as President and CEO of Plainview and Vice President of Energex. Erde owns forty-nine (49%) percent of Plainview's stock and fifty-one percent (51%) of Energex's stock. Russell Bleeker ("Bleeker") served as a corporate officer for both Plainview and Energex. In addition to overlapping management and ownership, Plainview and Energex share a common mailing address in Plainview, New York.

Beginning in the 1990s, plaintiff established a business relationship with Plainview in which plaintiff sold Plainview several million dollars worth of goods. Until 2005, plaintiff dealt with Erde as Plainview's representative. In January 2005, Bleeker became more involved in the transactions between Plainview and plaintiff. Contracts and purchase orders executed by the parties identify Plainview as the purchaser. However, in correspondence with plaintiff, Bleeker and Erde made references to Plainview and Energex, which tended to group the companies together, including the following:

> 1. The 14 March 2005 email from Bleeker in which he describes himself as V.P. of Business Development (Princi[pal] as well) on the Energex side of the business.
>
> 2. The 27 July 2005 email from Erde seeking assurance that Plainview/Energex really gets the best possible price[.]
>
> 3. The 15 February 2006 email from Bleeker referring to "business transference and asset purchase of Plainview" by Energex.

Between July and November 2005, the business relationship between the parties became antagonistic due to conflicts over payments Plainview owed to plaintiff. On 20 October 2006, plaintiff filed suit against Plainview, Energex, Erde, and Bleeker, seeking damages under the following claims for relief: (1) recovery of the balance due plus interest, under plaintiff's contracts with Plainview; (2) breach of contract; (3) unjust enrichment; and (4) piercing the corporate veil.

Plaintiff's complaint identified seven specific purchase orders for which plaintiff was owed "$244,850.54 plus accrued interest[.]" Plaintiff contended that when it tried to obtain the amounts owed under its contracts with Plainview, Bleeker told plaintiff's representatives that Energex had "acquired the assets of Plainview and that Plainview had been dissolved." Bleeker asserted the purchase of Plainview's assets by Energex served to insulate Energex from any responsibility for Plainview's debt due to plaintiff. Plaintiff also alleged that during 2005 "Erde and Bleeker repeatedly represented Energex and Plainview to be parts of the same organization, at least with regard to purchasing goods from [plaintiff.]"

Bleeker filed an answer admitting that he was an officer of Energex, and that personal jurisdiction was properly exercised by North Carolina. Bleeker conceded that he had "made representations regarding the connections of Plainview and Energex[,]" but denied specifically saying the companies were "part of the same legal corporate organization." Bleeker also admitted that "Plainview owes some amount [of money] to [plaintiff] for past due accounts." Bleeker denied any individual personal liability under plaintiff's claim seeking to pierce the corporate veil. Plainview filed an answer and denied the material allegations of the complaint. Plainview also filed a motion to dismiss for lack of personal jurisdiction, which it later withdrew. Neither Bleeker nor Plainview are parties to this appeal.

Defendants filed motions to dismiss for lack of personal jurisdiction and attached an affidavit by Erde to each motion. On 5 April 2007, the trial court denied the motions by Plainview, Energex, and Erde to dismiss for lack of personal jurisdiction, in an order concluding in pertinent part that:

> 2. Plaintiff has properly pleaded and alleged a claim for piercing the corporate veil against the Defendants in this Matter;
>
> 3. This Court has personal Jurisdiction over the Defendants; and
>
> 4. The Court's exercise of personal jurisdiction over these Defendants does not violate their rights to Due Process.

Defendants appeal.

II. Issue

Defendants argue the trial court erred by denying their motions to dismiss for lack of personal jurisdiction.

III. Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citations omitted).

> Either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required. . . . Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (citations omitted), *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

IV. Personal Jurisdiction

This Court has stated:

> The resolution of the question of *in personam* jurisdiction involves a two-fold determination: (1) do the statutes of North Carolina permit the courts of the jurisdiction to entertain this action against defendant, and (2) does the exercise of this power by the North Carolina courts violate due process of law.

Green Thumb Industry v. Nursery, Inc., 46 N.C. App. 235, 239-40, 264 S.E.2d 753, 755 (1980) (citing *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977)). N.C. Gen. Stat. § 1-75.4 (2005) sets forth twelve grounds upon which a court may assert personal jurisdiction over a person.

Defendants argue no statutory grounds exist for the trial court's assertion of personal jurisdiction over them, and argue the trial court's exercise of personal jurisdiction over them "violates their due process rights."

> If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ulti-

> mate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Bruggeman, 138 N.C. App. at 615, 532 S.E.2d at 217 (internal citations omitted).

Here, the trial court decided the issue of personal jurisdiction without an evidentiary hearing. Plaintiff was required to show the uncontroverted allegations of its complaint were sufficient to state a claim for personal jurisdiction. *Id.*, at 615, 532 S.E.2d at 217-18. *See also Spinks v. Taylor*, 303 N.C. 256, 264, 278 S.E.2d 501, 505-06 (1981) (citation and quotation omitted) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

Plaintiff asserts that personal jurisdiction is proper under several statutory provisions including: (1) N.C. Gen. Stat. § 1-75.4(1)d, permitting exercise of jurisdiction over a defendant "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise" and (2) N.C. Gen. Stat. § 1-75.4(5)d, which states jurisdiction is proper where action "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." The allegations of plaintiff's complaint support the exercise of personal jurisdiction under either provision, particularly when considered in the context of plaintiff's claim to pierce the corporate veil.

Having found that "the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant[s][,]" we now decide whether "the exercise of this power" would violate due process. *Dillon*, 291 N.C. at 675, 231 S.E.2d at 630. Our Supreme Court has stated:

> The constitutional standard to be applied in determining whether a State may assert personal jurisdiction over a nonresident defendant is found in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945): "[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment in personam, . . . he have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979).

> To generate minimum contacts, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court. The facts of each case determine whether the defendant's activities in the forum state satisfy due process.

Tejal Vyas, LLC v. Carriage Park Ltd. P'ship, 166 N.C. App. 34, 38-39, 600 S.E.2d 881, 885-86 (2004) (internal citations and quotations omitted), *aff'd*, 359 N.C. 315, 608 S.E.2d 751 (2005). Several factors are reviewed in determining minimum contacts including: "1) the quantity of the contacts; 2) the nature and quality of the contacts; 3) the source and connection of the cause of action with those contacts; 4) the interest of the forum state; and 5) the convenience to the parties." *Fox v. Gibson*, 176 N.C. App. 554, 560, 626 S.E.2d 841, 845 (2006) (citation omitted). These factors must be considered "in light of fundamental fairness and the circumstances of the case." *Id.* (citation omitted).

1. Defendant Erde

[1] In Erde's affidavit, he admitted that: (1) he was the president of Energex and vice president of Plainview and (2) he had visited plaintiff's factory in North Carolina "in [his] role as a corporate officer of Plainview Batteries, Inc." Erde also stated that "any dealings I had with Plaintiff were solely in my capacity as an officer of Plainview Batteries Inc." Erde argues he lacked sufficient minimum contacts for the trial court to exercise personal jurisdiction over him as an individual based upon the acts alleged in plaintiff's complaint. We agree.

"[P]ersonal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins v. Ingham*, 179 N.C. App. 764, 771, 635 S.E.2d 610, 615 (2006) (citing *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995)), *disc. rev. denied*, 361 N.C. 221, 642 S.E.2d 448 (2007). Corporate officers are subject to personal jurisdiction when "in addition to their roles as officers, [they] complete[] an act in *their individual capacities* . . . ." *Id.* (emphasis supplied).

In *Robbins*, this Court distinguished the case before it from prior precedent now cited in the dissenting opinion:

> Plaintiffs cite three cases in their brief in an attempt to prove that Hegg's, Ingham's and Trinity Court's contacts should be imputed to Gamble: *Better Business Forms, Inc.*, 120 N.C. App. 498, 462 S.E.2d 832 [(1995)]; *Centura Bank* [*v. Pee Dee Express, Inc.*], 119 N.C. App. 210, 458 S.E.2d 15 [(1995)]; and *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979). *All three of these cases are easily distinguished from the instant case because in all three cases the individual defendants, in addition to their roles as officers, completed an act in their individual capacities that would make them subject to personal jurisdiction.* For example, in *Better Business Forms, Inc.*, we found sufficient minimum contacts existed as to two individual defendants who owned a corporate buyer, but we noted that both individuals had obligated themselves to purchase a business by signing personal guarantees. *Better Business Forms, Inc.*, 120 N.C. App. at 501, 462 S.E.2d at 834. Similarly, in *Centura Bank*, we found individual defendants subject to personal jurisdiction in North Carolina, but we also noted that the individuals were individual guarantors. *Centura Bank*, 119 N.C. App. at 214, 458 S.E.2d at 19. Finally, in *Buying Group, Inc.*, the Supreme Court of North Carolina decided the State had personal jurisdiction over an individual defendant partly because the defendant had signed a promissory note in his individual capacity, had attended trade shows in North Carolina, and had a continuing relationship with a North Carolina corporation. *Buying Group, Inc.*, 296 N.C. at 516, 251 S.E.2d at 614.
>
> In the instant case, a review of the record does not compel us to conclude that North Carolina has personal jurisdiction over Gamble. *Unlike the cases discussed, we believe the facts of this case do not show Gamble acting in his individual capacity to a point where North Carolina has personal jurisdiction over Gamble.* We affirm the trial court.

Id. at 772, 635 S.E.2d at 616 (emphasis supplied).

This Court recently addressed this issue and held under markedly similar facts that a defendant lacked sufficient minimum contacts with North Carolina to satisfy the due process prong of personal jurisdiction. *See Rauch v. Urgent Care Pharm., Inc.*, 178 N.C. App. 510, 518-19, 632 S.E.2d 211, 217-18 (2006). In *Rauch*, the individual defend-

ant's actions in the forum state were performed in his official capacity as president of the corporate defendant:

> Defendant Burns signed and submitted defendant Urgent Care's 2002 application to the North Carolina Board of Pharmacy, seeking privileges for Urgent Care to conduct pharmacy business in this state, however he signed the application in his capacity as president of defendant Urgent Care. There is no evidence in the record which suggests that defendant Burns participated in the filling of any prescriptions or compounding activities at Urgent Care during 2002 when the contaminated methylprednisolone injections were compounded. Similarly, defendant Burns had no direct involvement with the day-to-day operations of defendant Urgent Care in 2002. He also had no contact with anyone in North Carolina regarding Urgent Care's compounding methylprednisolone injections, and in fact, was unaware that Urgent Care was compounding the drug until after Urgent Care was notified about the possible contamination. Defendant Burns then spoke, via telephone, to physicians and other individuals in North Carolina regarding the investigation and the recall of the contaminated injections, however he did so in his capacity as president of defendant Urgent Care. Defendant Burns also does not own any real or personal property in this state, nor has he lived here since he was eighteen years old. The evidence does suggest that he may have visited the state for personal reasons prior to 2002, and that during such visit he delivered Urgent Care's application to the North Carolina Pharmacy Board.

Id. at 518, 632 S.E.2d at 217-18. Upon these facts, this Court held that "defendant Burns did not have sufficient minimum contacts with the state of North Carolina, such that a court in our state could exercise personal jurisdiction over him individually without violating his due process rights." *Id.* at 518, 632 S.E.2d at 217.

We hold the analyses in *Robbins* and *Rauch* are directly on point to the facts at bar and are clearly distinguishable from the cases cited in the dissenting opinion. *See Buying Group, Inc.*, 296 N.C. at 510, 251 S.E.2d at 614; *Centura Bank, Inc.*, 119 N.C. App. at 213, 458 S.E.2d at 18.

Here, plaintiff wholly failed to allege any act Erde committed occurred within his individual capacity to subject him to personal jurisdiction. The trial court erred by denying Erde's motion to dismiss. That portion of the trial court's order is reversed.

2. Defendant Energex

[2] Energex argues that it cannot be subject to personal jurisdiction because the relevant contracts, correspondence, orders, and invoices all reference Plainview rather than Energex. "However, plaintiff does not allege that [Energex] had such contacts, but rather, asserts jurisdiction based on disregard of the corporate entity, or veil-piercing." *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 252, 625 S.E.2d 800, 803 (2006).

i. Piercing the Corporate Veil

Where the corporate veil is pierced, personal jurisdiction may be imputed to a defendant entity on the basis of the actions of its alter ego. "Our courts will 'disregard the corporate form' and 'pierce the corporate veil' where [a party] exercises actual control over a corporation, operating it as a mere instrumentality or tool." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 790, 561 S.E.2d 905, 908 (2002).

Our Supreme Court has articulated the instrumentality rule as follows:

> [W]hen . . . the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation.

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968).

To impose liability based upon the instrumentality rule, three elements are required to be present:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Strategic Outsourcing, 176 N.C. App. at 253, 625 S.E.2d at 804 (emphasis omitted) (quoting *Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985)).

"Factors to consider in determining whether to pierce the corporate veil include: (1) inadequate capitalization; (2) non-compliance with corporate formalities; (3) complete domination and control of the corporation so that it has no independent identity; and (4) excessive fragmentation of a single enterprise into separate corporations." *State ex rel. Cooper v. Ridgeway Brands Mfg.*, 184 N.C. App. 613, 621-22, 646 S.E.2d 790, 797 (2007) (citing *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31).

ii. Plaintiff's Burden

"[When] jurisdiction is challenged [by a defendant, the] plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (citation and quotation omitted). "Where unverified allegations in the complaint meet plaintiff's 'initial burden of proving the existence of jurisdiction . . . *and defendants . . . do not contradict plaintiff's allegations in their sworn affidavit,' such allegations are accepted as true and deemed controlling.*" *Id.* (quoting *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983)) (emphasis supplied). "When the allegations in a plaintiff's complaint, taken as true, are sufficient to state a claim for piercing the corporate veil, the trial court's grant of defendant's motion to dismiss is improper." *State ex rel. Cooper*, 184 N.C. App. at 622, 646 S.E.2d at 793.

The allegations of plaintiff's complaint include, *inter alia*, the following:

46. Upon information and belief, Defendants Erde and/or Bleeker as officers, principal agents and primary shareholders of Energex and Plainview have failed to observe the proper corporate formalities as required by applicable corporate law.

47. Upon information and belief, Defendants Erde and/or Bleeker hold complete domination, not only of finances, but of policy and business practice, in Energex and Plainview.

48. Upon information and belief, Defendants Erde and/or Bleeker have used this control and domination of Energex and Plainview

to conceal and/or divert assets away from Plainview to themselves and to Plainview's alter-ego Energex, thereby leaving Plainview inadequately capitalized and causing Plainview to default on its obligations to SAFT.

49. Upon information and belief, Erde and/or Bleeker have fraudulently concealed and/or diverted Plainview's assets that would otherwise have been or should have been available to pay outstanding amounts owed to SAFT.

50. Upon information and belief, Plainview's failure to pay the outstanding amounts owed to SAFT was caused by the actions of Erde and/or Bleeker, in particular their diverting assets from Plainview for personal gain or to the benefit of Plainview's alter-ego Energex. The actions of Erde and Bleeker were dishonest, unjust and in contravention of SAFT's legal rights.

51. The actions taken by Erde and/or Bleeker amount to a use of Plainview and/or Energex as shields for activities in express violation of applicable corporate law.

Erde submitted an affidavit in support of Energex's motion to dismiss for lack of personal jurisdiction. Erde's affidavit stated that "Energex has never had any dealings with the Plaintiff" and that all transactions between the parties were made on behalf of Plainview, not Energex. Erde's affidavit also makes the conclusory statement that "Energex is an independent corporation, completely and totally separate from Plainview Batteries, Inc., also an independent New York corporation . . . These entities are separate corporations, independent of one another."

Erde's generalized allegation that Plainview and Energex are independent entities does not state a fact within Erde's personal knowledge, but is a conclusion to be drawn on the basis of factual allegations. *See, e.g.*, *East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 636, 625 S.E.2d 191, 198 (2006) (discussing the "court's findings of fact regarding the extent of [defendant's] control over [codefendant]" and holding that this Court "must now ask whether these findings of fact support the trial court's conclusions of law that [codefendant] was the alter ego and mere instrumentality of the individual defendant[].").

As a conclusion rather than a statement of fact, Erde's contention that the two corporations are "completely separate and independent"

was properly ignored by the trial court. "As stated in 3 Am. Jur. 2d, *Affidavits* § 13 . . . Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.' " *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 348-49 (2004). *See also*, *e.g.*, *Ward v. Durham Life Ins. Co.*, 90 N.C. App. 286, 289, 368 S.E.2d 391, 393 (1988) (stating trial courts may not consider legal conclusions stated in an affidavit).

The assertions in Erde's affidavit do not contradict plaintiff's allegations that: (1) defendants violated certain corporate laws and formalities; (2) the individual defendants exercised control over the finances, policies, and business practices of both corporate defendants; and (3) assets were diverted from Plainview to Energex, leaving Plainview inadequately capitalized.

We hold that the uncontradicted allegations of plaintiff's complaint sufficiently state a basis for a claim of piercing the corporate veil, which allows the trial court to exercise personal jurisdiction over Energex. The trial court properly concluded that plaintiff had sufficiently alleged a claim for piercing the corporate veil. The trial court properly denied Energex's motion to dismiss. *State ex rel. Cooper*, 184 N.C. App. at 622, 646 S.E.2d at 797. The merits of plaintiff's claims, if any, are not before us. Our holding is solely limited to the jurisdictional issue. This assignment of error is overruled.

V. Conclusion

Plaintiff wholly failed to allege in its complaint that any act committed by Erde occurred in his individual capacity to subject him to personal jurisdiction. The trial court erred by denying Erde's motion to dismiss. That portion of the trial court's order is reversed.

The uncontradicted allegations in plaintiff's complaint regarding Energex are sufficient to state a claim for piercing the corporate veil. The trial court properly denied Energex's motion to dismiss. That portion of the trial court's order is affirmed. The trial court's order is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

Affirmed in Part; Reversed in Part; and Remanded.

Judge JACKSON concurs.

Judge ARROWOOD dissents by separate opinion.

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

I concur with the majority holding insofar as it affirms the trial court's denial of Defendant Energex's motion to dismiss for lack of personal jurisdiction. However, I believe that personal jurisdiction is also properly exercised over Defendant Erde. Accordingly, I respectfully dissent from the majority's reversal of the court's denial of Erde's motion to dismiss for lack of personal jurisdiction.

The dispositive issue is whether Erde had the requisite "minimum contacts" with North Carolina such that the exercise of personal jurisdiction over him does not violate his right to due process under the U.S. Constitution. "Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances. However, 'in each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[.]' " *Better Business Forms v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833-34 (1995) (quoting *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986)). In the instant case, I believe it is beyond dispute that Erde "purposefully avail[ed] himself of the privilege of conducting activities within [North Carolina]," thus subjecting himself to personal jurisdiction here.

The majority states that "plaintiff wholly failed to allege any act committed by Erde occurred within his individual capacity to subject him to personal jurisdiction." I disagree. Allegations in Plaintiff's complaint that were not contradicted by Erde's affidavit include, in relevant part, the following:

> 4. . . . [A]t all times alleged herein, Erde was Chief Operating Officer, Director and principal shareholder of Plainview and Chief Executive Officer, majority and/or principal shareholder of Energex and a resident of New York County, New York.
>
> . . . .
>
> 6. This court possesses jurisdiction over Defendants based upon their continuous and systematic contacts with North Carolina, including, but not limited to:
>
> (a) Erde and Bleeker, as officers and principal agents of Plainview and Energex, visited SAFT Ltd. in North

Carolina to tour the facilities and to negotiate a sales agreement between SAFT, Plainview and Energex;

(b) Erde and Bleeker submitted multiple purchase orders to SAFT in North Carolina on behalf of and as officers and principal agents of Plainview and Energex;

(c) Plainview and Energex transmitted payments to SAFT which were received by SAFT in North Carolina;

(d) Erde and Bleeker on behalf of and as officers and principal agents of Plainview and Energex transmitted correspondence to SAFT which was received by SAFT in North Carolina;

. . . .

(9) Plainview and SAFT have had a business relationship dating back to 1996 during which time SAFT has supplied Plainview with a total of over five million dollars worth of goods.

(10) Until January, 2005, SAFT representatives communicated primarily with Erde, who represented himself to be Chief Operating Officer and owner of Plainview. Erde acted as principal agent of Plainview with the authority to make all business decisions on behalf of Plainview relative to purchases from SAFT.

. . . .

(14) In January, 2005, Bleeker asked SAFT representatives to meet with him and Erde to discuss renegotiating the existing credit agreement between SAFT and Plainview[.] . . . During that meeting, and in other discussions, both Bleeker and Erde informed SAFT that Plainview and/or Energex was planning to bid for various large government contracts and that the company would look to SAFT to meet its increased supply needs if SAFT in turn would raise Plainview's credit limit and extend the current repayment terms. . . .

(15) Accordingly, in February, 2005, Erde, Bleeker and certain SAFT representatives met in New York to discuss new credit terms and Plainview and/or Energex's increased supply needs[.]

(16) After the February, 2005 Meeting, and based on the representations made by Erde and Bleeker regarding Plainview

and Energex's new business model and increased sales, SAFT raised Plainview's credit limit to $200,000 and extended repayment terms[.]

. . . .

(18) Upon information and belief, between February, 2005 and December, 2005, SAFT supplied Plainview with over $1,183,000.00 worth of goods. Orders for these goods were always placed by or on behalf of Plainview, regardless of whether the goods were to be used by Plainview or Energex.

As discussed in the majority opinion, Erde admitted in his affidavit that he was the president of Energex and vice president of Plainview, and that he had visited Plaintiff's factory in North Carolina "in [his] role as a corporate officer of Plainview Batteries, Inc." Erde's affidavit and the uncontroverted allegations of Plaintiff's complaint show that Plaintiff had a long-standing business relationship with Plainview; that Erde is a corporate officer of both Plainview and Engergex; that Erde visited North Carolina at least once in connection with this commercial relationship; and that Erde was personally involved in negotiating and carrying out the contracts that gave rise to the instant lawsuit.

Erde's connections to North Carolina arose from his actions as officer and principal shareholder of Plainview and Energex. On this basis, Erde asserts that, because his "alleged acts in this case were undertaken in his official capacity and not as an individual," he "lacked sufficient minimum contacts to permit the exercise of personal jurisdiction over him as an individual." Erde contends that "any dealings I had with Plaintiff were solely in my capacity as an officer of Plainview Batteries, Inc." and that without evidence that he "committed any act in his individual capacity that was outside Plainview's alleged corporate acts in North Carolina," he cannot be subject to personal jurisdiction. Erde's position, which was accepted by the majority, apparently is that actions taken by an individual in the course of his employment or in his "official" capacity do not "count" as part of a defendant's contacts with the forum state. I do not believe that this correctly states the law in North Carolina.

It is certainly true that, as noted by the majority, "personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins v. Ingham*, 179 N.C. App. 764, 771, 635 S.E.2d 610,

615 (2006) (citing *Godwin v. Walls*, 118 N.C. App. 341, 348, 455 S.E.2d 473, 479 (1995)), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 448 (2007). To base personal jurisdiction on the bare fact of a defendant's status as, *e.g.*, corporate officer or agent, would violate his due process rights. Accordingly, North Carolina precedent has consistently required that, before a defendant is subject to personal jurisdiction, there be evidence that he personally took some action subjecting him to North Carolina's jurisdiction.

For example, in *Rauch v. Urgent Care Pharm., Inc.*, 178 N.C. App. 510, 632 S.E.2d 211 (2006), a case cited by the majority, the plaintiff sued several individual and corporate defendants for injuries arising from alleged negligence in compounding a medication. The Plaintiff in *Rauch* attempted to exert personal jurisdiction over Defendant Burns on the basis of his being president of one of the corporate Defendants, and having signed the corporation's application to conduct business in North Carolina. However, there was "no evidence in the record which suggests that defendant Burns participated in" the allegedly negligent activities. The record indicated that "defendant Burns had no direct involvement with the day-to-day operations of [the corporate] defendant," that he "had no contact with anyone in North Carolina regarding" the events at issue, and that "in fact, [he] was unaware" of these events until after they were discovered by others. On these facts, this Court properly held that "defendant Burns did not have sufficient minimum contacts with the state of North Carolina, such that a court in our state could exercise personal jurisdiction over him individually without violating his due process rights." *Rauch*, 178 N.C. App. at 518, 632 S.E.2d at 217.

Similarly, in *Robbins v. Ingham*, also cited by the majority, the individual Defendant was an officer and principal shareholder of a corporate defendant. However, there was no allegation or evidence that the he had any contact with Plaintiffs or participated in the actions giving rise to the claims. This Court held that personal jurisdiction could not be exercised based solely upon defendant's status as a director and principal shareholder of the corporate defendant:

> [P]ersonal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum. The minimum contacts analysis "focuses on the actions of the non-resident defendant over whom jurisdiction is asserted, and not on the unilateral actions of some other entity."

Robbins, 179 N.C. App. at 771, 635 S.E.2d at 615-16 (quoting *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 213, 458 S.E.2d 15, 18 (1995)).

I agree with the majority that both *Rauch* and *Robbins* were correctly decided on the facts of those cases, on the grounds that in both cases the individual defendant's connection to North Carolina was limited to his status as an agent, employee, or officer of a corporation or business. However, it is important to note that these cases did not hold either that (1) personal jurisdiction over a defendant may only be based on the contacts he has with the state in the course of his private life; or, conversely, that (2) in assessing personal jurisdiction we may not "count" a defendant's contacts if they were made as part of his employment. Indeed, relevant precedent consistently interprets the requirement that a defendant act in his "individual capacity" to mean only that he must personally have minimum contacts with North Carolina, and not that these contacts must arise from his "personal life."

This is clearly demonstrated by this Court's holding in *Godwin v. Walls*. In *Godwin*, the nonresident individual defendant was a truck driver who was a resident of Maryland and was employed by a North Carolina trucking corporation. While operating a truck in Virginia, defendant was involved in an accident that killed two North Carolina residents. Plaintiffs sued several defendants, including the truck driver, who argued that North Carolina had no personal jurisdiction over him. This Court first considered the jurisdictional requirements of Plaintiffs' claims for wrongful death or injury to property, which require that a defendant's tortious conduct occur in North Carolina. The accident occurred while defendant was working for a North Carolina company. However, this Court held that because the status of the company could not be imputed to him, North Carolina lacked personal jurisdiction over the defendant as regards the claims requiring in-state actions. In contrast, jurisdiction over Plaintiffs' claims for negligent infliction of emotional distress and loss of consortium, although requiring injury to a North Carolina plaintiff, do not require that the claims be based on tortious conduct occurring in the state. Consequently, this Court held that personal jurisdiction could properly be exercised over defendant for these claims, based on actions personally taken by the defendant:

> [T]he emphasis upon the agency relationship ignores the issue for resolution in this appeal, namely, the exercise of personal jurisdiction by North Carolina courts over [the individual defendant],

> not [his corporate employer.] While a corporate entity is liable for any wrongful act or omission of an agent acting with proper authority, it does not follow an agent may be held liable under the jurisdiction of our courts for acts or omissions allegedly committed by the corporation. . . . [P]laintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual official capacity.

Godwin, 118 N.C. App. at 348, 455 S.E.2d at 479 (citations omitted). Significantly, this Court refers to a defendant's "individual *official* capacity." It is also notable that the pertinent actions of the *Godwin* defendant were all taken as part of his employment.

In another case, *Carson v. Brodin*, 160 N.C. App. 366, 585 S.E.2d 491 (2003), the plaintiffs, North Carolina residents, sued Virginia defendants for damages arising from the breach of a contract for construction of a vacation home in Virginia. When the nonresident individual defendant contested personal jurisdiction, this Court upheld the exercise of personal jurisdiction, based upon the defendant's commercial transactions with the plaintiffs:

> Here, defendant has engaged in sufficient contacts with North Carolina. He entered into a contract with North Carolina residents that those residents executed in North Carolina. . . . By negotiating within the state and entering into a contract with North Carolina residents, defendant purposefully availed himself of the privilege of conducting activities within North Carolina with the benefits and protection of its laws. Defendant's actions in contracting with North Carolina residents establish minimum contacts for specific jurisdiction because the actions are directly related to the basis of plaintiffs' claim.

Id. at 372, 585 S.E.2d at 496 (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)). Thus, North Carolina precedent does not hold that personal jurisdiction can only be predicated upon a defendant's contacts with North Carolina in his "personal life."

In addition,

> North Carolina common law interprets G.S. § 1-75.4 to extend jurisdiction to the full extent permitted by the Due Process Clause of the U.S. Constitution. In this regard, [it is significant] that in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804 (1984), the United States Supreme Court expressly rejected the argument made by the instant Defendants. The *Calder* defend-

> ant, a Florida resident and newspaper reporter, challenged California's exercise of personal jurisdiction over him on the basis that, notwithstanding his contacts with California, principles of due process prohibited exercise of jurisdiction on the basis of his actions as an employee of the newspaper. The United States Supreme Court disagreed:
>
> "Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. . . . In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."

Brown v. Refuel Am., Inc., 186 N.C. App. 631, 638, 652 S.E.2d 389, 394 (2007) (quoting *Calder*, 465 U.S. at 790, 79 L. Ed. 2d at 813).

Furthermore, where a defendant is an officer and principal shareholder of a corporation, the North Carolina Supreme Court has explicitly directed that we consider his corporate actions in determining personal jurisdiction:

> We hold that where, as in this case, defendant is a principal shareholder of the corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him.

United Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979).

"This Court is bound by decisions of the North Carolina Supreme Court." *State v. Glynn*, 178 N.C. App. 689, 697, 632 S.E.2d 551, 557, *disc. review denied*, 360 N.C. 651, 637 S.E.2d 180 (2006) (citations omitted). "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 the Supreme Court.' " *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992) (quoting *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985), *overturned on other grounds by Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993)). *Buying Group*, decided by the North Carolina Supreme Court, has never been overturned and remains the law.

Consequently, in our determination of whether personal jurisdiction is properly exercised over Erde, we should impute to Erde his corporate actions as principal shareholder and officer of Plainview and its alter ego, Energex.

This Court followed *Buying Group* in *Brickman v. Codella*, 83 N.C. App. 377, 350 S.E.2d 164 (1986). In *Brickman*, the North Carolina plaintiff sued a nonresident defendant to recover on a note under which defendant guaranteed payment of a debt. The record showed that the defendant "made a minimum of one phone call and two mailings to [plaintiff] regarding his business proposal", *Id.* at 382, 350 S.E.2d at 167, and that "he mailed four monthly payments due under the lease to the [plaintiffs]." *Id.* Noting that the defendant had "transacted business in North Carolina as principal agent for the company of which he is president", *Id.* at 381, 350 S.E.2d at 166, and relying on "our Supreme Court's analysis in *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979)," *Id.*, this Court attributed to Defendant his actions as president of the corporation involved in the underlying controversy for purposes of analyzing personal jurisdiction, and upheld the exercise of personal jurisdiction over the defendant.

In sum, under North Carolina precedent the determination of whether personal jurisdiction is properly exercised over a defendant does not exclude consideration of defendant's actions merely because they were undertaken in the course of his employment. In particular, the corporate actions of a defendant who is also an officer and principal shareholder of a corporation are imputed to him for purposes of deciding the issue of personal jurisdiction. On the other hand, personal jurisdiction cannot be based solely on a defendant's employment status as the agent or officer of a company with ties to North Carolina, or on personal connections to North Carolina that fall short of the requisite "minimum contacts."

For example, in *Centura Bank v. Pee Dee Express*, this Court considered four individual nonresident defendants. All four had signed personal guarantees for loans pertaining to the subject of the lawsuit. Two were also officers of the company involved in the suit and had additional contacts with North Carolina. The other two were the spouses of these defendants, with no other contact besides the loan guarantees. This Court first noted:

> At the outset we note our Supreme Court has held "where . . . defendant is a principal shareholder of the corporation and con-

> ducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him." In the present case [the individual defendants] were officers and the only two shareholders in Pee Dee. . . . Therefore, [their] corporate acts . . . can be imputed to them for the purpose of determining if they had sufficient minimum contacts.

Centura Bank, 119 N.C. App. at 214, 458 S.E.2d at 18 (quoting *Buying Group*, 296 N.C. at 515, 251 S.E.2d at 614) (citations omitted). The Court held that jurisdiction was properly exercised over the corporate actors with business activity in North Carolina, but not over their wives who merely signed a guarantee.

It is undisputed that Erde (1) was an officer and principal shareholder in both Plainview and Energex; (2) visited North Carolina at least once to conduct business with Plaintiff; and (3) negotiated the terms of pertinent contracts and was otherwise personally involved in the transactions at issue. "The courts of this State are open to defendant for protection of his activities and to enforce the valid obligations which [Plaintiff] assumed by reason of the contract. The contract was to be performed in North Carolina and has a substantial connection with the State. Applying to these facts the law as interpreted by the Supreme Court of the United States, [I would] hold that assumption of *in personam* jurisdiction over defendant by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment and that defendant's contacts with the State are sufficient to satisfy due process requirements." *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 707, 208 S.E.2d 676, 680 (1974).

Because I believe the undisputed allegations of Erde's actions on behalf of Plainview were sufficient to subject him to personal jurisdiction, I respectfully dissent from that part of the majority opinion reversing the denial of Erde's motion to dismiss for lack of personal jurisdiction.

S.N.R. MANAGEMENT CORP., PLAINTIFF-APPELLANT v. DANUBE PARTNERS 141, LLC, JAMES M. ADAMS, SR., ROSA BELVIN PROPERTIES, LLC, MILES C. BELVIN, HOWARD EUGENE BELVIN, AND LEE McGREGOR, DEFENDANTS-APPELLEES

No. COA07-434

(Filed 15 April 2008)

1. Unfair Trade Practices— sale of land for development—behavior not oppressive or egregious

The trial court did not err by dismissing plaintiff's claim for unfair and deceptive trade practices arising from the sale of land for development. Defendants' conduct appears to be nothing more than competitive business activities.

2. Conspiracy— civil—sale of property

The trial court properly dismissed a claim of civil conspiracy arising from the sale of property where plaintiff did not allege an agreement between the defendants to commit the alleged wrongful overt acts and did not establish evidence sufficient to create more than a suspicion or conjecture.

3. Fraud— sale of property for development—lack of particularity

The trial court properly dismissed a claim of fraud against certain defendants arising from the sale of property for development where plaintiff did not allege its claims with sufficient particularity (the time and place of the representations were not alleged, the content of the representations was not stated with particularity, and an allegation that "proprietary information" was obtained is not sufficient).

4. Fraud— sale of property—time and place of representations not alleged—content not stated with particularity

The trial court properly dismissed a claim for fraud against a particular defendant arising from the sale of property for development where plaintiff did not allege the time or place where the representations occurred and did not state with particularity the content of the purported fraudulent representations.

5. Fiduciary Relationship— sale of property—relationship not alleged

The trial court properly dismissed a claim for breach of fiduciary duty against particular defendants arising from the sale of

property for development where plaintiff did not allege a legal or factual fiduciary relationship, and therefore did not allege the requisite elements necessary to state the cause of action.

6. Wrongful Interference— tortious interference with contract—sale of property for development

The trial court properly dismissed plaintiff's claims against some of the defendants for tortious interference with contract and tortious interference with prospective advantage arising from the sale of property for development. The parties were developers and competitors who both wanted the property, and defendants' actions were justified.

7. Appeal and Error— preservation of issues—incorporation of argument by reference

An issue was not appropriately preserved for appellate review where plaintiff incorporated by reference into the brief an argument from a prior brief that was two years old.

8. Appeal and Error— rules violation—no dismissal

An appeal was not dismissed for violation of N.C. Appellate Rule 28(b)(6) where plaintiff violated only one rule and the appellees and the Court could easily ascertain the appeal.

9. Vendor and Purchaser— sale of real estate for development—time of the essence—contract amendments

The trial court did not err by dismissing a breach of contract claim arising from the sale of real estate for development where the Rule 12(b)(6) motion to dismiss for failure to state a claim for relief was converted to a Rule 12(c) motion for judgment on the pleadings by consideration of a contract amendment appended to the answer. Although plaintiff contended that amendments to the contract waived the clause that time was of the essence, the subsequent amendments unequivocally incorporated by reference the entire contract, including that clause. It was undisputed that plaintiff did not close within the required time.

10. Fiduciary Relationship— realtor—expired contract—development materials

The trial court correctly dismissed a claim for breach of fiduciary duty against a realtor arising from the sale of land for development where the contract had expired, the realtor no longer owed any fiduciary duty to plaintiff, and did not breach any previously owed duty by requesting plaintiff's development ma-

terials. Furthermore, those materials did not belong to plaintiff after the contract became null and void.

Appeal by plaintiff from orders entered 30 December 2004 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 31 October 2007.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for plaintiff-appellant.

Williams Mullen Maupin Taylor, by Gilbert C. Laite, III, Kevin W. Benedict, and Heather E. Bridgers, for defendant-appellees Danube Partners 141, LLC, and James M. Adams, Sr.

Hedrick Murray Kennett Mauch & Rogers, PLLC, by Josiah S. Murray, III & John C. Rogers, III, for defendant-appellees Rosa Belvin Properties, LLC, Miles C. Belvin, and Howard Eugene Belvin.

Boxley, Bolton, Garber & Haywood, LLP, by Ronald H. Garber, for defendant-appellee Lee McGregor.

CALABRIA, Judge.

S.N.R. Management Corporation ("plaintiff" or "purchaser") appeals from orders granting defendants' motions to dismiss and granting the motion to cancel the lis pendens of defendant Danube Partners, 141, LLC ("Danube"). We affirm.

On 17 April 2002, plaintiff executed a contract ("the contract" or "purchase contract") with Rosa Belvin Properties, LLC ("RBP" or "seller") and RBP's agents, Miles C. Belvin and Eugene Belvin (collectively, "the Belvin defendants") to purchase property for development. The contract named Lee McGregor Real Estate as one of the brokers entitled to a commission to be paid by the seller at closing. Lee McGregor ("McGregor") of Lee McGregor Real Estate served as plaintiff's real estate broker.

The property was located at the intersection of Danube Lane and Hebron Lane in Durham County, North Carolina. The purchase price for approximately 141.5 acres ("the property") was two million three hundred fifty-five thousand dollars ($2,355,000). The date for the original contract closing was contingent upon specified conditions stated as follows:

4. Provided all of the conditions set forth in Section 25 have been fulfilled to Purchaser's sole satisfaction, the closing of this transaction shall take place . . . on the earlier of (i) April 15, 2003 or (ii) thirty (30) days after the Property has been rezoned as set forth in Section 25(a). If the closing has not occurred by April 15, 2003 solely because the conditions set forth in Section 25 have not been fulfilled to Purchaser's sole satisfaction, this Contract shall thereupon become null, void and of no further effect, the parties shall be relieved of all obligations hereunder, the Deposit shall be returned to the Purchaser and Purchaser shall deliver to Seller copies of all studies performed by Seller on the Property including, but not limited to, all site plans, engineering reports and environmental studies performed after the Examination Period, at no cost to Seller.

. . . .

25. Closing under this Contract is contingent upon all of the following:

    a. Rezoning of the Property by the City/County of Durham to a zoning classification satisfactory to Purchaser and with zoning conditions reasonably satisfactory to Purchaser which permits Purchaser to construct single family dwellings, active adult housing, duplexes and fourplexes ("Rezoning"). Purchaser shall be responsible for all costs associated with the Rezoning. Seller shall cooperate fully with all rezoning efforts undertaken by Purchaser.

    b. Approval of Purchaser's site plan, to Purchaser's sole satisfaction, by the appropriate governmental authorities.

    c. No moratorium exists which limits the availability of public water and sewer service to the Property as Purchaser intends to develop it, which proposed development will be set forth on Purchaser's site plan.

Plaintiff and RBP extended the closing date on several occasions. RBP's attorney sent a letter to plaintiff stating plaintiff could exercise its options under sections 4 and 25 of the purchase contract. Plaintiff was unable to close on the designated date due to the possible existence of an endangered plant species ("the plant") on the property. Because of the plant, plaintiff sought to extend the closing

date, but RBP was unwilling to grant any further extensions beyond 30 January 2004.

Prior to the resolution of the issue regarding the plant, although plaintiff continued efforts to negotiate with RBP to extend the closing date, RBP sold the property to Danube on 26 March 2004. On 31 March 2004, RBP conveyed the property to Danube for the purchase price of $2,355,000. On 30 September 2004, plaintiff filed a complaint against Danube, Adams, McGregor, and the Belvin defendants. Plaintiff also filed a lis pendens.

Plaintiff states in the complaint that during the time the property was under contract, plaintiff sought to resell the property to various users and retail developers in order to commence marketing the property. Specifically, representatives of plaintiff discussed selling a portion of the property to James M. Adams, Sr. ("Adams") for development. Plaintiff alleges that Adams formed the limited liability company, Danube Partners 141, LLC, for the purpose of purchasing the property. Plaintiff gave certain proprietary information to Adams during these discussions in order to assist Adams in evaluating the purchase of the property. Plaintiff contends that after Adams received this information, and knew of the contract between plaintiff and RBP, Adams or one of his agents, contacted RBP and offered to purchase the property for the same price plaintiff agreed to pay, but without any of the contractual conditions. Therefore, plaintiff argues Adams intentionally induced RBP not to perform under its contract with plaintiff.

Plaintiff contends that subsequent to the sale of the property by RBP to Danube, representatives of plaintiff met with Adams and agreed upon a purchase price for the property. At the time of the meeting, plaintiff had a contract to sell a portion of the property to a third party, NRP Southeast Properties, LLC ("NRP"). Plaintiff avers that subsequent to the initial agreement between plaintiff and Adams, Danube or Adams contacted NRP and offered to sell the portion of the property to NRP at a lower price than the price stated in the contract between NRP and plaintiff. NRP then terminated its contract with plaintiff and negotiated to purchase the property from Danube.

Plaintiff alleges that in February or March 2004, McGregor also contacted Adams and furnished information he received from plaintiff to Adams without plaintiff's knowledge or consent. Plaintiff con-

tends that McGregor gave the materials to Adams in order to assist Adams in the purchase of the property, and that McGregor failed to notify plaintiff that Adams and RBP were negotiating the sale of the property.

The defendants responded to plaintiff's complaint with, *inter alia*, answers and motions to dismiss. Danube also filed a motion to cancel the lis pendens and counterclaimed for slander of title. On 30 December 2004, Judge Kenneth C. Titus in Durham County Superior Court granted defendants' motions to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6), as well as Danube's motion to cancel the lis pendens. The court also dismissed, *sua sponte*, all claims against the Belvin defendants pursuant to North Carolina Rule of Civil Procedure 12(c). On 27 January 2005, plaintiff gave notice of appeal. We dismissed the appeal as interlocutory due to Danube's outstanding counterclaim and remanded to the superior court.

On 31 July 2006, Danube dismissed its counterclaim with prejudice, and on 29 August 2006, plaintiff filed a second notice of appeal. We dismissed plaintiff's second appeal for violating the appellate rules. However, on 8 February 2007, we granted plaintiff's writ of certiorari pursuant to N.C.R. App. P. 21(a)(1) (2007), to review the court's judgment granting defendants' motions to dismiss and the judgment granting the motion to cancel the lis pendens.

On appeal, plaintiff argues the trial court erred by granting defendants' motions to dismiss. Specifically, plaintiff contends the trial court erred by granting defendants' motions to dismiss plaintiff's claims for: (1) breach of fiduciary duty; (2) unfair and deceptive trade practices; (3) fraud; (4) civil conspiracy; (5) breach of contract; (6) tortious interference with contract; and (7) tortious interference with prospective advantage. Plaintiff also contends the trial court erred by granting defendant Danube's motion to cancel the lis pendens.

I. Standard of review

Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). The Court must consider "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). Dismissal of a complaint is not proper "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." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation omitted). "The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. 464, 471, 369 S.E.2d 367, 371 (1988).

II. Motions to dismiss concerning all defendants

We first address plaintiff's contention that the trial court erred by granting all defendants' motions to dismiss regarding plaintiff's claims for: (1) unfair and deceptive trade practices and (2) civil conspiracy.

a. Unfair and deceptive practices

[1] "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2004). In order to establish a claim for unfair or deceptive acts or practices, a plaintiff must allege sufficient facts tending to show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

"[A]n unfair act or practice is one in which a party engages in conduct which amounts to an inequitable assertion of its power or position." *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) (citation omitted). Furthermore, an act is unfair or deceptive under N.C. Gen. Stat. § 75-1.1 if it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." *Pierce v. Reichard*, 163 N.C. App. 294, 301, 593 S.E.2d 787, 791-92 (2004) (quotation omitted). In the case *sub judice*, the complaint states in pertinent part:

> a. McGregor obtained from [plaintiff] proprietary information relating to the Property under false pretenses;
>
> . . . .
>
> c. Adams and/or Danube received and misused proprietary information obtained by Adams to allow Adams and/or Danube to evaluate the purchase of the Property;

d. Adams and/or Danube encouraged RBP and NRP to breach or to terminate their contracts with [plaintiff] without justification;

e. Alternatively, Adams and/or Danube discouraged RBP from extending the contract with [plaintiff] without justification;

f. Adams and/or Danube interfered with existing contracts between [plaintiff] and RBP and [plaintiff] and NRP;

. . . .

i. Defendants Gene Belvin, Clark Belvin and RBP represented to [plaintiff], even after the purchase and sale contract had been executed with Danube that they would be continuing to discuss an extension of the purchase agreement between [plaintiff] and RBP;

j. Even though RBP had already closed on the Property; Gene Belvin, Clark Belvin and/or RBP left and impression [sic] with [plaintiff] that they would be further discussions [sic] about the extension[.]

All the defendants were in a business relationship with the plaintiff. The complaint alleges "McGregor obtained proprietary information," Adams "encouraged RBP and NRP to breach their contracts with [plaintiff]," and the Belvin defendants "left the impression with [plaintiff]" that there would be further discussions about the contract extension. These allegations do not show any defendant engaged in "conduct which amounts to an inequitable assertion" of their power over plaintiff. *Southeastern Shelter Corp.*, 154 N.C. App. at 330, 572 S.E.2d at 206. Furthermore, the complaint does not allege sufficient facts to show any defendant engaged in conduct that was so egregious in nature to result in "immoral, unethical, oppressive" behavior. *Pierce*, 163 N.C. App. at 301, 593 S.E.2d at 791. Rather, defendants' conduct appears to be nothing more than competitive business activities. This assignment of error is overruled.

b. Civil conspiracy

[2] "In order to state a claim for civil conspiracy, a complaint must allege 'a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury.' " *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000) (quoting *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984)).

> In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all.

Dove v. Harvey, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (quotation omitted), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 249 (2006). Here, plaintiff's complaint alleges "[d]efendants maliciously conspired together and acted in concert, explicitly, impliedly or tacitly, to engage in the above-referenced fraudulent and otherwise wrongful acts with the intent to injure [plaintiff]."

> A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy *must be the showing that a conspiracy in fact existed*. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Id., 168 N.C. App. at 690-91, 608 S.E.2d at 801 (emphasis supplied) (internal citations and quotations omitted). In the complaint, plaintiff asserted the existence of a conspiracy, yet plaintiff failed to allege that there was an agreement between the defendants to commit the alleged wrongful overt acts against plaintiff. Furthermore, plaintiff failed to establish evidence of the conspiracy that was "sufficient to create more than a suspicion or conjecture." *Id.*, 168 N.C. App. at 691, 608 S.E.2d at 801. As such, the trial court could not "justify submission to a jury" and properly dismissed plaintiff's claim for civil conspiracy. *Id.* This assignment of error is overruled.

III. Fraud

[3] Plaintiff next asserts that the trial court erred by granting Danube, Adams, and the Belvin defendants' motions to dismiss plaintiff's fraud claim.

"The elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *McGahren v. Saenger*, 118 N.C. App. 649, 654, 456 S.E.2d 852, 855 (1995) (internal quotation marks

omitted) (citation omitted). In pleading a claim of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2004). Moreover, "in pleading actual fraud the particularity requirement is met by alleging *time*, *place* and *conten*t *of the fraudulent representation*, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981) (emphasis supplied).

a. Adams and Danube

In the case *sub judice*, plaintiff's pertinent claims for fraud against Adams and Danube are set out in the complaint as follows:

> 92. Adams and/or Danube induced [plaintiff] to act to its detriment by knowingly making the following false representations and/or material omissions:
>
> a. Adams and/or Danube obtained proprietary information from [plaintiff] for the purpose of evaluating [plaintiff's] due diligence and using such information in its negotiations with RBP, Clark Belvin, and/or Gene Belvin, however, Adams and/or Danube did not ever mention to [plaintiff] that it was interested in or involved in negotiations to purchase the [p]roperty;
>
> b. Adams and/or Danube took the due diligence information with an understanding that the information would be used only for the evaluation of purchasing part of the [p]roperty from [plaintiff];
>
> c. Adams and/or Danube never told [plaintiff] that it was in negotiations with RBP, Clark Belvin and/or Gene Belvin for purchasing the [p]roperty;
>
> d. After the sale of the [p]roperty from RBP to Danube, Adams and/or Danube falsely represented to [plaintiff] that Danube would sell a portion of the [p]roperty to [plaintiff][.]
>
> . . . .
>
> 93. The representations and/or material omissions of Adams and/or Danube to [plaintiff] were false when made and the material omissions of Adams and/or Danube when made tended to leave a false impression of the truth.

94. The false representations of Adams and/or Danube as alleged herein were made with the knowledge that they were false, or with reckless disregard for their truthfulness, and with the intention that [plaintiff] would be induced to act, or not act, and rely on those representations.

95. The material omissions of Adams and/or Danube as alleged herein were made to intentionally create the false impression, through omission, of the truth or were made with a reckless disregard for the truth and with the intention that [plaintiff] would be induced to act, or not act, and rely on the material omissions.

96. In reasonable reliance on the representations and/or material omissions of Adams and/or Danube, [plaintiff] entrusted proprietary information with Adams and/or Danube, withheld legal action to enforce its rights and/or continued negotiating with Adams and/or Danube.

97. [Plaintiff] relied to its detriment upon the intentional omissions and false statements of Adams and/or Danube.

98. As a direct and proximate consequence of the fraudulent acts of Adams and Danube, [plaintiff] has suffered damages in an amount in excess of Ten Thousand Dollars.

In the complaint, plaintiff does not allege the time nor place where Adams' and Danube's purported fraudulent representations to plaintiff occurred. Plaintiff's allegations do not state with particularity the content of Adams' and Danube's purported fraudulent representations. Furthermore, plaintiff only alleges that "Adams and/or Danube obtained *proprietary information* from [plaintiff]." The term "proprietary information" does not state with sufficient particularity "what was obtained as a result of the fraudulent acts or representations." *Id.* Therefore, in the complaint, plaintiff does not allege its claims for fraud with the requisite "particularity" needed to withstand Adams' and Danube's 12(b)(6) motions to dismiss. *Id.* This assignment of error is overruled.

b. Belvin defendants

[4] Plaintiff's pertinent claims for fraud against the Belvin defendants are set out in the complaint as follows:

81. RBP, Clark Belvin and/or Gene Belvin induced SNR to act to its detriment by knowingly making the following false representations and/or material omissions:

a. RBP, Clark Belvin and/or Gene Belvin repeatedly indicated to SNR that matters with respect to closing on the Property would be worked out;

b. RBP, Clark Belvin and/or Gene Belvin continued negotiations for a closing date on the Property when in fact, RBP, Clark Belvin and/or Gene Belvin were negotiating a purchase price and closing on the Property with Adams and/or Danube;

c. RBP, Clark Belvin and/or Gene Belvin failed to mention to SNR or its agents that is [sic] was in negotiations with Adams and/or Danube;

d. Even after the closing for the sale of the Property to Danube had been executed, but before the documents associated with the transaction were recorded, RBP, Clark Belvin and/or Gene Belvin gave SNR the indication that matters with respect to closing on the Property would be worked out;

e. After closing occurred, RBP, Clark Belvin and/or Gene Belvin omitted telling SNR that closing had already occurred;

f. After closing occurred, RBP, Clark Belvin and/or Gene Belvin made statements intending to leave with SNR the impression that RBP would continue to negotiate with SNR; and

. . . .

82. The representations of RBP, Clark Belvin and/or Gene Belvin to SNR were false when made and the material omissions of RBP, Clark Belvin and/or Gene Belvin when made tended to leave a false impression of the truth.

Here, plaintiff does not allege the time nor place where the Belvin defendants' purported fraudulent representations to plaintiff and material omissions occurred. Plaintiff's allegations state defendants "continued negotiations" and defendants "repeatedly indicated to [plaintiff] that matters with respect to closing on the Property would be worked out." These allegations do not state with particularity the content of defendants' purported fraudulent representations. We conclude plaintiff fails to allege its claims for fraud against the Belvin defendants with the requisite "particularity" needed to withstand

defendants' 12(b)(6) motion to dismiss. *Id.* This assignment of error is overruled.

IV. Danube and Adams

Plaintiff argues that the trial court erred by granting the motions to dismiss as to defendants Danube and Adams. Specifically, plaintiff contends the trial court erred in granting their motions to dismiss regarding plaintiff's claims for: (1) breach of fiduciary duty; (2) tortious interference with contract between plaintiff and RBP; (3) tortious interference with prospective advantage; and (4) tortious interference with contract between plaintiff and NRP.

a. Breach of fiduciary duty

[5] "[I]t is fundamental that a fiduciary relationship must exist between the parties in order for a breach of fiduciary duty to occur." *Branch v. High Rock Lake Realty, Inc.*, 151 N.C. App. 244, 251, 565 S.E.2d 248, 253 (2002) (citation omitted). A fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83 (1979) (quotation omitted).

> Generally, in North Carolina . . . there are two types of fiduciary relationships: (1) those that arise from "legal relations such as attorney and client, broker and client . . . partners, principal and agent, trustee and cestui que trust," and (2) those that exist "as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other."

Rhone-Poulenc Agro S.A. v. Monsanto Co., 73 F. Supp. 2d 540, 546 (M.D.N.C. 1999) (citations and quotations omitted). "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir. 1998) (internal quotation marks and citations omitted).

In the case *sub judice*, plaintiff does not allege in the complaint that plaintiff and Adams have a fiduciary relationship arising from a "legal relation[]." *Rhone-Poulenc*, 73 F. Supp. 2d at 546. Therefore, we must determine whether plaintiff and Adams have a fiduciary relationship existing in fact. Plaintiff does not allege in its complaint any facts that would show Adams had the "amount of control and domi-

nation required to form a fiduciary relationship outside that of the normal relationships recognized by law." *Id.* Thus, plaintiff's complaint does not allege the requisite elements necessary to state a cause of action for breach of fiduciary duty. This assignment of error is overruled.

b. Interference with contract and prospective advantage

[6] In the complaint, plaintiff alleges three claims for tortious interference against Adams and Danube. First, plaintiff alleges a claim for tortious interference with contract between plaintiff and RBP. Second, plaintiff contends in the alternative tortious interference with prospective advantage between plaintiff and RBP. Specifically, plaintiff contends that Adams and Danube induced RBP not to grant plaintiff an extension of plaintiff's existing contract with RBP. Third, plaintiff asserts that it had a contract to convey a portion of the property to a third party, NRP, and that after Danube took title to the property, Adams or Danube induced NRP not to honor its contract with plaintiff, but to instead contract directly with Adams or Danube.

> A claim for tortious interference of contract has five elements:
>
> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts *without justification*; (5) resulting in actual damage to plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (emphasis supplied). "Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992).

In the instant case, plaintiff's complaint alleges that plaintiff entered into a contract with RBP to purchase property for development. The complaint further alleges:

> 27. While the Property was under contract, [plaintiff] discussed the property with various end users and retail developers in order to commence marketing the Property.
>
> 28. Specifically, representatives of [plaintiff] discussed the Property with the Defendant Adams and the discussion

> focused on the sale to Adams by [plaintiff] of a portion of the Property for development.
>
> . . . .
>
> 75. As a realtor, a developer and/or a recipient of proprietary information, Adams understood that he owed a fiduciary duty to [plaintiff] . . . .

Therefore, looking at the face of the complaint, it appears plaintiff and Danube (including Adams) were developers and both wanted to purchase the property for development. We conclude plaintiff and Danube (including Adams) were competitors and as such, Danube and Adams' actions were justified. Because Danube and Adams' actions were justified, plaintiff fails to allege the requisite elements necessary to state a claim for relief regarding plaintiff's two tortious interference with contract claims. These assignments of error are overruled.

In order for a plaintiff to be successful on a claim of tortious interference with prospective advantage, plaintiff "must show that [d]efendants induced a third party to refrain from entering into a contract with [p]laintiff *without justification*. Additionally, [p]laintiff must show that the contract would have ensued but for [d]efendants' interference." *Holroyd v. Montgomery Cty.*, 167 N.C. App. 539, 546, 606 S.E.2d 353, 358 (2004) (internal quotation marks omitted) (internal citations and quotations omitted).

We previously stated plaintiff and Danube (including Adams) were competitors in developing property. Thus, Danube and Adams' actions were justified. Because Danube and Adams' actions were justified, plaintiff fails to allege the requisite elements necessary to state a claim for relief regarding plaintiff's tortious interference with prospective advantage. This assignment of error is overruled.

c. Lis Pendens

[7] Finally, with respect to defendants Danube and Adams, plaintiff contends the trial court erred by granting defendant Danube's motion to cancel the lis pendens.

However, before turning to a consideration of this issue, we must first address a preliminary matter. In plaintiff's new brief filed before this Court, plaintiff's attorneys included a statement incorporating by reference into the new brief the argument from a previous brief filed before this Court two years ago, rather than a new argument. Rule

28(b)(6) of our Rules of Appellate Procedure states in relevant part, "Assignments of error not set out in the appellant's brief, or in support of which *no reason or argument is stated or authority cited*, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2007) (emphasis supplied); *see also Fortner v. J.K. Holding Co.*, 319 N.C. 640, 357 S.E.2d 167 (1987) (Plaintiff's attorney's incorporating by reference into the new brief filed before the North Carolina Supreme Court the argument contained in plaintiff's brief filed before the Court of Appeals did not properly follow the rules of appellate procedure.). By including the same argument from a previous brief filed before this Court two years ago, plaintiff, in the new brief, did not appropriately preserve this issue for appellate review. Thus, we need not address this assignment of error.

V. Rosa Belvin Properties, LLC, Miles C. Belvin and Howard Eugene Belvin

[8] Plaintiff next asserts that the trial court erred by granting the motion to dismiss as to the Belvin defendants. Specifically, plaintiff argues the trial court erred in granting the Belvin defendants' motion to dismiss regarding plaintiff's claims for breach of contract. Plaintiff avers the trial court granted the Belvin defendants' motion to dismiss under both Rule 12(b)(6) and Rule 12(c) of the North Carolina Rules of Civil Procedure.

Plaintiff contends that when the court granted the Belvin defendants' motion to dismiss, the court acted *sua sponte*, and specifically considered exhibits appended to the Belvin defendants' answer. Plaintiff avers that because the trial court considered exhibits appended to the Belvin defendants' answer, the trial court, *sua sponte*, converted the Rule 12(b)(6) motion to a Rule 12(c) motion. Therefore, plaintiff contends the issue on appeal is whether the trial court's dismissal of plaintiff's breach of contract claim is correct under the standard of review for granting a motion for judgment on the pleadings pursuant to Rule 12(c). The Belvin defendants argue that plaintiff's appeal should be dismissed for failure to comply with Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. We disagree. Rule 28(b)(6) of our Rules of Appellate Procedure provides, in relevant part, that an appellate brief shall contain:

> An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, iden-

> tified by their numbers and by the pages at which they appear in the printed record on appeal.

N.C.R. App. P. 28(b)(6).

In the case *sub judice*, in plaintiff's appellate brief, the assignment of error pertaining to the court's consideration of evidence outside plaintiff's complaint under the question presented regarding this issue is not referenced. "The Rules of Appellate Procedure are mandatory, and failure to follow them will subject an appeal to dismissal." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 82, 548 S.E.2d 535, 537 (2001) (citations omitted). However, "[t]his Court has held that when a litigant exercises substantial compliance with the appellate rules, the appeal may not be dismissed for a *technical violation* of the rules." *Spencer v. Spencer*, 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003) (emphasis supplied) (internal quotation marks and citations omitted). One of the purposes of our Appellate Rules is to provide the appellee and the Court "notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *see generally Selwyn Village Homeowners Ass'n v. Cline & Co., Inc.*, 186 N.C. App. 645, 651 S.E.2d 909 (November 6, 2007) (No. COA07-116).

Here, plaintiff lists only nine assignments of error in the record. Therefore, the appellees and this Court can easily ascertain the appeal. Furthermore, since plaintiff violated only one appellate rule, we find no compelling reason to dismiss this issue and exercise our discretion to reach the merits regarding the breach of contract issue.

[9] We also note that the trial court acted *sua sponte* in granting the Belvin defendants' motion pursuant to Rule 12(c). This Court has determined a trial court may apply Rule 12(c) *sua sponte*. *See Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 660, 507 S.E.2d 923, 926 (1998) ("the trial court could have applied Rule 12(c) *sua sponte*.").

To determine whether the trial court erred in granting judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure in favor of the Belvin defendants, we apply *de novo* review. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal quo-

tation marks omitted) (internal citations and quotations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted). "A motion for judgment on the pleadings pursuant to . . . Rule 12(c), should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Toomer*, 171 N.C. App. at 66, 614 S.E.2d at 334 (internal quotation marks omitted) (citations omitted).

In the instant case, on 17 April 2002, plaintiff signed the contract with the Belvin defendants to purchase property for development. In section 19, the contract stated, "Time is of the essence in completing every item called for by this Contract." Although the contract specified several conditions for closing, the parties subsequently extended the closing date several times by written amendments. The third and final written amendment extended the closing until 29 January 2004 ("third amendment"). On 22 January 2004, the Belvin defendants' counsel sent a letter notifying the plaintiff that the Belvin defendants would not grant further extensions to close beyond 30 January 2004. On 4 February 2004, plaintiff's counsel sent a letter to the Belvin defendants' counsel requesting additional time for plaintiff to close on the property. On 10 February 2004, the Belvin defendants' counsel sent a letter to plaintiff's counsel declaring the Belvin defendants were "unwilling to enter into any further extension of the time for closing." On 31 March 2004, RBP sold and conveyed the property to Danube.

In granting the Belvin defendants' motion to dismiss, the trial court considered the third amendment which was appended to the Belvin defendants' answer and effectively converted the Belvin defendants' Rule 12(b)(6) motion to dismiss into a Rule 12(c) motion for judgment on the pleadings. The Belvin defendants argue that the clause, "[t]ime is of the essence," in section 19 of the original contract dated 17 April 2002 was saved by the clause in the subsequent written amendments declaring "all terms and conditions of the Contract shall remain in full force and effect." Therefore, the "[t]ime is of the essence" clause was in effect when the parties agreed to a third amendment. Since plaintiff did not close by the required closing date, the contract had expired.

Plaintiff argues the subsequent written amendments to the original 17 April 2002 contract amended the closing date and thus, logically waived the "[t]ime is of the essence" clause regarding the clos-

ing date. Since the "[t]ime is of the essence" clause was waived, plaintiff had a reasonable time to close. We disagree.

In *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 652 S.E.2d 365 (2007), this Court determined whether the defendant waived the "time is of the essence" clause stated in the parties' contract. The parties executed a contract for the sale of real property which included an addendum stating: "Time is of the essence as to the terms of this contract." *Id.*, 187 N.C. App. at 169, 652 S.E.2d at 366. The defendant subsequently agreed to allow plaintiff to close on a date two days after the date specified in the contract. *Id.*, 187 N.C. App. at 169, 652 S.E.2d at 366. When defendant refused to extend the closing date any further, plaintiff sued. *Id.*, 187 N.C. App. at 170, 652 S.E.2d at 367. On appeal, plaintiff argued that "defendant waived the contract's 'time is of the essence clause' through her subsequent actions on and after [the original closing date]. *Id.*, 187 N.C. App. at 172, 652 S.E.2d at 368. This Court disagreed:

> Waiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. . . . 'There can be no waiver unless it is intended by one party and so understood by the other[.]' . . . [Defendant] agreed to close . . . two days after the closing should have occurred. Defendant's waiver, if any, is limited to the two additional days she allowed for the closing to occur. Defendant did not waive the 'time is of the essence' clause.

Id., 187 N.C. App. at 172-73, 652 S.E.2d at 368 (citing *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492 (2000); and quoting *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975) (internal citation omitted)).

In the instant case, each of the three written amendments restated the warning in section 4, that if closing did not occur by the amended date "this Contract shall thereupon become null, void and of no further effect[.]" In addition, each of the amendments expressly stated that:

> Except as amended herein, all terms and conditions of the Contract shall remain in full force and effect.

Thus, the amendments changed only the latest possible closing date, but retained all other provisions of the contract, including the contract's "[t]ime is of the essence" clause. Moreover, since the

amendments retained the other provisions of the contract, defendant did not "show an intention to relinquish" the "[t]ime is of the essence clause" in executing the amendments. *Id.*, 187 N.C. App. at 172-73, 652 S.E.2d at 368.

"Here, the 'time is of the essence' provision was written into the contract as an additional provision and was acknowledged by both parties. A court must construe a contract as it is written and give effect to every part and provision whenever possible." *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001) (citing *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984)). Further, in interpreting a contract, "the common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it." *Marcoin*, 70 N.C. App. at 504, 320 S.E.2d at 897 (citations omitted).

Therefore, we conclude the subsequent written amendments to the contract unequivocally incorporated by reference the entire contract, including the "[t]ime is of the essence" clause. It is undisputed that plaintiff did not close within the time frame set forth in section 4 of the contract as amended. Since the contract contained a "[t]ime is of the essence" provision and plaintiff did not close within the required time frame, plaintiff's claim for breach of contract must fail. This assignment of error is overruled.

VI. Lee McGregor

[10] Plaintiff's final argument is that the trial court erred by granting McGregor's motion to dismiss plaintiff's claim for breach of fiduciary duty. "[A] broker representing a purchaser or seller in the purchase or sale of property owes a fiduciary duty to his client based upon the agency relationship itself." *Kim v. Professional Business Brokers*, 74 N.C. App. 48, 51-52, 328 S.E.2d 296, 299 (1985) (citations omitted).

In the case *sub judice*, plaintiff's contract with RBP expired on 30 January 2004 because plaintiff did not complete the enumerated conditions under sections 4 and 25 of the contract. Plaintiff's complaint alleges, *inter alia*, that:

> 59. [Plaintiff] was represented in its contractual transaction with RBP by Defendant McGregor, whom [plaintiff] is informed and believes is a realtor duly licensed as such by the State of North Carolina.

> 60. In February or March of 2004, McGregor contacted counsel for [plaintiff] and in his capacity as realtor for [plaintiff], requested a copy of all due diligence and development materials compiled by [plaintiff] in relation to the [p]roperty.
>
> 61. Counsel for [plaintiff], after confirming that McGregor was still acting as the realtor for [plaintiff], complied with McGregor's request and forwarded the materials to McGregor.
>
> 62. [Plaintiff] is informed and believes . . . that McGregor furnished the information received from [plaintiff] to Adams, Adams' agents, or Danube.
>
> 63. At all times relevant herein, McGregor was employed as the realtor for [plaintiff]; as such, he owed a fiduciary duty to [plaintiff].

However, since RBP refused to extend the deadline for closing beyond 30 January 2004, it appears McGregor no longer owed any fiduciary duty to plaintiff regarding the sale of the property after 30 January 2004. As such, McGregor did not breach any fiduciary duty previously owed to plaintiff when he contacted plaintiff's attorney in February or March 2004 requesting plaintiff's development materials regarding the property.

Furthermore, the development materials McGregor requested from plaintiff's attorney in February or March 2004 did not belong to the plaintiff. On 23 September 2003, plaintiff and RBP executed a third amendment to the contract which stated in relevant part:

> If the closing has not occurred by January 29, 2004 solely because the conditions set forth in Section 25 have not been fulfilled to Purchaser's sole satisfaction, this Contract shall thereupon become null, void and of no further effect, the parties shall be relieved of all obligations hereunder, the Deposit shall be returned to the Purchaser and Purchaser shall deliver to Seller copies of all studies performed by Seller on the Property including, but not limited to, all site plans, engineering reports and environmental studies performed after the Examination Period, at no cost to Seller.

This same provision that RBP would be the owner of any materials completed by plaintiff in relation to the property if the contract became null and void also was in the original contract between plaintiff and RBP executed on 17 April 2002. Thus, any materials com-

piled by plaintiff in relation to the property belonged to RBP after 29 January 2004 pursuant to the terms of the contract. Therefore, McGregor was free to request the materials from plaintiff's attorney and he did not breach a fiduciary duty owed to plaintiff as a result of their previous relationship. This assignment of error is overruled.

VII. Conclusion

In conclusion, the judgment of the trial court is affirmed as to plaintiff's claims for unfair and deceptive practices; civil conspiracy; fraud; breach of contract; breach of fiduciary duty regarding Danube, Adams, and McGregor; tortious interference with contract; tortious interference with prospective advantage; and canceling the lis pendens.

Affirmed.

Judges STEPHENS and ARROWOOD concur.

CYNTHIA ANN FREY, PLAINTIFF v. JOHN P. BEST, JR., DEFENDANT

No. COA07-703

(Filed 15 April 2008)

1. Divorce— alimony—reduction—findings

The trial court erred by reducing a husband's alimony obligation to zero without making findings regarding the wife's reasonable needs or the husband's ability to pay. A finding that the wife's income increased is not alone sufficient to warrant modification of an alimony order, and the court may not use the husband's capacity to earn as the basis of its alimony award unless it finds that he deliberately depressed his income or indulged in excessive spending.

2. Child Support, Custody, and Visitation— child support—reduction—findings

The trial court's findings were not sufficient to reduce a husband's child support obligation where the husband had remarried and had another child (that alone is not sufficient) and findings about the husband's decreased income were not sufficient to determine whether the modification of support was

based on a substantial change in circumstances supported by competent evidence.

3. Child Support, Custody, and Visitation— moving out of state—findings conclusive on appeal

The trial court did not abuse its discretion by denying a wife's request to modify the parenting agreement to allow her to relocate with the children to the State of Washington. The court's findings are conclusive on appeal if there is evidence to support them, even if the evidence might sustain findings to the contrary.

4. Child Support, Custody, and Visitation— visitation increased—findings

The trial court erred by increasing a husband's visitation with the minor children without sufficient findings to support its conclusion. The conclusion about the husband's custodial time was not supported by findings of fact indicating that those changes affected the welfare of the parties' minor children.

Appeal by plaintiff from judgment entered 28 September 2006 by Judge Lillian Jordan in Durham County District Court. Heard in the Court of Appeals 4 February 2008.

Sandlin & Davidian, P.A., by Deborah Sandlin, for plaintiff-appellant.

No brief, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff Cynthia Ann Frey ("wife") and defendant John P. Best, Jr. ("husband") were married on 4 April 1998 and separated on 13 September 2002. Three children were born to the parties during the course of their marriage; at the time the parties separated, the ages of the children were four years, two years, and six months. On 8 October 2002, the parties executed a Separation, Child Custody, and Family Support Agreement. In May 2003, wife filed a complaint seeking enforcement of the parties' October 2002 Family Support Agreement, as well as sole custody of the minor children, child support, post-separation support, alimony, equitable distribution, issuance of a temporary restraining order to prevent waste of a named marital asset, and attorney's fees. On 20 June 2003, husband filed his Answer, Counterclaim, and Motions seeking joint custody of the minor children and praying for the court to set the amount of child support

according to the North Carolina Child Support Guidelines. Wife filed her Reply to husband's counterclaims on 21 July 2003. The record on appeal referenced more than eighteen motions subsequently filed by both parties; those motions and orders relevant to the issues before this Court are identified below.

On 26 June 2003, the parties agreed in a consent order that husband would pay $1,150.00 per month in child support and $1,150.00 per month in alimony, in addition to other costs including health insurance for wife and the minor children, as well as $5,500.00 in arrearages accrued under the parties' October 2002 Family Support Agreement. On 10 July 2003, the court entered an order incorporating the parties' Parenting Agreement which established that the minor children would reside with wife and would visit with husband on specified days and times.

On 12 March 2004, husband filed a motion to modify alimony and child support based on a substantial change in circumstances. On 14 June 2004, wife filed a motion praying for the court to deviate from the North Carolina Child Support Guidelines in the event that the court determined there had been a substantial change in circumstances when considering husband's 12 March motion. On 10 September 2004, the court entered an Amended Order dismissing wife's motion to deviate from the North Carolina Child Support Guidelines and reducing husband's child support obligation to $964.95 per month. The amount of alimony payable to wife remained $1,150.00 per month based on the court's findings regarding wife's actual monthly needs and its conclusions regarding husband's continued ability to pay. The court also ordered husband to pay arrearages accrued in child support, alimony, and unreimbursed medical expenses for the minor children, as well as wife's attorney's fees. On 4 November 2004 and 28 March 2006, the court ordered husband to be held in Durham County Jail after finding him in contempt for continued nonpayment of child support and alimony.

On 28 June 2006, wife filed a motion to amend the current parenting agreement between the parties to allow her to relocate with the minor children to Olympia, Washington. On 11 July 2006, the court entered a pretrial conference order signed by wife (*pro se*), husband's counsel, and the presiding judge setting the hearing on the issue of child custody for 21-22 September 2006. On 11 August 2006, husband filed and served a motion to modify child custody, child support, and alimony based upon a material and substantial change in circum-

stances. A hearing on wife's motion to permit relocating the children to the State of Washington was held on 14-15 September 2006. At that time, the court indicated its intent to also hear husband's 11 August 2006 motion to "modify the existing custodial, child support and alimony orders, which are in effect." Wife's counsel asked to continue the matters of child support and alimony because she was not aware that those issues were set for court on that day and was "not prepared to go forward." Nevertheless, the court decided to "just hear all issues pending."

On 28 September 2006, the court entered an order denying wife's motion to relocate with the minor children, reducing husband's alimony payments to $0, and reducing husband's child support payments to $720.00 per month. Husband was also ordered to pay a total of $43,412.30 in arrearages arising from amounts due for alimony, child support, medical bills, child care, and attorney's fees. Due to a finding that husband "ha[d real anger] problems that if left unchecked could have an adverse effect on his sons," husband was also ordered to attend an anger management assessment within 90 days from the order entry date, and to complete the treatment recommended, if any. By consent of the parties, all of whom were residents of Wake County at the time of the September 2006 hearing, the case was transferred to Wake County.

The record on appeal contains forty-five assignments of error. Those assignments of error for which wife failed to present arguments are not discussed below and 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] Wife first contends that the trial court erred by reducing husband's alimony obligation to zero dollars ($0.00) without making findings of fact regarding wife's reasonable needs or husband's ability to pay alimony. We agree.

"An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, 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." N.C. Gen. Stat. § 50-16.9(a) (2007). "This power to modify includes the power to terminate alimony altogether." *Self v. Self*, 93 N.C. App. 323,

325, 377 S.E.2d 800, 801 (1989) (citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966)).

On 26 June 2003, the parties in this case agreed in a consent order that husband would pay wife $1,150.00 per month in alimony. "[W]hen alimony is part of a private agreement between the parties and is then incorporated into a court order such as a divorce decree[,] . . . the agreement is treated as a court order for purposes of modification." *Cunningham v. Cunningham*, 345 N.C. 430, 434, 480 S.E.2d 403, 405 (1997). Therefore, for the trial court to have the authority to modify the 2003 alimony order in the present case, it must have determined that there was "a showing of changed circumstances." *See* N.C. Gen. Stat. § 50-16.9(a).

" '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.' " *Cunningham*, 345 N.C. at 436, 480 S.E.2d at 406 (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), *disc. review denied*, 314 N.C. 331, 333 S.E.2d 489 (1985)). However, "it [i]s error for a court to modify an alimony award based only on a change in the parties' earnings." *Self*, 93 N.C. App. at 326, 377 S.E.2d at 801. "The significant inquiry is how [a] change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support." *Id.* (internal quotation marks omitted). The trial court is required to "find specific ultimate facts to support [its] judgment [that there has been a material and substantial change in circumstances to support a modification of an alimony order], and the facts found must be sufficient for the 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).

A.

When determining a dependent spouse's need for support, "[t]he trial court should . . . consider[] the *ratio* of [the dependent spouse's] earnings to the funds necessary to maintain [his or] her accustomed standard of living . . . ." *Self*, 93 N.C. App. at 326, 377 S.E.2d at 801 (internal quotation marks omitted). This Court has held that "the trial court's failure [to consider or] to make any findings regarding [the dependent spouse's] reasonable current financial needs and expenses and the ratio of those needs and expenses to [his or] her income constitute[s] error." *See id.* at 326-27, 377 S.E.2d at 802.

In the present case, the court concluded there had been "a substantial and material change in circumstances" affecting husband's obligation to pay alimony to wife based on the following findings of fact:

> 17. When the parties entered into the consent order on June 26, 2003 setting the alimony payments at $1150.00 per month[, wife] was employed part time and had monthly gross earnings of $200.00 and the youngest child was 6 months old. [Husband] has filed a motion to decrease his alimony payments.
>
> 18. [Wife] is currently employed as a CPA. She works 35 hours per week and makes $25.00 per hour and has a monthly gross income of $3788.00. This constitutes a substantial and material change in circumstances and the alimony award is reduced to zero. However[, husband] is still responsible for the alimony arrearages [in the amount of] $29,350.12 . . . .

In other words, as the basis for its determination that there was a "substantial and material change in circumstances" sufficient to allow modification of the alimony award, the trial court found only that wife's income had increased since the entry of the original alimony order. However, an "increase in [wife's] income . . . alone is not a sufficient change in circumstances to warrant a modification" of the alimony order. *See Cunningham*, 345 N.C. at 439, 480 S.E.2d at 408. Therefore, "[w]e find error in the trial court's failure to make any findings as to [wife's] current reasonable expenses and her income and earning capacity and the ratio between them." *See Self*, 93 N.C. App. at 327, 377 S.E.2d at 802.

B.

"[T]he ability of the supporting spouse to pay [alimony] is ordinarily determined by his or her income at the time the award is made." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). "If the supporting spouse is deliberately depressing income or engaged in excessive spending [because of a disregard of the marital obligation to provide support for the dependent spouse], then capacity to earn, instead of actual income, may be the basis of the award." *Id.* Absent findings of fact to indicate whether the trial court believed that the supporting spouse was "deliberately depressing his or her income or indulging in excessive spending . . . [in] disregard of the marital obligation to provide support for the dependent spouse, the

ability of the supporting spouse to pay alimony is ordinarily determined by his or her income at the time the award is made." *Id.*

Here, the court made the following findings of fact regarding husband's income:

> 20. At the time of the June 2004 hearing [in which husband's child support obligation was first reduced, the] . . . court found [husband's] monthly gross income to be $5618.00 from his three jobs. He received $1020.00 per month from the City of Durham as a Councilman, $870.00 per month from Bennett Pointe Grill as a bartender, and $3720.00 per month from his business JP Ryan's Party Rentals. [Husband] is no longer a Councilman. He lost the election last fall. He no longer works for Bennett Pointe Grill. It was a mutual decision between the owner and [husband].
>
> 21. [Husband] is working only with his business JP Ryan's Party Rentals at this time. He has for years worked second and even third jobs. As with most self employed persons[,] it is difficult to determine exactly what [husband's] income is from his business since there is evidence he pays personal expenses from the business he claims as business expenses and there was evidence that he does not always claim all income[,] especially that paid in cash.
>
> 22. The court finds that [husband] is capable of earning at least as much as he was earning in June 2004 minus the amount he earned as a city councilman. The court therefore finds his gross monthly income for the purpose of calculating child support to be $4600.00.

The court found that husband was only working with his business JP Ryan's Party Rentals at the time the court's modified alimony award was made, and found that husband earned $3,720.00 from that business in June 2004. However, the trial court made no findings about his *actual* income from that business at the time of the award. The court also found husband "capable of earning" $4,600.00 "*for the purpose of calculating child support*" based on husband's earnings "in June 2004 minus the amount he earned as a city councilman." (Emphasis added.) Nonetheless, unless the trial court makes findings of fact that husband was "deliberately depressing his . . . income or indulging in excessive spending because of a disregard of [his] marital obligation to provide support for [his] dependent spouse," *see Quick*, 305 N.C. at

453, 290 S.E.2d at 658, the court may *not* use husband's "capacity to earn" as the basis for its alimony award.

Additionally, where the alimony order originates from a private agreement between the parties, as it does here, "determining whether there has been a material change in the parties' circumstances sufficient to justify a modification . . . may require the trial court to make findings of fact as to what the original circumstances or factors were *in addition to* what the current circumstances or factors are." *Cunningham*, 345 N.C. at 436, 480 S.E.2d at 406 (emphasis added).

Therefore, "[w]e conclude that the trial court's findings of fact are insufficient for us to determine as a matter of law whether there has been a change of circumstances sufficient to require a modification or termination of the alimony order." *See id.* at 438, 480 S.E.2d at 408. Thus, we vacate the portion of the judgment reducing husband's alimony obligation to zero and remand to the trial court so that it may make further findings and conclusions with respect to this issue, consistent with this opinion.

II.

[2] Wife next contends the trial court erred by reducing husband's child support obligation without making sufficient findings of fact that there had been a substantial change in circumstances affecting the welfare of the minor children. Again, we agree.

"[A]n order of a court of this State for support of a minor child 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." N.C. Gen. Stat. § 50-13.7(a) (2007). "The changed circumstances with which the courts are concerned are those which relate to child-oriented expenses." *Gilmore v. Gilmore*, 42 N.C. App. 560, 563, 257 S.E.2d 116, 118 (1979). "The burden is upon the party seeking the modification to establish the requisite change in circumstances." *Id.*

"The modification of the order must be supported by findings of fact, based upon competent evidence, that there has been a substantial change of circumstances affecting the welfare of the child." *Ebron v. Ebron*, 40 N.C. App. 270, 271, 252 S.E.2d 235, 236 (1979). The findings of facts must be "specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d

185, 189 (1980) (alteration in original) (internal quotation marks omitted). "In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence." *Id.*

A.

Wife first argues that it was "improper for the trial court to consider the birth of [husband's] child with his new wife as a change in circumstances" sufficient to permit a modification of his child support obligation to the parties' minor children. "[P]ayment of support for a child of a former marriage may not be avoided merely because the husband has remarried and thereby voluntarily assumed additional obligations." *Shipman v. Shipman*, 25 N.C. App. 213, 215, 212 S.E.2d 415, 417 (1975) (citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966)). "[I]ncreases in expenses [that] were voluntarily assumed additional obligations[, including entering into another marital and family relationship,] . . . although they may render the child support payments more burdensome, do not justify a reduction in such payments." *Gilmore*, 42 N.C. App. at 564, 257 S.E.2d at 119. Nevertheless, the North Carolina Child Support Guidelines allow the use of a deduction from a parent's gross income for natural or adopted children "(other than children for whom child support is being determined)" when those other children "currently reside with the parent" who is a party to the support action. *See* N.C. Child Support Guidelines, AOC-A-162, at 4 (2002) (amended 1 Oct. 2006). However, the Guidelines do not permit the use of that deduction to "be the sole basis for modifying an existing [child support] order." *Id.*

In the present case, the trial court found that, "[s]ince the parties separated[, husband] remarried and had another son who is two years old and is the half brother of the three sons born of these parties. . . . [Husband] and his second wife are separated and he has this son approximately half the time." While husband might have been eligible to receive a deduction in his monthly gross income for the purpose of calculating child support if it was determined that the minor child from his second marriage was residing with him, this deduction cannot be the "sole basis" for the court's determination that there had been "substantial and material changes in circumstances regarding the amount of child support." However, it is not clear from the court's order whether this finding was the "sole basis" for the court's decision to modify child support.

B.

Wife next argues that the trial court erred by modifying child support without finding that husband voluntarily left employment opportunities in bad faith and in disregard of his financial obligations to support their minor children. "[A parent's] ability to pay child support is normally determined by his actual income at the time the award is made or modified." *Goodhouse v. DeFravio*, 57 N.C. App. 124, 127, 290 S.E.2d 751, 753 (1982). "If, however, there is a finding that the [parent] is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his *capacity to earn may be made the basis of the award*." *Id.* (emphasis added). But "[t]he imposition of the earnings capacity rule must be based on evidence that tends to show the husband's actions resulting in reduction of his income were not taken in good faith." *Id.* at 127-28, 290 S.E.2d at 753-54 (internal quotation marks omitted).

In the findings of fact excerpted in Section I above, the trial court found that husband was only working with his business JP Ryan's Party Rentals at the time the 28 September 2006 order was entered. The court also found that husband "no longer work[ed] for Bennett Pointe Grill" as a result of a "mutual decision between the owner and [husband]." So, the trial court found that husband was "capable of earning at least" $4,600.00 "for the purpose of calculating child support" based on his earnings "in June 2004 minus the amount he earned as a city councilman." However, the trial court made no findings about husband's *actual* income at the time of the award, and made no findings that husband left his job at Bennett Pointe Grill in bad faith or otherwise tried to deliberately minimize his child support obligation.

The welfare of the child is "the 'polar star' in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the [supporting parent] to meet the need." *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967). In the absence of findings of fact showing bad faith, child support orders may be modified upon a showing of substantial change in circumstances

> [which] may be shown in any of several ways [including]: a substantial increase or decrease in the child's needs; a substantial and involuntary decrease in the income of the non-custodial par-

> ent even though the child's needs are unchanged; [or] a voluntary decrease in income of either supporting parent, absent bad faith, upon a showing of changed circumstances relating to child oriented expenses.

Wiggs v. Wiggs, 128 N.C. App. 512, 515, 495 S.E.2d 401, 403 (1998) (citations omitted), *disapproved of on other grounds*, *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). However, without sufficient findings to establish any of these factors or to support the trial court's use of husband's earning capacity to calculate his monthly gross income in lieu of his actual earnings at the time of the award, we cannot determine whether the court's conclusion to modify husband's September 2004 child support obligation was based on a substantial change in circumstances supported by competent evidence. *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189. Accordingly, we must vacate the portion of the September 2006 judgment reducing husband's child support obligation to $720.00 per month and remand so that the trial court may make further findings and conclusions with respect to this issue, consistent with this opinion.

III.

[3] Next, wife contends that the trial court erred by denying her request to modify the parties' parenting agreement to allow her to relocate with the children to the State of Washington. After careful consideration of her arguments, we must disagree.

"In granting visitation privileges, as well as in awarding primary custody of minor children, necessarily a wide discretion is vested in the trial judge." *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); *see also In re Custody of Pitts*, 2 N.C. App. 211, 212, 162 S.E.2d 524, 525 (1968) ("[The trial judge] has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion."). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833. Thus, absent a clear abuse of discretion, a trial court's "findings of fact are conclusive on appeal if there is [substantial] evidence to support them, even if evidence might sustain findings to the contrary." *Everette v. Collins*, 176 N.C. App. 168, 170, 625

S.E.2d 796, 798 (2006) (citing *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

"[T]he court may not make any modifications to [a final or permanent child custody or visitation] order without first determining that there has been a 'substantial change in circumstances' " affecting the welfare of the child. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) (citing *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002)). "[I]f the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003).

This Court has stated that, "[i]n evaluating the best interests of a child in a proposed relocation, the trial court may appropriately consider several factors." *Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000). Those factors include:

> [t]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Id. (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 80, 418 S.E.2d 675, 680 (1992), *disapproved of on other grounds*, *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)). However, although the trial court "may appropriately consider" these factors, " '[t]he court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties.' " *Id.* at 141, 530 S.E.2d at 580 (quoting *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954)). " 'All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations, and *if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State*, the court should not hesitate to do so.' " *Id.* (emphasis added). "Naturally, no hard and fast rule can

be laid down for making this determination, but each case must be determined upon its own peculiar facts and circumstances." *Griffith*, 240 N.C. at 275, 81 S.E.2d at 921.

In the present case, the trial court concluded in its Conclusion of Law 2 that "[wife's] plan to move the three minor sons to . . . Olympia, Washington[,] is a substantial and material change in circumstances regarding the welfare of said sons." Wife did not assign error to this conclusion of law. The North Carolina Rules of Appellate Procedure require that "[t]he appellant must assign error to each conclusion [of law] it believes is not supported by the evidence." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (citing 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." *Id.* Thus, wife waived her right to challenge this conclusion of law. Instead, wife contends that the court's findings of fact do not support its Conclusions of Law 3 and 4:

> 3. This proposed move across the country would have an adverse effect on the sons and is not in the best interest of the parties' three sons who are ages 4, 6, and 8 because the children have a close and loving relationship with their father . . . . They also have close relationships with extended family members of both parties who live in the area.
>
> 4. It is not in the best interest of the minor sons to be uprooted from the area where they have spent their entire life and be separated from their father and their extended family members in the area.

In support of these conclusions, the trial court made the following findings of fact:

> 6. The court finds that [husband] has regularly had his three sons in his care on a consistent and regular basis and that he and his sons have a good, loving and close relationship.
>
> 7. The oldest son, JP, for a time was very angry and did not want to be with [husband]. The court finds that this has changed. The aunt of [wife] testified that [husband] picks up and delivers the boys to her home each time he has them and that the boys are glad to see [husband] and are pretty much happy to go with him and the court so finds.
>
> . . . .

9. Since the parties separated[, husband] remarried and had another son who is two years old and is the half brother of the three sons born of these parties. All four of these children have a close relationship. [Husband] and his second wife are separated and he has this son approximately half the time.

10. [Wife] and [husband] have always lived in the Raleigh/Durham area, as have all of their sons. [Wife's] parents previously lived in Raleigh. She has a brother and sister-in-law in this area and an uncle and aunt who live in Raleigh. [Husband's] parents live in the Durham area. The sons have close relationships with all of these extended family members.

11. [Wife's] parents and her other brothers and sisters and their families live in the Olympia, Washington area. [Wife] wants to relocate there and take her three sons with her so she will have the moral support of her family and help with the boys. She owns a townhouse in Raleigh, the two older boys go to school in Raleigh, she works as a CPA, and she has not remarried and does not have a job transfer or a job in Washington. She does have the promise of a job there. As a CPA she can earn the financial support she needs either here or in Washington.

. . . .

13. It is [husband's] increasing anger over the last [1.5] years and his lack of payments that have made [wife's] life increasingly unpleasant and has encouraged her to want to be closer to her parents.

. . . .

15. [Wife] has not taken advantage of the help she could have from [husband's] family. She has rebuffed their offers to see and keep the children by declaring that they can see the children on [husband's] time. Yet she testified that she allows others to care for the children when she needs help and the court so finds.

In *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000), when the trial court "found that the proposed relocation would adversely affect the relationship between the father and his child[, but] . . . made no findings of fact indicating the effect of the . . . relocation on the child himself [and did not] . . . discuss the impact of the proposed

move on the child," *id.* at 141, 530 S.E.2d at 579-80, this Court concluded that "the facts found d[id] not support the conclusions that there ha[d] been a substantial change in circumstances and that it [wa]s in the best interest of the child that the custody decree be amended." *Id.* at 142, 530 S.E.2d at 580. However, in this case, the trial court not only made findings regarding the improving relationship between the children and their father, but also regarding the close relationships the children share with their half brother from husband's second marriage, maternal aunt and uncle, maternal great aunt and uncle, and paternal grandparents who all live in the area. Husband testified that his parents and stepparents, as well as numerous cousins, aunts, and uncles, all live in the Raleigh/Durham area, and his children see them "on a regular occasion" like holidays, birthdays, and other special events, "at least once a month, at the minimum" averaged over a year. Wife's best friend further testified that her children and wife's children have grown up together and are best friends and see each other daily.

Both parties presented evidence that the parties' children were actively involved in soccer, swimming, baseball, basketball, and karate, and their oldest son was active in the Cub Scouts. Wife's best friend testified that the oldest son took second place honors in the Cub Scout-sponsored Pinewood Derby with his maternal great uncle, where they built, painted, and raced a car made out of a block of pinewood, and testified that husband was also present at the event, cheering on his son. Husband, who has joint custody of the minor child from his second marriage, testified that the four children all play well together. He also testified that the parties' three children enjoy building forts, playing laser tag, and riding bikes when they are in his care.

In support of her request to move to Washington, wife testified that her personal Internet research indicated that the average SAT scores of the schools in the State of Washington were about fifty points above North Carolina's average scores, and almost forty points above the national SAT average scores. Wife also testified that the same activities in which the children currently participate, including Cub Scouts, karate, and other sports-oriented programs, are offered in the community in which she and the children would live in Olympia, Washington. Wife also argues that "one of the reasons [she] wanted to leave North Carolina was to put some distance between her and [husband] and defray some of the acrimony that existed." The trial court found that wife's motive in seeking to relocate to

Washington was "so she will have the moral support of her family *and help with the boys*." (Emphasis added.) Wife's mother testified about her willingness to assist her daughter with the children, and identified immediate family members near her home in Olympia, Washington, who would also be available to support wife to look after the children. However, wife did not assign error to the court's finding that she "has not taken advantage of the *help she could have* from [husband's] family," (emphasis added), and "rebuffed their offers to see and keep the children by declaring that [husband's family] can see the children on [husband's] time."

Since the trial court's "findings of fact are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary," *Everette*, 176 N.C. App. at 170, 625 S.E.2d at 798 (citing *Williams*, 288 N.C. at 342, 218 S.E.2d at 371), we hold that the trial court's denial of wife's motion to relocate with the children was not an abuse of discretion "manifestly unsupported by reason." *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

IV.

[4] Finally, wife contends that the trial court erred by increasing husband's visitation time with the minor children without sufficient findings of fact to support its conclusion. We agree.

"The same standards that apply to changes in custody determinations are also applied to changes in visitation determinations." *Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811 (citing *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978)). "In a custody modification action, . . . the existing child custody order cannot be modified [unless] . . . the party seeking a modification [first shows] that there has been a substantial change in circumstances affecting the welfare of the child . . . ." *Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002). The moving party must prove a "nexus" between the changed circumstances and the welfare of the child in order for the trial court to determine that a child support order may be modified, *see Shipman*, 357 N.C. at 478, 586 S.E.2d at 255-56 (citing 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.103 (5th rev. ed. 2002)), "and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Id.* at 478, 586 S.E.2d at 255.

Here, in support of its conclusion that "[t]here have been substantial and material changes in circumstances regarding [husband's]

custodial time with the minor sons since the entry of the order approving the parenting agreement in this case on July 10, 2003," the trial court made the following findings of fact:

> 5. The parties hereto entered into a parenting agreement that became an order of the court July 9, 2003. According to the agreement the three sons are to be in [husband's] care for a period of time each weekend and every Tuesday from 3:30 p.m. until 6:00 p.m. Due to [husband's] work schedule at the time the parties agreed in October 2003 to a modification of this schedule eliminating the Friday night every other weekend. In March of 2006 the parties further modified the schedule and [husband] began having his sons in his care every other weekend from Saturday at 9:00 a.m. until late on Sunday afternoon and every Tuesday. In addition there is some holiday time and three weeks in the summer. [Husband] has not exercised all of his three weeks in the summer but he has exercised the other times. This past summer he used two weeks of his time.
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> . . . .
>
> 8. Since the entry of the order approving the Parenting Agreement and the oral agreement modifying it there has been a substantial change in circumstances in that [husband] no longer works on Friday nights and rents a three-bedroom townhouse instead of a one-bedroom apartment. The children are older now as they were only 6 months, 2 years and 4 years when the parties separated.

As a result of these findings, the trial court ordered an increase in husband's visitation with the minor children.

"Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated." *Coble*, 300 N.C. at 714, 268 S.E.2d at 190. The "link in the chain of reasoning [between findings of fact and conclusions of law] must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto." *Id.* Here, the court's conclusion that there had been a substantial change in circumstances regarding husband's "custodial time" is not supported by findings of fact which indicate that those changes affected the welfare of the parties' minor children. Accordingly, we must vacate the portion of the judgment increasing hus-

band's visitation with the parties' minor children and remand to the trial court so that it may make further findings and conclusions consistent with this opinion.

Our decision to remand this matter for additional proceedings with respect to the issues of alimony and child support render it unnecessary to address wife's contention that she did not receive proper notice from the court that the issues of child support and alimony raised in husband's 11 August motion would be heard at the 14-15 September 2006 hearing.

In closing, we are constrained to remind counsel that "[t]he Rules of Appellate Procedure are mandatory; an appellant's failure to observe the rules frustrates the process of appellate review and subjects the appeal to dismissal." *May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000) (citing *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999)); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, No. 303A07 (N.C. Mar. 7, 2008) ("[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y] of resolving disputes. It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice.") (second alteration in original) (citation omitted) (internal quotation marks omitted). Here, our review of the issues raised by this appeal has been impeded and prolonged by a multitude of appellate rules violations, both in the record and in the appellant's brief. While, in this case, "we elect[ed] to exercise the discretion accorded us by N.C.R. App. P. 2 to consider this appeal on its merits despite appellant's violations of the Appellate Rules," *see May*, 136 N.C. App. at 581, 525 S.E.2d at 227, counsel is admonished to observe the rules in the future.

Affirmed in part, vacated in part, and remanded.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. MARIO LLAMAS-HERNANDEZ

No. COA07-566

(Filed 15 April 2008)

1. Evidence— lay witness testimony—detectives—cocaine

The trial court did not abuse its discretion in a trafficking in cocaine by possession of 28 grams or more but less than 200 grams case by admitting the lay witness testimony of two detectives that a white powder substance found in an apartment leased by defendant was cocaine because: (1) North Carolina law favors admissibility of lay opinion testimony where the witness has personal knowledge of the subject; (2) an officer's training and experience is sufficient personal knowledge to form the basis of lay opinion testimony that a substance is a narcotic; (3) although *Rogers*, 28 N.C. App. 1001 (1975), implies that a law enforcement officer's training and experience alone do not qualify that officer to give an opinion concerning the chemical makeup of a white powder, the Court of Appeals was compelled under *Freeman*, 185 N.C. App. 408 (2007), to hold that the evidence with respect to both officers' training and experience in dealing with narcotics was sufficient to show a rational basis for their opinions that the substance was cocaine; and (4) although the dissent seemed to suggest that lay opinion testimony identifying a substance as crack cocaine might perhaps be admissible while the same testimony concerning powder cocaine may not, there was no support in the case law for this distinction.

2. Constitutional Law— effective assistance of counsel—failure to object—objective standard of reasonableness

A defendant was not denied effective assistance of counsel in a trafficking in cocaine by possession of 28 grams or more but less than 200 grams case based on his trial attorney's failure to object to the testimony of two detectives stating the white powder substance found in an apartment leased by defendant was cocaine because: (1) a review of the record revealed that defense counsel did in fact object to the detectives' testimony on multiple occasions; (2) during an evidentiary discussion with the trial court, defense counsel specifically stated she objected to this testimony since the State had not provided her with a lab report analyzing the substance, and these objections were acknowledged by the trial court; and (3) although defense counsel did not object to

the police chemical analyst's testimony, the failure did not fall below an objective standard of reasonableness or prejudice defendant when the witness was an expert in chemical analysis of controlled substances.

3. Drugs— trafficking in cocaine by possession of 28 grams or more but less than 200 grams—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in cocaine by possession of 28 grams or more but less than 200 grams because: (1) in order for the State to meet its burden of the weight element for the offense of trafficking in cocaine, the State must either offer evidence of its actual measured weight or demonstrate that the quantity of the controlled substance itself was so large as to permit a reasonable inference that its weight satisfied this element; (2) two detectives both testified that they weighed the white powder cocaine and that it weighed 55 grams; and (3) the jury could reasonably infer that the statutory threshold for trafficking was satisfied.

4. Joinder— charges—same series of events—common scheme

The trial court did not abuse its discretion by granting the State's motion to join the two charges of trafficking in cocaine because: (1) the two charges arose from the same series of events on the same day; (2) the evidence indicated a common scheme to sell drugs; and (3) defendant failed to satisfy his burden of showing he was deprived of a fair trial and prejudiced as a result of the joinder.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 14 September 2006 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Public Defender Kevin P. Tully, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

MARTIN, Chief Judge.

Mario Llamas-Hernandez ("defendant") was charged in 05 CRS 244830 with one count of trafficking in cocaine by possession of 400 grams or more of cocaine, in violation of N.C.G.S. § 90-95(h)(3)c (2007), and in 05 CRS 244832 with one count of trafficking in cocaine by possession of 28 grams or more, but less than 200 grams, of cocaine in violation of N.C.G.S. § 90-95(h)(3)a (2007). He was convicted by a jury of the charge of trafficking in cocaine by possession of 28 grams or more, as charged in 05 CRS 244832. The jury was unable to reach a unanimous verdict as to the charge of trafficking in 400 grams or more of cocaine as charged in 05 CRS 244830, and a mistrial was declared in that case.

Pursuant to a plea agreement, defendant then pled guilty in 05 CRS 244830 to the charge of trafficking in cocaine by possession of more than 200 grams but less than 400 grams. The two charges were consolidated for sentencing, and defendant was sentenced to imprisonment for a minimum term of 70 months and a maximum term of 84 months. Defendant appeals.

The State presented evidence at trial which tended to show that in April 2005 Charlotte-Mecklenburg Detective Jorge Olmeda began working with an informant who provided him with information about drug trafficking activity. On 16 September 2005 the informant arranged a meeting with Oseil Lopez-Tucha at a restaurant to negotiate a sale of cocaine. On 24 September 2005 the informant met Lopez-Tucha in the parking lot of a Bi-Lo supermarket to purchase cocaine. Lopez-Tucha called defendant from the parking lot. Defendant told Lopez-Tucha and the informant to meet him at 6506 Yateswood Road, and stated that he would be driving a green Suburban. Lopez-Tucha and the informant went to Yateswood Road and saw the Suburban. Defendant took Lopez-Tucha and the informant into the residence at 6506 Yateswood Road, and defendant told the informant that he had a kilogram of cocaine for him to purchase. The informant left the room and called the police.

Police officers arrived on the scene approximately five minutes later with a search warrant. Detective Olmeda arrived and discovered a woman, Elvira Villa-Gomez, in the Suburban. Detective Olmeda's partner, Detective Stephen Whitesel, went into the apartment and found the informant, Lopez-Tucha, and defendant in the master bedroom. The informant told Detective Olmeda that cocaine was located

underneath a large teddy bear in the master bedroom. Detective Whitesel looked under the teddy bear and found a package containing a kilogram of white powder. Jennifer Mills, a chemical analyst with the Charlotte-Mecklenburg Police Department, gave expert testimony that chemical testing revealed that the substance "contained cocaine." This substance formed the basis of the charge contained in 05 CRS 244830, in which defendant entered a negotiated guilty plea.

Detective Olmeda interviewed Villa-Gomez and obtained her consent to search her home at 4113 Craig Avenue. The Craig Avenue residence was leased to Villa-Gomez and defendant. Detective Olmeda and Detective Whitesel searched the residence and found a white powdery substance weighing approximately 55 grams in the linen closet. Although a chemical analysis was performed on this substance, the report was not admitted at trial. Over defendant's objection, Detectives Olmeda and Whitesel were permitted to testify as lay witnesses that the substance found at Craig Avenue was cocaine. Mills also testified that in her opinion the substance found at Craig Avenue was similar to the substance found at Yateswood Road, the case in which defendant pled guilty. The substance found at Craig Avenue formed the basis of the charge contained in 05 CRS 244832.

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[1] The issues raised in this appeal relate only to the defendant's conviction of trafficking in 28 grams or more, but less than 200 grams, of cocaine as charged in 05 CRS 244832, which involved the substance found at 4113 Craig Avenue. Defendant argues the trial court erred by admitting the lay witness testimony of Detectives Olmeda and Whitesel that the substance found at 4113 Craig Avenue was cocaine. When reviewing a trial court's rulings on the admission or exclusion of lay witness or expert testimony, we review for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000).

N.C.G.S. § 8C-1, Rule 701 governs the admission of lay witness opinion testimony and provides that a lay witness's 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 (2007). "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991).

In *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876, 881-82 (2007), *appeal dismissed*, 362 N.C. 178, 657 S.E.2d 663 (Jan. 7, 2008) (No. 475A07), *reconsideration denied*, 362 N.C. 178, 657 S.E.2d 666 (Jan. 18, 2008) (No. 475A07), another panel of this Court held that the trial court did not abuse its discretion in admitting lay opinion testimony of a police officer that pills found on defendant were crack cocaine. In that case Police Officer Christopher Miller recovered a pill bottle which the defendant dropped upon being confronted by Officer Miller and other officers. *Id.* at 411, 648 S.E.2d at 879-80. "Inside the pill bottle, Officer Miller discovered a variety of white pills and believed that two of them were crack cocaine." *Id.* at 411, 648 S.E.2d at 880. At defendant's trial on the charge of possession of cocaine, Officer Miller was permitted, without objection, to testify that, in his opinion, two of the pills contained in the bottle were crack cocaine. *Id.* at 414-15, 648 S.E.2d at 882. In addition, an expert chemist testified "that she analyzed the pills and determined that they were cocaine[.]" *Id.* As defendant did not object to Officer Miller's testimony, defendant argued on appeal that the trial court committed plain error in allowing Officer Miller to so testify. *Id.* at 415, 648 S.E.2d at 881. The Court said:

> Pursuant to Rule 701 of the North Carolina Rules of Evidence, "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005). "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991) (holding that an officer's testimony concerning practices of drug dealers was admissible lay opinion as it was based on personal knowledge and helpful to the jury).
>
> Officer Miller testified that two of the pills in the pill bottle seized during defendant's arrest were crack cocaine and that he based his identification of the pills as crack cocaine on his extensive training and experience in the field of narcotics. Officer Miller, who had been with the police department for eight years at the time, testified that he had come into contact with crack cocaine between 500 and 1000 times. As Officer Miller's testimony on this issue was helpful for a clear understanding of his overall testimony and the facts surrounding defendant's arrest,

> the trial court did not abuse its discretion, much less commit plain error, in permitting Officer Miller to testify as to his opinion that the pills were crack cocaine. Defendant's argument, therefore, is overruled.

Id. at 414-15, 648 S.E.2d at 881-82. In its analysis and discussion of the admissibility of Officer Miller's contention, the Court apparently did not consider the testimony of the expert chemist, only Officer Miller's personal knowledge based on his training and experience. *Id.* at 414, 648 S.E.2d at 881-82.

Were we confronting this issue anew, we would be inclined to reach a different interpretation of Rule 701 than that reached by the *Freeman* panel. We acknowledge that North Carolina law favors admissibility of lay opinion testimony where the witness has personal knowledge of the subject about which he or she is testifying. *See* 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 181, at 23 (6th ed. 2004) ("A lay witness may give his opinion as to the identity of a person or object he has seen, and his lack of positiveness affects only the weight, not the admissibility of his testimony."); *State v. Yelton*, 175 N.C. App. 349, 354, 623 S.E.2d 594, 597 (2006) (holding that drug user could testify that a substance she smoked was methamphetamine); *State v. Rich*, 132 N.C. App. 440, 449, 512 S.E.2d 441, 448 (1999) (holding that an officer testifying as a lay witness could give his opinion as to whether a person involved in a car accident was intoxicated "based on his experience as a law enforcement officer in conjunction with his observations of the circumstances surrounding the collision"). Further, our Court has held that an officer's training and experience is sufficient personal knowledge to form the basis of lay opinion testimony that a substance is a narcotic. *Freeman*, 185 N.C. App. at 414, 648 S.E.2d at 882; *see also* Broun, § 181, at 23 (citing *dicta* in *State v. Greenlee*, 146 N.C. App. 729, 732, 553 S.E.2d 916, 918 (2001), for the proposition that "[a] police officer [is] properly permitted to identify substance as a 'rock of crack cocaine' as lay testimony based on specialized training and work experience").

However, we find instructive *dicta* contained in this Court's opinion in *State v. Rogers*, 28 N.C. App. 110, 113-14, 220 S.E.2d 398, 400-01 (1975), where a deputy sheriff was permitted to testify that white powder seized from a car in which the defendant was a passenger contained heroin. An expert chemist also testified that the substance was heroin. *Id.* at 114, 220 S.E.2d at 401. Defendant

assigned error to the deputy's testimony. *Id.* at 113, 220 S.E.2d at 400. The Court wrote:

> Defendant assigns error to the court's overruling his objection and allowing [the deputy sheriff] to testify that from his examination of the white powder found in the five tinfoil packets, in his opinion the white powder contained heroin. The witness had previously testified that he had approximately twenty-five hours training in the identification of controlled substances, both through the S.B.I. and the Federal Government, that he had three and a half years experience "working with drugs on the street," and that he had examined heroin "numerous times." He was not asked, either on direct or on cross-examination, as to what his "examination" of the white powder consisted of, or as to what tests, if any, he made in the course of that "examination." *Had such questions been asked, it would be easier to evaluate the witness's qualification to testify to the opinion called for*, and the jury could have assessed more accurately the weight which it might give to the opinion expressed. In any event, in view of the subsequent testimony of the S.B.I. chemist, we find no prejudicial error in the court's ruling in the present case.

Id. at 113-14, 220 S.E.2d at 400-01 (emphasis added). The implication of *Rogers* is that a law enforcement officer's training and experience alone do not qualify that officer to give an opinion concerning the chemical makeup of a white powder. Indeed, while training and experience are relevant to the qualification of a witness as an expert, see N.C. Gen. Stat. § 8C-1, Rule 702 (2007) ("[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."), we question whether they are "perceptions" of the witness. It seems to us that to allow a lay witness, even a police officer with extensive training and experience, to render an opinion that white powder is cocaine based solely upon the witness's visual examination, is little more than speculation, and is not based on perception, for the visual characteristics of cocaine in powder form are not unique to that substance alone. *See*, *generally*, Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 Am. U. L. Rev. 557 (1998). Notably, the ease with which a person may pass off a counterfeit controlled substance as an actual controlled substance has prompted our General Assembly to enact legislation making it a Class I felony to "create, sell or deliver,

or possess with intent to sell or deliver, a counterfeit controlled substance." N.C. Gen. Stat. § 90-95(c), (a)(2) (2007).

However, though the holding in *Freeman* concerns us for the reasons stated above, we are bound to follow it. *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("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."). In the present case, the trial court acknowledged that both Detective Olmeda and Detective Whitesel were testifying as lay witnesses. Both detectives have experience in the identification of controlled substances. At the time of the trial, Detective Olmeda had worked for the Charlotte-Mecklenburg police for six and a half years and was assigned to the Vice and Narcotics Bureau, where he investigated and infiltrated drug organizations. He received six months of intensive drug investigation training prior to this assignment. He previously worked in the Drug Crimes Interdiction Unit. Detective Whitesel testified that he had worked for the Mecklenburg Police Department for sixteen years and with Vice and Narcotics for two and a half years. He received four and a half months of drug investigation training before being assigned to Vice and Narcotics. He also testified that he had between 760 to 800 hours of training on identifying controlled substances, that in his sixteen-year tenure with the Mecklenburg Police Department he had seen cocaine "approximately two and three times a week, between 1600 and 2000 times[,]" and that he has never submitted a substance that he thought was cocaine for chemical analysis that did not in fact test positive for cocaine. Following the decision in *Freeman*, we are compelled to hold that the evidence with respect to both officers' training and experience in dealing with narcotics was sufficient to show a rational basis for their opinions that the substance found at Craig Avenue was cocaine, and the trial court did not abuse its discretion in admitting their testimony.

Expressing reservations similar to those which we have expressed above, the dissent seeks to distinguish *Freeman* on the basis that the substance involved in that case was crack cocaine, while the substance involved here is cocaine in powder form. The distinction, according to the dissent, is that powder cocaine is more nondescript and has less distinct properties than crack cocaine and, therefore, cannot be as easily identified by a layperson as can crack cocaine, which "has a distinctive color, texture, and appearance." Thus, the

dissent suggests that lay opinion testimony identifying a substance as crack cocaine might perhaps be admissible, while the same testimony concerning powder cocaine would not. We find no support in the case law for this distinction. Indeed, the *Freeman* panel made no distinction between the different forms of cocaine and did not discuss whether the particular form of a narcotic impacts the admissibility of lay opinion testimony. In any event, the crack cocaine in *Freeman* was described as being in pill form, rather than in rock form. Thus, we do not find the form of a narcotic to be determinative, and we must follow *Freeman*.

[2] Defendant next argues that he was denied the effective assistance of counsel because his trial attorney failed to object to the testimony of Olmeda and Whitesel that the substance found at Craig Avenue was cocaine. "In order to successfully challenge a conviction on the basis of ineffective assistance of counsel, defendant must demonstrate: 1) that his trial counsel's performance 'fell below an objective standard of reasonableness[;]' and 2) that this deficiency in performance was prejudicial to his defense." *State v. Lemonds*, 160 N.C. App. 172, 177, 584 S.E.2d 841, 845 (2003) (quoting *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)).

A review of the record reveals that defense counsel did in fact object to the detectives' testimony on multiple occasions. In addition, during an evidentiary discussion with the trial court, defendant's counsel specifically stated that she objected to the testimony of Olmeda and Whitesel because the State had not provided her with a lab report analyzing the substance found at Craig Avenue, and these objections were acknowledged by the trial court. We note that defense counsel did not object to Mills' testimony, but this did not fall below an objective standard of reasonableness or prejudice defendant, as Mills was an expert in chemical analysis of controlled substances. *See State v. Bullard*, 312 N.C. 129, 139-40, 322 S.E.2d 370, 376 (1984) ("It is undisputed that expert testimony is properly admissible when such testimony can assist the jury . . . . The trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony."). Therefore, this assignment of error is overruled.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge where the evidence was insufficient for a rational trier of fact to find each and every element of the offense of trafficking in cocaine by possession beyond a reasonable doubt. We disagree.

N.C.G.S. § 90-95(h)(3) (2007) provides, in pertinent part, that "[a]ny person who . . . transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, . . . and . . . shall be sentenced to a minimum term of 35 months and a maximum term of 42 months . . . ." N.C. Gen. Stat. 90-95(h)(3), (h)(3)a (2007). Consequently, "[t]he elements the State must prove beyond a reasonable doubt to support a conviction of trafficking in cocaine or methamphetamine by possession is that defendant: '(1) knowingly possess[ed] cocaine and (2) that the amount possessed was 28 grams or more.' " *State v. Cardenas*, 169 N.C. App. 404, 409, 610 S.E.2d 240, 243-44 (2005) (quoting *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991)). In order for the State to meet its burden of the weight element for the offense of trafficking in cocaine the State "must either offer evidence of its actual, measured weight or demonstrate that the quantity of [the controlled substance] itself is so large as to permit a reasonable inference that its weight satisfied this element." *State v. Mitchell*, 336 N.C. 22, 28, 442 S.E.2d 24, 27 (1994).

In the present case, Lopez-Tucha testified that defendant planned to sell cocaine to the informant. Cocaine was found at the defendant's residence and in close proximity to defendant at Yateswood Avenue where he met Lopez-Tucha and the informant in order to arrange the sale of cocaine. Detective Olmeda and Detective Whitesel testified that they believed that the substance was cocaine, and Mills testified that the substance was similar to the cocaine found at Yateswood Road. Detective Whitesel and Mills both testified that they weighed the cocaine found at Craig Avenue and that it weighed 55 grams. Therefore, the jury could reasonably infer that the statutory threshold for trafficking was satisfied. This assignment of error is overruled.

[4] Defendant next argues that the trial court erred by granting the State's motion to join the two charges of trafficking in cocaine. N.C.G.S. § 15A-926(b)(2) (2007) states that joinder is appropriate:

> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When . . . the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C. Gen. Stat. § 15A-926(b)(2) (2007). Further, "[t]he propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge." *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994). The trial court's decision to consolidate cases for trial will not be disturbed on appeal absent a showing that joinder resulted in defendant receiving an unfair trial. *Id.*

Here, the trial court joined defendant's two cocaine trafficking charges, 05 CRS 244830 and 05 CRS 244832. These charges arose from the same series of events on the same day, and the evidence indicated a common scheme to sell drugs. Further, defendant has failed to satisfy his burden by showing he was deprived of a fair trial and prejudiced as a result of the joinder. Consequently, the trial court did not abuse its discretion, and we overrule this assignment of error.

No error.

Judge STEPHENS concurs.

Judge STEELMAN concurs in part and dissents in part with separate opinion.

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

I concur in the portions of the opinion that question the rationale of this Court's holding under Rule 701 of the North Carolina Rules of Evidence in *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007), and the portions of the opinion pertaining to joinder. I must respectfully dissent to the portions of the opinion allowing a detective to express a lay opinion as to the chemical composition of a white powder and upholding the trial court's denial of defendant's motion to dismiss.

Initially, it should be noted that the defendant pled guilty to the Class F offense of trafficking in cocaine and received the mandatory sentence of 70-84 months. The issues involved in this case pertain to the guilty verdict as to the Class G offense of trafficking in cocaine, which was consolidated with the Class F offense for purposes of judgment. Regardless of whether the defendant's conviction for the Class G offense is upheld or reversed, he will still serve a sentence of 70-84 months imprisonment for the Class F trafficking offense. Nonetheless, under the rationale of *State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990), the consolidation of the two convictions does not render the error of the trial court harmless.

I. Additional Factual and Procedural Background

Detective Olmeda testified in this case that at the Craig Avenue address they found 55 grams of cocaine. Defendant objected to this testimony. While the State elicited testimony as to Olmeda's experience in undercover drug operations, no testimony was elicited concerning his ability to identify controlled substances by sight.

At the trial of this case, the State sought to offer into evidence a laboratory report concerning 55 grams of white powder. Defendant's counsel objected, stating that she had requested any such report in discovery, and that she had been told by the district attorney's office that they would not be testing the smaller amount. As a result, no effort was made by defendant to have the 55 grams of white powder tested. The State acknowledged that the report was not provided, even though the testing was done nine months prior to trial. The trial court excluded the lab report as a discovery sanction pursuant to N.C. Gen. Stat. § 15A-910(a)(3) (2007). Following this ruling, the trial court permitted Detective Whitesel to give a lay opinion concerning the 55 grams of white powder. He testified that in his opinion it was cocaine. No preliminary testing of any kind was performed on the substance. The identification of the 55 grams as being cocaine was based solely upon his visual observations. No testimony was offered as to why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. No testimony was offered as to any distinguishing characteristics of the 55 grams of white powder, such as its taste or texture.

Jennifer Mills, a chemical analyst with the Charlotte-Mecklenburg Police Department, testified that a visual examination of a controlled substance is merely a preliminary test, and is not conclusive.

II. Analysis

Our courts frequently are confronted with cases involving two types of cocaine; powdered cocaine and crack cocaine. Powdered cocaine is a non-descript white powder. Crack cocaine is an off-white pasty substance that comes in small blobs, referred to in street parlance as "rocks." *See generally* Blanchard & Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 Amer. U. L. Rev. 557 (1998).

A. North Carolina Statutes Dealing With Controlled Substances

Article 5 of Chapter 90 of the North Carolina General Statutes is the North Carolina Controlled Substances Act. A controlled substance is defined as "a drug, substance, or immediate precursor included in Schedules I through VI of this Article." N.C. Gen. Stat. § 90-87(5) (2007). The statute then goes on to describe in great chemical detail the substances prohibited in Schedules I through VI. For example, cocaine is described in Schedule II as follows:

> Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

N.C. Gen. Stat. § 90-90(1)(d) (2007). There are different definitions of isomers for different controlled substances. For purposes of cocaine, isomer means "the optical isomer or diastereoisomer." N.C. Gen. Stat. § 90-87(14a). Optical isomers are compounds with the same molecular formula but which act in opposite ways on polarized light. *See* Ducor, *New Drug Discovery Technologies and Patents*, 22 Rutgers Computer & Tech. L.J. 369, 379 (footnote 47) (1996). Diastereoisomers are compounds whose molecules are not mirror images but each molecule rotates polarized light. *See* Strong, *FDA Policy and Regulation of Stereoisomers: Paradigm Shift and the Future of Safer, More Effective Drugs*, 54 Food Drug L.J. 463 (1999).

By enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance. This is how drug cases have been handled and tried in the Superior Courts of this State for many years. Officers gather the evidence, carefully identify it with control numbers and submit it to a laboratory for chemical analysis. If the laboratory testing reveals the presence of a controlled substance, the prosecution of the defendant goes forward. If the laboratory testing reveals that no controlled substance is present, then the case is dismissed by the prosecutor.

The General Assembly has further set forth procedures for the admissibility of such laboratory reports. *See* N.C. Gen. Stat.

§ 8-58.20, 90-95(g) and (g1). N.C. Gen. Stat. § 15A-903 provides that criminal defendants have broad pretrial access to discovery of materials obtained or prepared for the prosecution for use in its case in chief, including "not only conclusory laboratory reports, but also any tests performed or procedures utilized by chemists to reach such conclusions." *State v. Dunn*, 154 N.C. App. 1, 8, 571 S.E.2d 650, 655 (2002) (quotation and emphasis omitted). This is due to "the extraordinarily high probative value generally assigned by jurors to expert testimony . . ." *Id.* at 6, 571 S.E.2d at 654 (quotation omitted).

I submit that if it was intended by the General Assembly that an officer could make a visual identification of a controlled substance, then such provisions in the statutes would be unnecessary.

B. Lay Opinion Under Rule 701

The majority relies primarily upon the case of *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007) to support its holding that a law enforcement officer can express a lay opinion under Rule 701 of the North Carolina Rules of Evidence as to the composition of a controlled substance.

1. State v. Freeman

In *Freeman*, police in Charlotte arrested an armed robbery suspect, who had in his possession what "looked like a pill bottle." *Id.* at 411, 648 S.E.2d at 879. This container contained a "variety of white pills," two of which the arresting officer believed to be crack cocaine. *Id.* at 411, 648 S.E.2d at 880. These two items were tested by the Charlotte-Mecklenburg Police Crime Laboratory and found to be cocaine, having a weight of .22 grams. *Id.*

One of defendant's assignments of error was that the trial court committed plain error by allowing the officer to testify that the two items seized were crack cocaine. *Id.* at 414, 648 S.E.2d at 881. In light of the lab report confirming that it was cocaine, the admission of the officer's statement was clearly not plain error. However, this Court went on to hold that it was permissible under Rule 701 for the officer to render an opinion that the substance was cocaine. *Id.* at 414, 648 S.E.2d at 882. In so holding, this Court relied solely upon the case of *State v. Bunch*, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

State v. Bunch, *supra*, held that an officer, based upon his experience, can testify as to common practices of drug dealers. *Id.* at 110, 408 S.E.2d at 194. The testimony dealt with the practice that one per-

son in a drug deal holds the money, and another holds the drugs. *Id.* This testimony dealing with custom and practice in drug deals is completely different from an officer testifying as to the chemical composition of a purported controlled substance under Chapter 90 of the General Statutes. *Bunch* in no way supports the holding of *Freeman* that an officer can give a lay opinion that a substance is cocaine.

In *Freeman*, the substance involved was crack cocaine, not powdered cocaine. A review of the opinion, briefs and record in that case does not reveal anything about the appearance of the cocaine other than to describe it as "pills." Two of the "pills" were distinctive enough from the other pills in the bottle for the arresting officer to immediately identify them as crack cocaine. The appearance of the cocaine in *Freeman* simply was not a major concern in the case because the laboratory report conclusively established the chemical composition of the substance. Crack cocaine has a distinctive color, texture, and appearance. While it might be permissible, based upon these characteristics, for an officer to render a lay opinion as to crack cocaine, it cannot be permissible to render such an opinion as to a non-descript white powder.

2. Prejudicial Effect

Jennifer Mills only testified as to the similarity of the two packages of powder. Thus the admission of Detective Olmeda's and Whitesel's opinion testimony that the 55 grams of white powder was cocaine, over the objection of defendant, was not harmless error.

III. Conclusion

Based upon the evidence presented in this case, there were no distinguishing characteristics of the 55 grams of white powder to support a lay opinion under Rule 701 that the substance was cocaine. Such opinions must be rationally based on the perception of the witness. N.C. Gen. Stat. § 8C-1, Rule 701 (2007). The mere "similarity" of the kilogram of white powder established by laboratory tests to be cocaine to the 55 grams is not sufficient to establish the 55 grams to be cocaine, a controlled substance. I would hold the trial court abused its discretion in allowing lay opinion testimony that the substance was in fact cocaine.

The trial court erred in allowing the lay opinion testimony of the officers that the 55 grams of white powder was cocaine to come before the jury. Without this testimony, there was no evidence before the jury as to the nature of the white powder. The trial court erred in

denying defendant's motion to dismiss the Class G trafficking offense. I would reverse the judgment of the trial court in that case. Since defendant received the mandatory sentence on the Class F trafficking offense, it would be unnecessary to resentence defendant.

ALMA CHINITA TROTTER, PETITIONER v. NC DEPARTMENT OF HEALTH & HUMAN SERVICES, PUBLIC HEALTH DEPT., RESPONDENT

No. COA07-1035

(Filed 15 April 2008)

1. Administrative Law— judicial review of final agency decision—standard of review—de novo—whole record test

The superior court did not err in an employment age discrimination case by applying both a de novo review and the whole record test when it substituted new findings of fact for those found in the State Personnel Commission decision because: (1) petitioner's first allegation was addressed by N.C.G.S. § 150B-51(b)(4) and was characterized as a law-based inquiry requiring de novo review by the superior court; and (2) petitioner's second and third allegations were subject to N.C.G.S. § 150B-51(b)(5) and (6) respectively, requiring review under the whole record test as fact-based inquiries.

2. Administrative Law— age discrimination—judicial review of final agency decision—de novo standard of review—conclusions of law

The superior court did not err in an employment age discrimination case by concluding the State Personnel Commission (SPC) erred in its conclusions of law because the superior court acted within its statutory authority to review the issue of the petition to the SPC de novo as a law-based inquiry.

3. Administrative Law— age discrimination—judicial review of final agency decision—whole record review—substantial evidence determination

The superior court erred in an employment age discrimination case by determining that the State Personnel Commission's (SPC) decision was unsupported by substantial evidence in the record when it reviewed petitioner's second and third assign-

ments of error because: (1) the whole record test required the superior court to analyze all the evidence in the record in order to determine whether there was substantial evidence to justify the SPC decision, and if so, the court could not substitute its judgment or engage in new fact finding as it sat as an appellate court; and (2) the superior court improperly found facts and substituted its judgment for the SPC's decision as between two conflicting views.

Judge GEER concurring in result only.

Appeal by respondent from judgment entered 2 May 2007 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 21 February 2008.

Alan McSurely, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for respondent-appellant.

TYSON, Judge.

The Public Health Department of the North Carolina Department of Health and Human Services ("DHHS") appeals from order entered by the superior court, which reversed the decision of the State Personnel Commission ("SPC"). We reverse and remand.

I. Background

In the Spring of 2005, sixty-two-year-old Dr. Alma Chinita Trotter ("Dr. Trotter") applied for a full-time Educational Diagnostician II position opening posted by DHHS ("the position"). The position was to be located in the Raleigh office for the Child Developmental Services Agency ("CDSA"), a subdivision of DHHS.

The application and review process is described in the record. Applications received by DHHS are sent to the Human Resources office where a personnel technician enters the applicant's name and other information into the Applicant Tracking System ("ATS"). The technician forwards the applications and an applicant log that contains Equal Employment Opportunity ("EEO") information to a recruitment coordinator.

The recruitment coordinator reviews the applications, screens the applicants for "minimum qualifications" based on the "Training and Experience" requirements listed in the posting, and indicates

whether the applicant is qualified on the applicant log. The applications and the applicant log are returned to the personnel technician. The technician enters the new information into the ATS and generates an Applicant Selection Log. The Applicant Selection Log lists qualified applicants without disclosing their EEO information. The Applicant Selection Log is sent to the hiring manager.

Hiring manager Timothy C. Pritchard ("Pritchard") received the Applicant Selection Log from the personnel technician, which listed Dr. Trotter and seven other applicants as qualified by the human resources staff. Pritchard interviewed two internal applicants listed on the Applicant Selection Log that he also determined to be qualified. Pritchard recommended thirty-seven-year-old internal applicant Evangeline Seay ("Seay") for the position in the Raleigh CDSA office.

Pritchard indicated that he believed Dr. Trotter had "sufficient experience but less than the selected candidate." On 27 June 2005, the DHHS recruitment staff sent a rejection letter to Dr. Trotter regarding the position. Dr. Trotter contacted Pritchard to discern why she did not receive an interview. Pritchard told Dr. Trotter that a candidate currently working for DHHS possessed the qualifications and was a better fit for the position.

On 26 July 2005, Dr. Trotter filed a petition for a contested case hearing pursuant to N.C. Gen. Stat. § 126 and alleged she had been discriminated against based on race, sex, and age. On 1 June 2006, the Administrative Law Judge ("ALJ") filed its decision, which concluded DHHS did not discriminate against Dr. Trotter. In an opinion and award filed on 14 September 2006, the SPC adopted the ALJ's decision and findings of fact. On 14 October 2006, Dr. Trotter appealed to the superior court pursuant to N.C. Gen. Stat. § 150B-45.

On 2 May 2007, the superior court reversed the SPC decision and remanded the case "with instructions to retroactively instate and award retroactive back pay for Dr. Trotter in the position she was discriminatorily denied as of the date [D]HHS denied her [an] opportunity for an interview." The court also: (1) ordered DHHS to apologize for its "disrespect . . . showed to [Dr. Trotter;]" (2) awarded Dr. Trotter "her reasonable lawyers fees and costs[;]" and (3) ordered extra training in the non-discriminatory treatment of applicants for DHHS's management by the Office of State Personnel. DHHS appeals.

II. Issues

DHHS argues the superior court erred when it: (1) applied multiple standards of review when it substituted new findings of fact for those in the SPC final decision; (2) determined the SPC final decision was unsupported by substantial evidence and was arbitrary and capricious; (3) concluded that the SPC erred in its conclusions of law that DHHS had discriminated against Dr. Trotter based on age; and (4) ordered DHHS to issue an apology to Dr. Trotter and to provide extra training for DHHS management.

III. Standard of Review

"[When] we . . . review[] a 'review proceeding' in the superior court and petitioners are appealing pursuant to N.C. Gen. Stat. § 7A-27, we . . . apply N.C. Gen. Stat. § 150B-52 . . . ." *Lincoln v. N.C. Dep't of Health & Human Servs.*, 172 N.C. App. 567, 569, 616 S.E.2d 622, 624 (2005). N.C. Gen. Stat. § 150B-52 (2005) states:

> A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases.

"[T]he appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (internal quotation omitted), *disc. rev. denied*, 360 N.C. 531, 633 S.E.2d 675 (2006).

IV. Superior Court's Standard of Review

[1] DHHS argues the superior court erred when it applied both a *de novo* review and the whole-record test when it substituted new findings of fact for those found in the SPC decision.

"The proper standard of review by the trial court depends upon the particular issues presented by the appeal." *Bobbitt v. N.C. State Univ.*, 179 N.C. App. 743, 748, 635 S.E.2d 463, 467 (2006). Our Supreme Court has held that "the substantive nature of each assignment of error dictates the standard of review" during appellate review of an administrative agency's final decision. *N.C. Dept. of Env't &*

Natural Res. v. Carroll, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (internal citations omitted).

N.C. Gen. Stat. § 150B-51(b) (2007) states:

> [I]n reviewing a final decision, the [superior] 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 if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

"Subparts (1) through (4) of N.C. Gen. Stat. § 150B-51(b) are characterized as 'law-based' inquiries. Reviewing courts consider such questions of law under a *de novo* standard." *Gordon v. N.C. Dep't of Corr.*, 173 N.C. App. 22, 31, 618 S.E.2d 280, 287 (2005) (internal citations omitted). Subparts (5) and (6) "are 'fact-based' inquiries." *Id.* at 34, 618 S.E.2d at 289. "Fact-intensive issues 'such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test.' " *Id.*

On appeal to the superior court, Dr. Trotter assigned error to the SPC final decision: "(1) The SPC made an error of law in its statement of the issue; (2) The SPC's finding of no age discrimination was 'unsupported by substantial evidence in view of the entire record[;]' and (3) The SPC's finding of no age discrimination was arbitrary and capricious."

Dr. Trotter's first allegation is addressed by § 150B-51(b)(4) and is characterized as a "law-based" inquiry requiring *de novo* review by the superior court. *Id.* at 31, 618 S.E.2d at 287. Dr. Trotter's second

and third allegations are subject to N.C. Gen. Stat. § 150B-51(b)(5) and (6) respectively, and require review under the whole-record test as "fact-based" inquiries. *Id.* at 34, 618 S.E.2d at 289. Both *de novo* review and the whole-record test were appropriate for the issues presented on appeal to the superior court. The superior court appropriately used a *de novo* review and the whole-record test in its review to the respective assignments of error alleged in the SPC final decision. This assignment of error is overruled.

V. *De Novo* Review

[2] DHHS argues that the superior court erred when it concluded that the SPC erred in its conclusions of law. We disagree.

De novo review allows the superior court or this Court to consider the matter anew and to freely substitute its own judgment in place of the agency's. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (internal citations omitted). Dr. Trotter's first exception was a law-based inquiry allowing *de novo* review. *Gordon*, 173 N.C. App. at 31, 618 S.E.2d at 287.

This Court has stated:

> An employee can establish a *prima facie* case of age discrimination when the employee shows that (1) the employee is a member of the protected class, or over forty years old; (2) the employee applied or sought to apply for an open position with the employer; (3) the employee was qualified for the position; and (4) the employee was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. An inference of unlawful discrimination arises when an employee is replaced by a substantially younger worker.

N.C. Dep't of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 538, 616 S.E.2d 594, 600-01 (2005) (internal citation and quotation omitted).

Reviewing the case anew, the superior court applied the *Greene* elements when it concluded that Dr. Trotter had met her burden of establishing a *prima facie* case. *Id.* The superior court stated:

> Dr Trotter's prima facie case here is a strong one. It is uncontroverted she applied for a vacant position. Furthermore the uncontroverted evidence clearly demonstrates that Dr. Trotter, unlike some discrimination claimants, was extremely well qualified for

the position she sought. It is also beyond question that Dr. Trotter satisfied the third and fourth elements of her prima facie burden, namely that, despite her qualifications, Mr. Prichard rejected her application and then quickly filled the position by hiring a substantially younger, less-qualified applicant.

The superior court acted within its statutory authority to review the issue of the petition to the SPC *de novo* as a law-based inquiry. N.C. Gen. Stat. § 150B-51(b)(4) (2007); *Gordon*, 173 N.C. App. at 31, 618 S.E.2d at 287. The superior court properly exercised its appropriate *de novo* scope of review. *Id.*; *Carillon Assisted Living*, 175 N.C. App. at 270, 623 S.E.2d at 633. This assignment of error is overruled.

VI. Whole Record Test

[3] DHHS argues that the superior court erred in its determination that the SPC decision was unsupported by substantial evidence in the record. We agree.

Dr. Trotter's second and third assignments of error qualified as fact-based inquiries under N.C. Gen. Stat. § 150B-51(b)(5) and (6). The superior court was required to apply the whole-record test. *Gordon*, 173 N.C. App. at 34, 618 S.E.2d at 289. "A court applying the whole record test *may not substitute its judgment* for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (internal citations omitted) (emphasis supplied). Instead, the superior court "must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* (internal citations omitted). " 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2005).

The superior court reviewed the record of Dr. Trotter's petition, considered the application and hiring process, the applications of Dr. Trotter and Seay, and Pritchard's justifications for failing to extend an interview to Dr. Trotter. The superior court determined that no substantial evidence existed to justify the SPC's final decision which stated "[Pritchard] offered different justifications at different times for his failure to interview Dr. Trotter." The superior court

found "[t]he SPC's finding of no age discrimination . . . 'unsupported by substantial evidence in view of the entire record' and . . . arbitrary and capricious."

The whole record test required the superior court to analyze all the evidence in the record in order "to determine whether there [was] substantial evidence to justify the [SPC] decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. If so, the superior court could not substitute its judgment or engage in new fact finding, as it sat as an appellate court. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990).

The superior court appropriately used the whole-record test in its review of Dr. Trotter's second and third assignments of error. In determining a lack of substantial evidence to justify the SPC final decision, the superior court improperly found facts and substituted its judgment for the SPC's decision as between two conflicting views. *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. In doing so, the superior court erred and its order is reversed. In light of our holding, it is unnecessary to review DHHS's remaining assignments of error.

VII. Conclusion

The superior court appropriately used both a *de novo* review and the whole-record test to the respective issues on appeal when it reviewed the final decision of the SPC. The superior court erred when it improperly substituted its judgment for that of the SPC under the whole-record test. The superior court's order, which reversed the SPC final decision due to a lack of substantial evidence to support the agency's order, is reversed. This case is remanded to the superior court with instructions to enter an order to affirm the SPC's final agency decision.

Reversed and remanded.

Judge STROUD concurs.

Judge GEER concurs in the result only by separate opinion.

GEER, Judge, concurring in the result only.

While the trial court *stated* the correct standard of review in its decision below, I cannot agree with the majority opinion that it properly *applied* that standard of review. Nor can I fully agree that the

trial court properly concluded that the State Personnel Commission erred in its conclusions of law. As a result, I concur in the result only.

Dr. Trotter filed a petition for a contested case pursuant to the State Personnel Act, N.C. Gen. Stat. § 126-1 *et seq.* (2007), initially asserting that she was denied employment "without justifiable cause." She subsequently filed an amended petition, alleging race, sex, and age discrimination when she was denied an interview. The administrative law judge, Sammie Chess, Jr., concluded that Dr. Trotter was not subjected to unlawful discrimination, and the State Personnel Commission adopted that decision.

In her petition for judicial review, Dr. Trotter contended: (1) the Commission erred in its statement of the issue by focusing on a denial of employment rather than the denial of an interview; (2) the Commission's determination that Dr. Trotter was not discriminated against based on her age was not supported by substantial evidence in view of the whole record; and (3) the finding of no age discrimination was arbitrary and capricious.

The majority opinion does not address the trial court's discussion of the first issue: the correct articulation of the issue before the Commission. The trial court concluded that the Commission's decision was "infected by an error in applying discrimination law, mainly not examining the ultimate decision here—to deny Dr. Trotter an interview." While I agree that this issue is properly a question of law, subject to de novo review, the trial court's conclusion cannot be reconciled with the State Personnel Act.

N.C. Gen. Stat. § 126-34.1(b) (2007) provides:

> An applicant for initial State employment may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes based upon:
>
> (1) Alleged denial of employment in violation of G.S. 126-16.
>
> (2) Denial of the applicant's request for removal of allegedly inaccurate or misleading information from the personnel file as provided by G.S. 126-25.
>
> (3) Denial of equal opportunity for employment and compensation on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of

> the General Statutes. This subsection with respect to equal opportunity as to age shall be limited to persons who are at least 40 years of age. An applicant may not, however, file a contested case where political affiliation was the reason for the person's nonselection for (i) an exempt policymaking position as defined in G.S. 126-5(b)(3), (ii) a chief deputy or chief administrative assistant position under G.S. 126-5(c)(4), or (iii) a confidential assistant or confidential secretary position under G.S. 126-5(c)(2).
>
> (4) Denial of the veteran's preference in initial State employment provided by Article 13 of this Chapter, for an eligible veteran as defined by G.S. 126-81.
>
> (5) Denial of employment in violation of G.S. 126-14.2, where an initial determination found probable cause to believe that there has been a violation of G.S. 126-14.2.

Thus, under the statute, an applicant for state employment may bring a contested case for a denial of employment, but no provision authorizes a contested case for denial of an interview.

The Commission properly reviewed Dr. Trotter's case as asserting a claim for discrimination in employment since otherwise, Dr. Trotter asserted no claim at all. It was the trial court—and not the Commission—that addressed the wrong issue.

With respect to Dr. Trotter's contention that the evidence did not support the Commission's finding of no discrimination, we apply the analytical framework set out in *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983). In *Gibson*, our Supreme Court adopted the framework first established for federal employment discrimination actions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Our Supreme Court explained that the plaintiff carries an initial burden of establishing a *prima facie* case of discrimination. *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82. The Court stressed that "[t]he burden of establishing a prima facie case of discrimination *is not onerous*." *Id.* (emphasis added). For example, in a termination case, "a prima facie case of discrimination may be made out by showing that (1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group." *Id.*, 301 S.E.2d at 82-83.

Once a plaintiff establishes a *prima facie* case, "a presumption arises that the employer unlawfully discriminated against the [plaintiff]." *Id.* at 138, 301 S.E.2d at 83. Nevertheless, "[t]he showing of a prima facie case is not equivalent to a finding of discrimination." *Id.* Instead, it only shifts the burden to the employer "of *producing* evidence to rebut the presumption of discrimination raised by the prima facie case." *Id.* The employer satisfies this burden "if [it] simply explains what [it] has done or produces evidence of legitimate nondiscriminatory reasons. The employer is not required to prove that its action was actually motivated by the proffered reasons . . . ." *Id.*

When the employer articulates a nondiscriminatory reason for its action, "the plaintiff is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination." *Id.* at 139, 301 S.E.2d at 84. Our Supreme Court stressed, however, that "[t]he trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination." *Id.* at 140, 301 S.E.2d at 84. With respect to this prong of *McDonnell Douglas*, "an employee must prove '*both* that the reason was false, and that discrimination was the real reason.' " *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 540, 616 S.E.2d 594, 601 (2005) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 422, 113 S. Ct. 2742, 2752 (1993)). As this Court explained: " 'It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the [employee's] explanation of intentional discrimination.' " *Id.* (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 519, 125 L. Ed. 2d at 424, 113 S. Ct. at 2754).

With respect to the *prima facie* case required in an age discrimination proceeding brought under the State Personnel Act, this Court has set forth the following elements:

> An employee can establish a *prima facie* case of age discrimination when the employee shows that (1) the employee is a member of the protected class, or over forty years old; (2) the employee applied or sought to apply for an open position with the employer; (3) the employee was qualified for the position; and (4) the employee was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *An inference of unlawful discrimination arises when an employee is replaced by a substantially younger worker.*

Greene, 172 N.C. App. at 538, 616 S.E.2d at 600-01 (emphasis added) (internal citations and quotation marks omitted).

I agree with the majority opinion and the trial court that the State Personnel Commission erred in concluding that Dr. Trotter had not met her burden of establishing this *prima facie* case. The Commission overlooked *Greene's* holding that the fourth element only requires a showing that a "substantially younger" applicant was hired. The evidence is undisputed that Dr. Trotter met the actual final element set forth in *Greene*.[1]

Like the majority opinion, I conclude that the trial court erred in reviewing the Commission's decision regarding the evidence at the pretext stage. Whether or not the reason articulated by the employer is a pretext for intentional discrimination is a question for the trier of fact. The Commission found: "Petitioner is extremely well qualified for the position. However, the evidence put forth by Petitioner falls short of demonstrating that Respondent's proffered reasons for its actions are false and a mere pretext for race, age and sex discrimination." This finding must be reviewed under the whole record test.

I do not agree with the majority opinion's conclusion that the trial court applied the correct standard of review. Although the trial court recited the whole record test, it proceeded to substitute the court's own evaluation of the evidence for that of the Commission. Rather than determining whether there was substantial evidence to support the Commission's finding, the trial court asserted that "there is ample evidence" that the reasons offered by Mr. Pritchard were false.[2]

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1. Although the trial court properly concluded that Dr. Trotter established a *prima facie* case, I am concerned that its analysis, stating that it is "beyond question" that DHHS filled the position by hiring a "less-qualified" applicant, amounts to fact finding by the trial court. The elements of a *prima facie* case required only a determination that Dr. Trotter was qualified for the position. The trial court's gratuitous assertion that Dr. Trotter was indisputably more qualified than the younger employee improperly resolved an issue of fact.

2. Notably, the trial court pointed to the Commission's conclusion that Dr. Trotter was "extremely well qualified." The trial court then translated this finding as meaning that Dr. Trotter was "the highest qualified candidate for the position"—a translation contradicted by the remainder of the Commission's and ALJ's decision. The trial court was thus substituting its judgment that Dr. Trotter was "the strongest and highest qualified candidate" for the Commission's determination that Dr. Trotter was "extremely well qualified." The fact that someone is well qualified—even extremely well qualified—does not necessarily mean that they would be the best fit for the job, one of the criteria apparently applied by Mr. Pritchard. *See Enoch v. Alamance County Dep't of Soc. Servs.*, 164 N.C. App. 233, 246, 595 S.E.2d 744, 754 (2004) (rejecting argument that superior qualifications necessarily establish pretext for discriminatory motive). It was not the trial court's role to decide who should have been hired.

Our Supreme Court has, however, explained:

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (internal citation omitted). In turn, " '[s]ubstantial evidence' is defined as 'relevant evidence a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting N.C. Gen. Stat. § 150B-2(8b) (2003)).

Thus, it is immaterial whether "ample evidence" exists to support the trial court's view. The question is whether the record contains evidence that a reasonable mind could accept as adequate to support the Commission's findings. Here, the record contains evidence that would permit a reasonable mind to find that Mr. Pritchard's reasons were true. Mr. Pritchard explained in his testimony why he found Ms. Seay's education and experience more directly relevant to the vacant position and why he believed she would be a better fit for the job.

The trial court's and Dr. Trotter's arguments regarding the credibility of Mr. Pritchard's testimony were questions for the ALJ and the Commission to consider. The trial court was not free to revisit those credibility determinations. As this Court stated in *Greene*, 172 N.C. App. at 536, 616 S.E.2d at 599 (quoting *Little v. N.C. State Bd. of Dental Exam'rs*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)): "On review of an agency's decision, a trial court 'is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to [the trial court] to be, so long as substantial evidence of those findings exist in the whole record.' " *See also N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 904 (2004) (holding that it is the agency's responsibility, and not the court's, 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 trial court also disregarded the principle that even if the plaintiff presents evidence that the reasons offered were untrue, the

trier of fact is still not required to conclude that the reasons were a pretext *for intentional unlawful discrimination*. *See Miller v. Barber-Scotia College*, 167 N.C. App. 165, 168, 605 S.E.2d 474, 477 (2004) (" 'The ultimate question is whether the employer intentionally discriminated, and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that [plaintiff's] proffered reason . . . is correct. It is not enough to disbelieve the defendants here; the fact-finder must believe [plaintiff's] explanation of intentional race discrimination.' " (quoting *Love-Lane v. Martin*, 355 F.3d 766, 788 (4th Cir.), *cert. denied*, 543 U.S. 813, 160 L. Ed. 2d 18, 125 S. Ct. 49 (2004))). In other words, a trier of fact could find that the reasons were untrue, but were a pretext for some motive other than the alleged discrimination.

Dr. Trotter makes little effort to argue that the actual motive was age discrimination apart from pointing to the age disparity. Indeed, her argument primarily suggests that Mr. Pritchard was implementing his desire to promote from within. Even assuming without deciding, that such a motivation was improper under state regulations, that motive is not age discrimination. I would, therefore, conclude that under the whole record test, the Commission's determination that Dr. Trotter was not denied employment as a result of her age is supported by substantial evidence. Since the Commission's finding of no discrimination is supported by substantial evidence, it is not arbitrary and capricious.

While Dr. Trotter may have presented sufficient evidence to permit a finding of discrimination, her evidence did not mandate such a finding. The trial court was not permitted to substitute its view of the evidence for the Commission's and should have upheld the Commission's decision.

JOSEPH HORRY, JR., PLAINTIFF v. DAVID H. WOODBURY, INDIVIDUALLY, AND AS THE EXECUTOR OF THE ESTATE OF RUTH N. HORRY, DEFENDANT

No. COA07-477

(Filed 15 April 2008)

1. Estates— standing—estate beneficiary—acts by attorney-in-fact—failure to assert demand or seek removal of executor

Plaintiff estate beneficiary had no standing to challenge defendant's conduct prior to decedent's death in an action alleging defendant, the executor of decedent's estate, engaged in improper conduct while acting under a power of attorney for decedent because: (1) as a beneficiary of the estate, plaintiff's challenges to defendant's actions prior to decedent's death must be asserted by a demand upon the executor, or by seeking to remove the executor through petition before the clerk of superior court; (2) no allegations in the complaint and no evidence in the record showed that plaintiff did either of the conditions precedent prior to filing this action; and (3) plaintiff, as a credit or, next of kin, or beneficiary of the estate, cannot assert a *jus tertii* claim for a debt due to the decedent without a demand upon the executor or petition before the clerk of superior court to remove the executor.

2. Conversion— funds deposited in new account—joint tenants with rights of survivorship

The trial court did not err in a conversion case by granting partial summary judgment against defendant for funds deposited in new accounts 6749-2 and 6753-6 because: (1) the signature card for source accounts numbered 5508-4 and 5900-0 were personally signed by decedent and defendant, and specifically listed both parties as owners of the accounts; (2) no evidence in the record showed that decedent and defendant agreed with or required the bank to demand that withdrawals contain both owners' signatures; and (3) as a matter of law, plaintiff could not establish that defendant's actions constituted conversion of the source account of which defendant and decedent individually opened and owned as joint tenants with rights of survivorship.

3. Appeal and Error— preservation of issues—failure to assert issue at trial

Although defendant contends the trial court erred by failing to grant decedent and defendant, in his individual capacity, a right of equitable subrogation against plaintiff for the funds paid from source account 5508-4 based on plaintiff's default on a loan for which the account was pledged collateral, this assignment of error is overruled, because: (1) defendant attempted to bring this claim for the first time on appeal under N.C.G.S. § 1A-1, Rule 54(c); and (2) defendant's reliance on Rule 54(c) is misplaced.

Judge McCULLOUGH concurring in part and dissenting in part.

Appeal by defendant from orders entered 21 September 2005 and 8 October 2005 by Judge Steve A. Balog in Durham County Superior Court. Heard in the Court of Appeals 1 November 2007.

Brady, Nordgren, Morton & Malone, PLLC, by Travis K. Morton, for plaintiff-appellee.

Hendrick Murray & Cheek, PLLC, by Josiah S. Murray, III, and John C. Rogers, III, for defendant-appellant.

TYSON, Judge.

This cause of action arises from Joseph Horry, Jr.'s ("plaintiff") claims that David H. Woodbury ("defendant"), in his individual capacity and as executor of the estate of Ruth N. Horry ("decedent"), engaged in improper conduct while acting under a power of attorney for decedent and while serving as the executor of decedent's estate.

The affidavits and evidence before the superior court, relevant to this appeal, tended to show that decedent and defendant, decedent's cousin, maintained a close relationship. On 13 April 1999, decedent and defendant entered the branch of Mechanics & Farmers Bank at which decedent regularly banked and opened savings account number *****5508-4 ("source account 5508-4"), naming decedent and defendant as joint account owners with rights of survivorship. That account was initially opened with $64,802.42 of decedent's funds. Both decedent and defendant individually signed the signature card for that account.

On 13 March 2000, decedent executed a durable power of attorney naming defendant as attorney-in-fact. The power of attor-

ney expressly authorized defendant to engage in fifteen categories of transactions, including banking transactions and personal property transactions.

On 3 October 2000, decedent and defendant opened money market account number *****5900-0 ("source account 5900-0"), naming decedent and defendant as joint account owners with rights of survivorship. That account was initially opened with $63,107.12 of decedent's funds. Both decedent and defendant individually signed the signature card for that account.

In November of 2002, plaintiff, decedent's nephew and sole beneficiary under decedent's will, who lived in New York, was experiencing financial difficulties and contacted defendant seeking financial assistance. Sometime prior to 30 May 2003, source account 5508-4 was pledged as security for a loan from Mechanics & Farmers Bank to plaintiff. After partial repayment of the loan, plaintiff defaulted. On 30 May 2003, Mechanics & Farmers Bank closed source account 5508-4, using a portion of the funds from that account to pay the unpaid balance of plaintiff's loan.

On that same day, 30 May 2003, defendant individually opened the two accounts at issue in this appeal. Defendant used the balance of funds previously held in source account 5508-4 as the initial deposit for account number *****6749-2 ("new account 6749-2"), which named decedent and defendant as joint account owners. On the signature card for new account 6749-2, defendant signed defendant's name as owner and decedent's name in defendant's capacity as attorney-in-fact for decedent. In addition, because decedent was being moved to a skilled nursing facility, upon the recommendation of a bank employee, defendant closed source account 5900-0 and used the funds held in that account as the initial deposit for account number *****6753-6 ("new account 6753-6"), which he individually signed and also named decedent and defendant as joint account owners. New account 6753-6 was recommended because it would enable defendant to make three withdrawals per month without being charged a service fee. On the signature card for new account 6753-6, defendant signed his name individually as owner as well as decedent's name in defendant's capacity as attorney-in-fact for decedent.

On 1 June 2003, decedent died. Defendant asserted ownership to the funds to all the aforementioned joint bank accounts. On 21 October 2004, plaintiff filed an action against defendant asserting claims that defendant made improper payments, engaged in

constructive fraud, breached his fiduciary duty, and converted decedent's funds.

On 21 September 2005, Superior Court Judge Steve A. Balog granted partial summary judgment in favor of plaintiff for claims against defendant for the funds deposited in: (1) new account 6753-6, in the amount of $60,962.14; and (2) new account 6749-2, in the amount of $71,412.08. Defendant appeals.

I. Issues

Defendant argues the trial court erred when it: (1) granted partial summary judgment against defendant for funds deposited in new accounts 6749-2 and 6753-6; and (2) failed to grant decedent and defendant, in his individual capacity, a right of equitable subrogation against plaintiff for funds paid from source account 5508-4 due to plaintiff's default on the loan for which the account was pledged as collateral.

II. Standing

[1] Our Supreme Court has stated:

> Pending the administration of an estate, it is well settled that title to personal property of an intestate vests in his administrator and not his next of kin. Therefore, it necessarily follows that the administrator, and not creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property. *If a debt is due a decedent, it can be collected only by his administrator.*
>
> To this general rule, however, there are certain exceptions. If the administrator has refused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative—particularly if the latter is insolvent; or, if some other peculiar circumstance warrants it, the creditors or next of kin may bring the action which the personal representative should have brought. However, in such a case the administrator must be a party defendant.

Spivey v. Godfrey, 258 N.C. 676, 677, 129 S.E.2d 253, 254 (1963) (citations omitted) (emphasis supplied).

Here, no allegations or demands in the complaint support any of the stated exceptions. "In a proper case, a personal representative may be removed for failure to prosecute or defend actions in behalf

of the estate he represents. But clearly a request to sue and a refusal would be conditions precedent." *Id.* at 679, 129 S.E.2d at 256 (citations omitted).

Plaintiff has no standing to challenge defendant's conduct prior to decedent's death. Without proper standing, the superior court acquired no jurisdiction to adjudicate plaintiff's claims. *See Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." (Citations omitted)). Absence of jurisdiction can be raised at any time, including on appeal and *ex mero moto*. *Id.*

As a beneficiary of the estate, plaintiff's challenges to defendant's actions prior to decedent's death must be asserted by a demand upon the executor, or by seeking to remove the executor through petition before the clerk of superior court. *Spivey*, 258 N.C. at 677, 129 S.E.2d at 254. No allegations in the complaint and no evidence in the record shows that plaintiff did either of the conditions precedent prior to filing this action. Plaintiff has no standing and the superior court acquired no jurisdiction over this action. *Aubin*, 149 N.C. App. at 324, 560 S.E.2d at 878-79. Plaintiff, as a creditor, next of kin, or beneficiary of the estate, cannot assert a *jus tertii* claim for a debt due to the decedent without a demand upon the executor or petition before the clerk of superior court to remove the executor. *Spivey*, 258 N.C. at 677, 129 S.E.2d at 254; *see* N.C. Gen. Stat. § 28A-18-1(a) (2003) ("Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate."); *see also Holmes v. Godwin*, 69 N.C. 467, 470 (1873) ("In general, *jus tertii*[,] [the right of a third party,] cannot be set up as a defense by the defendant, unless he can in some way connect himself with the third party.").

III. Conversion Claim

[2] Even if plaintiff had standing, he cannot legally establish a claim of conversion. The signature cards for source accounts numbered 5508-4 and 5900-0 were personally signed by decedent and defendant, specifically listed both parties as owners of the accounts, and contained the following language:

> We understand that by establishing a joint account under the provisions of North Carolina General Statute 53-146.1 that:
>
> 1. *The bank may pay the money* in the account *to*, *or on the order of*, *any person named* in the account unless we have agreed with the bank that withdrawals require more than one signature . . . .

(Emphasis supplied). No evidence in the record shows that decedent and defendant agreed with or required the bank to demand that withdrawals contain both owners' signatures.

When a person deposits funds into a joint account with another, the other is designated the depositor's agent with authority to withdraw the funds. *Smith v. Smith*, 255 N.C. 152, 155, 120 S.E.2d 575, 579 (1961). A principal may maintain an action in conversion to recover funds converted by their agent. *See Finance Co. v. Holder*, 235 N.C. 96, 99, 68 S.E.2d 794, 796 (1952) ("[T]he cause of action set out in plaintiff's complaint sounds in tort for conversion of funds." (Citation omitted)).

Our Supreme Court has defined the tort of conversion as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (quotation omitted).

Defendant closed the two source accounts he and decedent had individually opened and owned as joint tenants with rights of survivorship and opened the two new accounts which he and decedent again owned as joint tenants with rights of survivorship. Defendant's actions did not constitute "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Id.* As a matter of law plaintiff cannot establish that defendant's actions constituted conversion of the source account of which defendant and decedent individually opened and owned as joint tenants with rights of survivorship.

IV. Claim for Equitable Subrogation

[3] Defendant contends the trial court erred in failing to grant decedent and defendant, in his individual capacity, a right of equitable subrogation against plaintiff for the funds paid from source account 5508-4 due to plaintiff's default on a loan for which the account was

pledged as collateral. Defendant attempts to bring this claim for the first time on appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(c) (2007). Defendant's reliance on Rule 54(c) is misplaced. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404 (1999) (refusing to consider a claim for the first time on appeal where the party's pleadings did not allege facts sufficient to support the claim). This assignment of error is overruled.

V. Conclusion

As a beneficiary of the estate, plaintiff's challenges to defendant's actions prior to decedent's death must be asserted by a prior demand upon the executor, or by seeking to remove the executor through petition before the clerk of superior court. *Spivey*, 258 N.C. at 677, 129 S.E.2d at 254. No allegations in the complaint and no evidence in the record shows that plaintiff did either of these conditions precedent prior to filing this action. Plaintiff has no standing and the superior court acquired no jurisdiction over this action. *Aubin*, 149 N.C. App. at 324, 560 S.E.2d at 878-79.

Plaintiff cannot establish a claim for conversion against defendant, who was a true and rightful owner of the funds, with full authority to withdraw. *Peed*, 244 N.C. at 439, 94 S.E.2d at 353. The superior court erred when it granted summary judgment in favor of plaintiff for conversion of funds deposited into the two new accounts. We reverse and remand with instruction to the trial court to enter an order dismissing plaintiff's claims.

Reversed and Remanded

Judge STROUD concurs.

Judge McCULLOUGH concurs in part and dissents in part by separate opinion.

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

Because I find that the majority departs substantially from well-settled estate planning precedent and disregards express statutory provisions intended to prevent fraud, I respectfully dissent.

I. Standing

First, I disagree with the majority that plaintiff lacks standing. The very case upon which the majority relies, *Spivey v. Godfrey*,

258 N.C. 676, 129 S.E.2d 253 (1963), recognizes that a beneficiary does have standing to bring an action for conversion against an administrator without making any demands on the administrator or petitioning for his removal. *Spivey* stands for the proposition that, as a general rule, during the course of an orderly administration of an estate, a beneficiary may not bring suit to collect a debt of the estate without first making a demand upon the executor or seeking to have the executor removed; however, *Spivey* emphasizes that a tort action against the administrator is not the same as an action to collect a debt. *Id.* at 677, 129 S.E.2d at 254. Our Supreme Court in *Spivey* expressly noted two examples in which beneficiaries had standing to bring tort actions against an administrator without first making a demand upon the administrator:

> In at least two cases the Court has permitted the next of kin to maintain a suit against the representative of a defaulting administrator for a distributive share in the estate by making the administrator d.b.n. of the intestate a party defendant **even though there were no allegations of collusion or refusal to bring suit**. *Hardy v. Miles*, *supra* and *Snipes v. Estates Administration, Inc.*, *supra* . . . .
>
> . . . .
>
> In both *Hardy* and *Snipes*, plaintiffs were seeking to recover their distributive shares of an estate from the representative of a former administrator whom they alleged had **wrongfully converted** or failed to account for it. . . .
>
> **It is one situation when the next of kin sue an administrator for conversion or negligence and quite another when they attempt to take over the administrator's duty.**

Spivey, 258 N.C. 676, 677-78, 129 S.E.2d 253, 254-55 (emphasis added).

Thus, *Spivey* does not stand for the proposition that a beneficiary has no standing to bring an action for conversion without first petitioning the clerk of superior court for the administrator's removal. Not only does the majority misconstrue *Spivey*, but they depart from a line of cases, which hold that claims against an administrator for breach of fiduciary duty, fraud, conversion, and negligence " ' "arise *from [the]* administration of an estate, [but] their resolution is *not a part* of 'the administration, settlement and distribution of estates of decedents" ' " and cannot be brought by petition before the clerk of superior court, which has no jurisdiction over such claims. *State ex*

rel. Pilard v. Berninger, 154 N.C. App. 45, 53, 571 S.E.2d 836, 842 (2002) (emphasis added) (citation omitted), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 100 (2003); *see also Mullinex v. Mabry*, 174 N.C. App. 839, 622 S.E.2d 523 (2005) (unpublished) ("[P]laintiffs allege constructive fraud on the part of [the administrator] with regard to her actions as personal agent for decedent prior to her death. Plaintiffs, therefore, have standing as decedent's heirs to bring the action as successors to the rights of decedent."). *In re Estate of Parrish*, 143 N.C. App. 244, 251, 547 S.E.2d 74, 78 ("We recognize that an action for damages resulting from a fiduciary's breach of duty in the administration of a decedent's estate is not a claim under the original jurisdiction of the clerk of court. Such actions should, therefore, be brought as civil actions in the trial division of Superior Court."), *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001); *In re Trust Under Will of Jacobs*, 91 N.C. App. 138, 141-42, 370 S.E.2d 860, 863 (noting "our courts distinguish cases which 'arise from' the administration of an estate from those which are 'a part of' the administration and settlement of an estate"; only those matters "a part of" the administration of an estate are within exclusive original jurisdiction of the clerk of superior court), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988).

Here, plaintiff's complaint alleges claims of conversion, breach of fiduciary duties, improper payments, and constructive fraud. These claims arise from the administration of decedent's estate, but are not part of the administration of the estate and could not have been brought before the clerk of superior court. *Pilard*, 154 N.C. App. at 54, 571 S.E.2d at 842. I, therefore, disagree with the majority that plaintiff, as a real party interest, was required to file a petition before the clerk of superior court to remove defendant as a condition precedent to having standing in the superior court. Not only was this not required, but this conclusion is a substantial departure from well-settled precedent and will create confusion for estate planning practitioners throughout the state.

II. Conversion

Next, I disagree with the majority's conclusion that the undisputed evidence of record does not establish that defendant converted the funds contained in new accounts 6749-2 and 6753-6. " 'The tort of conversion is well defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." ' " *Lake Mary Ltd. Part. v. Johnston*, 145 N.C.

App. 525, 531, 551 S.E.2d 546, 552 (citations omitted), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538 (2001). " ' "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner[.]" ' " *Id.* at 532, 551 S.E.2d at 552 (citations omitted). Thus, " 'it is clear then that two essential elements are necessary in a complaint for conversion—there must be [1] ownership in the plaintiff and [2] a wrongful conversion by defendant.' " *Id.* (citations omitted).

Because the undisputed evidence shows, as a matter of law, that (1) plaintiff is the owner of the funds held in the new accounts at issue and (2) defendant has assumed control of those funds without plaintiff's authorization, defendant has committed conversion with respect to those funds.

A. Plaintiff's Ownership of New Accounts

First, I disagree with the majority that defendant has any valid ownership interest in the funds contained in new accounts 6749-2 and 6753-6. The majority's analysis is erroneous in that it simply glosses over the undisputed evidence of record, which is that the signature cards for the new accounts at issue did not comply with N.C. Gen. Stat. § 53-146.1 (2007), and therefore, did not create a valid right of survivorship in defendant. Without a right of survivorship, the funds contained in the new accounts at issue were part of decedent's estate and belong to plaintiff as sole beneficiary of decedent's estate.

It is well established that a right of survivorship cannot be created by the intentions of the parties without satisfaction of the statutory requirements. *See*, *e.g.*, *Mutual Community Savings Bank v. Boyd*, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997) (extrinsic or parol evidence of parties' intent to establish joint tenancy with right of survivorship inadmissible); *Powell v. First Union Nat. Bank*, 98 N.C. App. 227, 229, 390 S.E.2d 461, 462 (1990) (regardless of clear intent of parties to establish joint savings account with right of survivorship, survivorship account not created where statutory requirements not met). Therefore, if the statutory requirements necessary to establish a right of survivorship in new accounts 6749-2 and 6753-6 were not satisfied, it is irrelevant that decedent may have intended for defendant to have had survivorship rights in those accounts.

Failure to Satisfy Requirements of N.C. Gen. Stat. § 53-146.1

The signature cards for new account 6749-2 and 6753-6 did not comply with N.C. Gen. Stat. § 53-146.1.

(a) Requirements of N.C. Gen. Stat. § 53-146.1

Parties who desire to establish a joint deposit account with a right of survivorship may do so pursuant to N.C. Gen. Stat. § 53-146.1. To establish this type of account under N.C. Gen. Stat. § 53-146.1, *all* persons establishing the account must (1) sign a statement that (2) uses language conspicuously indicating the intent to establish such an account, and (3) the language used must be substantially similar to the form language provided in the statute. N.C. Gen. Stat. § 53-146.1. We construe these statutory requirements strictly. *In re Estate of Heffner*, 99 N.C. App. 327, 330, 392 S.E.2d 770, 771-72 (1990).

(b) Failed Signatures under N.C. Gen. Stat. § 32A-14.1(b)

A critical error in the majority's analysis is their complete disregard of the express language of N.C. Gen. Stat. § 32A-14.1(b) (2007). Section 32A-14.1(b) prohibits an attorney-in-fact from exercising a power of attorney in favor of the attorney-in-fact, unless the power of attorney expressly authorizes the attorney-in-fact to do such things. N.C. Gen. Stat. § 32A-14.1(b) provides:

> [U]nless gifts are expressly authorized by the power of attorney, **a power [of attorney] may not be exercised by the attorney-in-fact in favor of the attorney-in-fact** or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

In the instant case, the power of attorney expressly authorized defendant to engage in fifteen categories of transactions, including banking transactions and personal property transactions; it did not, however, expressly authorize defendant to make gifts of decedent's property.

As discussed below, the survivorship rights associated with the source accounts were lost at the moment that those accounts were closed. *Pilard*, 154 N.C. App. at 56, 571 S.E.2d at 844 ("In any event, even if the demand deposit account carried a 100% right of survivorship feature, any such feature became of no consequence the moment [the defendant] transferred its assets into new certificates of deposit.") By using the power of attorney to grant himself survivorship interests in the new accounts, defendant used the power of attorney in favor of himself, which is prohibited by § 32A-14.1(b); accordingly, those signatures fail.

Regardless of defendant's intentions in opening the new accounts, whether actions are authorized under a power of attorney

is a question of law, not fact. *See Hutchins v. Dowell*, 138 N.C. App. 673, 676-77, 531 S.E.2d 900, 902 (2000). In *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 819, 487 S.E.2d 166. 168 (1997), this Court noted that the statutory language of N.C. Gen. Stat. § 32A-14.1 was intended as a codification of existing North Carolina common law. *See Honeycutt*, 126 N.C. App. at 819-20, 487 S.E.2d at 168. Under well-established principles of North Carolina agency law,

> [a]n agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with the power to manage all the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.

Id. at 820, 487 S.E.2d at 168 (citations omitted).

The majority has disregarded the legislative protection against fraud afforded by N.C. Gen. Stat. § 32A-14.1(b). Because decedent was prohibited by statute from using the power of attorney in favor of himself and decedent never personally signed the signature cards for the new accounts, the signature cards for the new accounts only contain the valid signatures of one of the parties—not both of the parties; therefore, the signature cards do not comply with N.C. Gen. Stat. § 53-146.1. Accordingly, no valid survivorship rights were created by virtue of the signature cards associated with the new accounts.

Survivorship Rights Do Not Transfer

Second, the undisputed evidence of record shows that defendant's survivorship rights from the source accounts did not transfer to the new accounts at issue. It is well settled that the signature card from one joint account with right of survivorship cannot be used to create survivorship rights in a new account, unless there is some evidence, either on the face of the claimed agreement or the documents setting up the account that what is being put forward as the survivorship agreement was intended to govern the particular account in question. *Napier v. High Point Bank & Trust Co.*, 100 N.C. App. 390, 393-94, 396 S.E.2d 620, 622 (1990), *disc. review denied*, 328 N.C. 92, 403 S.E.2d 99 (1991) (holding that even though money used to purchase a certificate of deposit had been withdrawn from a joint account with survivorship rights, there was no right of survivorship in the certificate of deposit because there was nothing on the face of the certificate or on the signature card of the prior account to indicate

that its provisions were intended to control the funds represented by the certificate).

Here, there is no evidence on the face of the signature cards for the source accounts or on the documents setting up the new accounts that the survivorship agreements for the source accounts were intended to govern the new accounts. Thus, the signature cards for the source accounts do not create survivorship rights in the funds contained in the new accounts. Therefore, the trial court properly concluded that defendant's survivorship rights in the source accounts were lost on 30 May 2003, when the source accounts were closed.

In sum, the majority erroneously concludes: "Defendant closed the two source accounts he and decedent opened and owned as joint tenants with right of survivorship and opened the two new accounts which he and decedent again owned as joint tenants with right of survivorship." It is clear that because of the protections against fraud afforded by N.C. Gen. Stat. § 32A-14.1(b) and N.C. Gen. Stat. § 53-146.1, a caretaker may not use a power of attorney to make himself a joint account holder with a right of survivorship, unless the caretaker has express authority in the power of attorney to do so.

Because (1) the signature cards to the new accounts did not comply with N.C. Gen. Stat. § 53-146.1 and (2) defendant's survivorship rights from the source accounts did not transfer to the new accounts, as a matter of law, defendant had no survivorship rights in new account 6749-2 nor in new account 6753-6. Thus, when decedent died, those funds became part of decedent's estate.[1] Plaintiff, as sole beneficiary of decedent's estate is the owner of those funds.

B. Wrongful Deprivation by Defendant

As previously stated, " '[t]he essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation

1. As an aside, I note that there is no evidence of an *inter vivos* gift from decedent to defendant. The evidence of record shows that decedent was the depositor of all of the funds held in the source accounts and that those funds were intended to pay for decedent's expenses. Defendant has not introduced evidence of decedent's donative intent or loss of dominion and control; accordingly, decedent's estate is deemed owner of the funds which were transferred from the source accounts to the new accounts. *See Smith v. Smith*, 255 N.C. 152, 154-55, 120 S.E.2d 575, 578 (1961) (holding that a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other; the depositor is deemed to be the owner of the funds, absent evidence of donative intent coupled with loss of dominion and control over the property).

of it to the owner[.]' " *Lake Mary Ltd. Part.*, 145 N.C. App. at 532, 551 S.E.2d at 552 (citation omitted). The majority erroneously focuses its analysis on defendant's authority to withdraw the funds from the source accounts, rather than on defendant's assumption of control over funds that he does not own.

This Court has stated that the authority of joint owners to withdraw from a joint bank account does "not release one depositor to a joint account from liability to another for withdrawal which constitutes wrongful conversion." *Myers v. Myers*, 68 N.C. App. 177, 180, 314 S.E.2d 809, 812 (1984).

The instant facts are substantially analogous to the facts of *Pilard*, 154 N.C. App. at 47-50, 571 S.E.2d at 838-40. In *Pilard*, a wife and husband were listed on a joint bank account with a right of survivorship. *Id.* While the husband was very ill in the hospital, upon a bank teller's recommendation and with no evidence of any fraudulant intent or bad faith on the part of the wife, the wife attempted to establish a new joint bank account with a right of survivorship by signing her husband's name on the signature card. *Id.* Because the husband did not sign the signature card himself, the wife's signature failed to establish a valid survivorship right in the funds held in the second bank account. Upon the husband's death, the wife, who was the administrator of the husband's estate, refused to distribute the funds held in the second account to the husband's heirs. This Court held that despite the wife's authority to withdraw the funds as a joint bank account holder on the first account, to the extent that the wife did not have a valid ownership interest in the funds held in the second account yet assumed ownership of those funds, the evidence was sufficient to support a claim of conversion against the wife.

Here, because defendant had no authority to sign decedent's name under N.C. Gen. Stat. § 32A-14.1, defendant's signatures have the same effect as the wife's failed signature in *Pilard*—they failed to create valid survivorship interests in the new accounts. Here, as the majority notes, defendant was acting as decedent's agent in withdrawing the funds from the source accounts; all of the funds deposited in the new accounts at issue, therefore, belonged to decedent, and now to plaintiff, as sole beneficiary of decedent's estate. Despite defendant's authority as a joint account holder to withdraw the funds from the source accounts, to the extent that defendant has no survivorship interest in those funds and has refused to distribute those funds to plaintiff, he is liable for conversion.

III. Equitable Subrogation

Finally, with regard to defendant's claim for equitable subrogation, I concur with the majority.

IN THE MATTER OF: J.A.P. AND I.M.P.

No. COA07-1562

(Filed 15 April 2008)

1. Termination of Parental Rights— subject matter jurisdiction—service of process on attorney advocate—service on guardian ad litem

Where a juvenile's guardian ad litem is represented by an attorney advocate in a termination of parental rights proceeding, service of summons on the attorney advocate constitutes service on the guardian ad litem for the purpose of conferring subject matter jurisdiction on the trial court. Service of summons on the guardian ad litem constitutes service on the juvenile.

2. Termination of Parental Rights— personal jurisdiction—children not served—service on guardian ad litem's attorney—sufficiency

A mother's argument that the trial court lacked personal jurisdiction over the children in a termination of parental rights case because the children were not served was overruled where the guardian ad litem did not object at trial or argue on appeal that the trial court lacked jurisdiction, and it was decided elsewhere in this opinion that service upon the guardian ad litem's attorney advocate was sufficient. Furthermore, respondent failed to demonstrate any prejudice from service upon the attorney advocate rather than the guardian at litem.

3. Termination of Parental Rights— evidence supporting termination—sufficiency

There was clear, cogent, and convincing evidence in a termination of parental rights proceeding to support findings which supported a conclusion that the minor children were neglected and that grounds existed for termination. The findings included animals in the house, unsanitary conditions in the house, hitchhiking with the children, and sexual abuse.

4. Termination of Parental Rights— only one ground required—others not considered on appeal

Only one ground is necessary to support termination of parental rights, and it was not necessary in this case to consider whether the findings supported termination based on leaving the children in placement or failing to pay a portion of the cost of care where the findings supported other grounds.

5. Termination of Parental Rights— best interest of children—no abuse of discretion

The trial court did not abuse its discretion by concluding that termination of parental rights was in the children's best interests.

6. Termination of Parental Rights— delay in written order—not prejudicial

Respondent was not prejudiced by an 82-day delay in reducing a termination of parental rights order to writing where the decision was announced in open court and the neglect was proven by clear, cogent, and convincing evidence.

Appeal by Respondent from judgment entered 17 October 2007 by Judge William G. Jones in Iredell County District Court. Heard in the Court of Appeals 17 March 2008.

Lauren Vaughan for Petitioner-Appellee Iredell County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Lori R. Keeton, for Respondent-Appellee Guardian Ad Litem.

Carol Ann Bauer for Respondent-Appellant Mother.

STEPHENS, Judge.

On 27 October 2006, the Iredell County Department of Social Services ("DSS") filed petitions for the termination of Respondent's parental rights as to her minor children, J.A.P. and I.M.P. The petitions were heard on 12, 26, and 27 July 2007. On 17 October 2007, the trial court entered a consolidated judgment and order of adjudication and disposition terminating Respondent's parental rights to both children. From this order, Respondent appeals.

I. Subject Matter Jurisdiction

[1] As a preliminary matter, we must determine whether the trial court had subject matter jurisdiction over the termination proceed-

ings in this case. Although the parties have not questioned the court's subject matter jurisdiction, "a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*. *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 571 S.E.2d 588 (2002).

Our juvenile code requires:

> (a) . . . [U]pon the filing of the [termination] petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:
>
> . . . .
>
> (5) The juvenile.
>
> . . . Except that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed . . . .

N.C. Gen. Stat. § 7B-1106 (2007). Plainly, where a guardian *ad litem* has been appointed for the juvenile, the statute directs that service of the summons be made on the guardian *ad litem* rather than on the juvenile.

In *In re C.T.*, 182 N.C. App. 472, 643 S.E.2d 23 (2007), the petition to terminate parental rights was captioned with the names of both minor children at issue, C.T. and R.S., but no summons was issued referencing R.S. This Court held the trial court lacked subject matter jurisdiction to terminate respondent-mother's parental rights in R.S. because "the record fail[ed] to show that a summons was ever issued as to R.S." *Id.* at 475, 643 S.E.2d at 25. Accordingly, this Court vacated the termination order to the extent it terminated respondent-mother's parental rights in R.S.

In *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007), summons was issued regarding the minor child to the mother and father, but no summons was issued to the minor child. This Court, citing *C.T.*, vacated the trial court's order terminating respondent-father's parental rights because it held that "the failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction." *Id.* at 504, 653 S.E.2d at 428-29.

However, in *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005), this Court overruled respondent-mother's argument that the trial court had not acquired jurisdiction over the juvenile where service of summons regarding the juvenile was served on the guardian *ad litem's* attorney, rather than on the guardian *ad litem*, as contemplated by N.C. Gen. Stat. § 7B-1106(a). Noting that the guardian *ad litem* had not objected at trial to the sufficiency of service of the summons, nor raised such issue on appeal, this Court held that respondent-mother had failed to demonstrate any prejudice to her "from the alleged failure to properly serve [the juvenile]." *Id.* at 8, 616 S.E.2d at 269. Additionally, this Court did not question the trial court's subject matter jurisdiction based on the service of summons and specifically concluded that the trial court did have subject matter jurisdiction over the proceedings. Thus, the trial court's order terminating respondent-mother's parental rights in J.B. was affirmed.[1] *See also In re B.D.*, 174 N.C. App. 234, 620 S.E.2d 911 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006) (holding the trial court had jurisdiction where summons was served on the attorney advocate for the juvenile's guardian *ad litem*).

Here, the record on appeal includes copies of summonses captioned: "In the Matter of: [J.A.P.]" and "In the Matter of: [I.M.P.]" The record also contains certifications by the Attorney Advocate for the Guardian *ad Litem* that she accepted service of process regarding both minors. The certifications read: "I, Holly Groce, Attorney Advocate, do hereby accept service of the attached Summons in Proceeding for Termination of Parental Rights and Petition for Termination of Parental Rights, and acknowledge receipt of the same in the above-entitled proceeding pending in the General Court of Justice, Iredell County, North Carolina, and service by an officer is hereby expressly waived." The Acceptance of Service of Process certifications are entitled "In the Matter of: [J.A.P.], a minor child[,]" and "In the Matter of: [I.M.P.], a minor child." The summonses and the Acceptance of Service of Process certifications are paginated consecutively in the record. Thus, unlike in *C.T.* where no summons was issued regarding R.S., summonses were issued referencing both J.A.P. and I.M.P. Furthermore, unlike in *K.A.D.* where no summons was issued to the minor child,[2] here, as in *J.B.*, summonses were accepted on behalf of the minor children by the attorney advocate for the chil-

1. The Court's opinion in *K.A.D.* is silent as to whether summons was issued to K.A.D.'s guardian *ad litem*, although the opinion reflects that a guardian *ad litem* had been appointed for K.A.D.

2. *See* Footnote 1.

dren's guardian *ad litem*. *See* North Carolina Rules of Prof'l Conduct R. 1.2(a) (2005) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."). We hold that where a juvenile's guardian *ad litem* is represented by an attorney advocate in a termination of parental rights proceeding, service of summons on the attorney advocate constitutes service on the guardian *ad litem*. Service of summons on the guardian *ad litem*, in turn, constitutes service on the juvenile, as expressly stated in N.C. Gen. Stat. § 7B-1106(a). Accordingly, we conclude that the trial court had subject matter jurisdiction over these proceedings.

II. Personal Jurisdiction

[2] Next, Respondent asserts that the trial court erred in concluding that it had personal jurisdiction over the minor children because summons was not properly issued to the minor children.

Upon the filing of a petition to terminate parental rights, a summons regarding the proceeding must be issued to the juvenile. N.C. Gen. Stat. § 7B-1106(a)(5). "[T]he summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed[.]" N.C. Gen. Stat. § 7B-1106(a). Here, the record reflects that the summonses required by N.C. Gen. Stat. § 7B-1106(a) were served upon the guardian *ad litem's* attorney advocate. Such service, as explained above, effectively served the minor children for purposes of N.C. Gen. Stat. § 7B-1106(a).

However, even if service upon the attorney advocate was error, "[o]nly 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) (quoting N.C. Gen. Stat. § 1-271). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Id.* Here, the guardian *ad litem* did not object at trial to the sufficiency of service, nor does the guardian *ad litem* argue now that the trial court lacked jurisdiction over the minor children. Furthermore, Respondent failed to demonstrate any prejudice to her resulting from service upon the attorney advocate, rather than the guardian *ad litem*. Accordingly, we overrule this argument.

III. Termination of Parental Rights

[3] Proceedings to terminate parental rights occur in two phases: (1) the adjudication phase, and (2) the disposition phase. *In re Baker*, 158 N.C. App. 491, 581 S.E.2d 144 (2003). In the adjudication phase,

findings made by the trial court must be supported by clear, cogent, and convincing evidence, and the findings must support a conclusion that at least one statutory ground for the termination of parental rights exists. *In re Shermer*, 156 N.C. App. 281, 576 S.E.2d 403 (2003). A trial court is only required to find one statutory ground for termination before proceeding to the disposition phase. N.C. Gen. Stat. § 7B-1111(a) (2007). In the disposition phase, the trial court must determine whether termination of parental rights is in the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001).

A. Neglect as Grounds for Termination

Respondent assigns error to the trial court's determination that grounds existed to terminate Respondent's parental rights based on the neglect of the minor children.

The standard of review on appeal is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001). Findings of fact supported by competent evidence are binding on appeal, even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Parental rights may be terminated if the juvenile has been neglected. N.C. Gen. Stat. § 7B-1111(a)(1) (2007). A neglected juvenile is one "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2007). A determination of neglect must be based on evidence showing neglect at the time of the termination proceeding. *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997). When a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the requisite finding of neglect at the time of the termination proceeding may be based upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect." *Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407. " '[E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights.' " *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). "Where evi-

dence of prior neglect is considered, a trial court must also consider evidence of changed circumstances and the probability of a repetition of neglect." *Id.* at 382, 628 S.E.2d at 455. Here, between February 1992[3] and 28 February 2003, there were approximately 36 reports to social service agencies in Forsyth, Stokes, Guilford, Yadkin, Wilkes, and Iredell counties regarding Respondent's lack of supervision of the children in her home, inappropriate discipline of those children, and/or the condition of Respondent's home. Approximately 20 of those reports were substantiated, and on 24 June 1998, the children were adjudicated neglected in Forsyth County.

DSS filed juvenile petitions in Iredell County on 28 February 2003 alleging J.A.P. and I.M.P. were neglected juveniles. On 5 March 2003, DSS was granted nonsecure custody of the children. Respondent absconded with the children for a period of time, avoiding DSS by hitchhiking between counties, before the agency was finally able to locate and take physical custody of the children. In support of the juvenile petitions, DSS alleged that

> on or about October 27, 2002, social worker made a visit to the home and found three large, adult goats, a pot belly pig, a ferret, and a gerbil living in the home.
>
> Social worker noted that there were animal feces everywhere in the home, as the animals were allowed to roam free throughout the home. There were dead and live roaches covering the floors. Live roaches were crawling on the walls, furniture, food containers, beds, and on the children. There was a dead, decomposed, dried up chicken on the parents' bathroom sink.
>
> During the investigation, the agency learned that the family had an extensive Child Protective Services history in Yadkin, Stokes, and Forsyth Counties, and the children had been in foster care on more than one occasion previously. At one point, the plan for these children was TPR. It was learned that all services had already been offered to this family many times. They cooperate well while Social Services is involved, and then apparently, as soon as Social Services becomes uninvolved, things go back to the same way or worse.
>
> On February 20, 2003, social worker made a home visit and found four baby goats, a rabbit, and a ferret running free in the house.

3. At that time, Respondent's oldest child, S.N.P., who is not a subject of this appeal, was two years old.

> There were still roaches, but it was not as bad. There were goat feces, rabbit feces, ferret feces, and possibly other type[s] of animal feces in most of the house.
>
> While social worker was visiting the home, the goat got up on the couch and urinated on the couch. The children report to social worker that the goats "pee on their bed," and "pee on their homework," and father and the children all want the goats to be outside, but the mother indicated that she would get rid of the children and the father before she got rid of the goats.

Respondent stipulated in open court that "the allegations contained in the Juvenile Petitions were true as of the date the petitions were filed and that there exist[ed] a factual basis for the Court to conclude as a matter of law and to adjudicate the minor children neglected children." An order adjudicating the minor children neglected was entered on 15 May 2003. On 1 July 2003, an order continuing nonsecure custody with DSS was entered, with Respondent ordered to "have no pets or animals at her residence."

Between July 2003 and July 2007, numerous review and permanency planning hearings were held, and the permanent plan for the minor children fluctuated between termination of parental rights/adoption, reunification, guardianship, or some combination thereof. Although the trial court returned the children to the physical custody of Respondent on 25 November 2003, the children were again removed from Respondent's home on or about 18 May 2004 after a squirrel, rats, a hamster, and animal feces were found in the home. Respondent absconded with the children to Texas for a period of time prior to DSS taking custody of the children.

In its order terminating Respondent's parental rights, the trial court made numerous findings of fact in support of its determination that the minor children were neglected, including:

> 8. That [Respondent is] not [a] fit and proper person[] to have custody of the minor children in that:
>
> a. The Iredell County Department of Social Services has been extensively involved with this family since March 5, 2003.
>
> b. Examples of behavior manifesting recurring concerns of neglect by the Respondent[] in the form of improper supervision, inappropriate discipline, and the condition of the home include:

- The Respondent [] used very poor judgment in hitchhiking with the children on numerous occasions.
- [Respondent] took the children dumpster-diving.
- The home was found to have below minimal standards with animal feces/urine on the floor, throughout the home and in the bedding.
- Goats were found to be living inside the home and a dead and decaying chicken was observed in the bathroom.
- Roaches infested the house and were in the food and in the bedding, and the mother required the children to eat roach-infested food and sleep in roach-infested beds.
- The children were found to be very dirty.

The minor child [J.A.P.] stated that the Respondent [] would slap him if he did not eat the food. The minor child [J.A.P.] reported that he felt that his mom loved the goats more than him. The Social Worker confronted the Respondent [] about the animals living in her home on numerous occasions to little or no avail.

c. The Respondent [] used corporal punishment to discipline the minor children. That a number of services including in-home aide services were offered to the Respondent [] as well as parenting classes, domestic violence classes, and individual and family counseling. She chose not to participate in these services.

. . . .

e. A family services case plan was then developed for the Respondent [] and signed []. The plan included, *inter alia*, a provision that animals were to be removed from the home and not allowed in the home.

. . . .

h. The [Respondent's] pattern has been that she was able to respond to agency expectations and would make steps toward making her home safe and healthy for the minor children, and then the Department would visit the home and

find that conditions in the home had reverted to the condition described in paragraph 8b above.

. . . .

k. In March of 2005, the minor child [S.N.P.][4] reported that she had been sexually abused by Virgil a.k.a. "Froggy" Howard, the [Respondent's] adult son by a previous marriage and the minor child's half-brother. The court ordered the Respondent [] not to allow "Froggy" to be in the presence of the minor children; the Respondent [] disregarded the Court's order, allowing "Froggy" to transport the minor child [I.M.P.] to a church function and to transport the family to therapy, including [I.M.P.] and [J.A.P.], to therapy.

l. The minor child [I.M.P.] had to be hospitalized due to fears about "Froggy" at the time of his release from custody.[5]

. . . .

o. The Guardian ad Litem Rachal Hannibal reported that when the minor children were residing with the Respondent Mother, the house was chaotic, with no rules or structure. Ms. Hannibal observed the minor children to say and do whatever they wanted, and that they did not listen to the Respondent [].

. . . .

q. The [] Parents [of the minor children] have a history of domestic violence. In March of 2005, the minor children were present during a domestic violence dispute between the [] Parents, which was traumatic for the children.

. . . .

y. The Court finds from the credible evidence that it is highly probable, based on past performance, that neither parent would change his or her parenting practices, or disregard of court orders, and that if either or both children were returned to either or both parents, they would be subjected to the same conditions described above and to continuing neglect.

---

4. S.N.P. is Respondent's oldest daughter, who is not a subject of this appeal.

5. "Froggy," who was awaiting trial for sexual assault allegedly perpetrated upon S.N.P., made bail and was released from custody around May 2006.

As Respondent did not challenge any of the trial court's findings of fact, these findings are binding on appeal. *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984). Regardless, there is clear, cogent, and convincing evidence to support the trial court's findings of fact. In turn, we hold the trial court's findings of fact support its conclusion that the minor children were neglected within the meaning of N.C. Gen. Stat. § 7B-101 and, thus, that grounds existed to terminate Respondent's parental rights. Accordingly, we overrule this assignment of error.

B. Additional Grounds for Termination

[4] Respondent also asserts that the trial court erred in concluding that grounds existed to terminate her parental rights because she willfully left the minor children in placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of the children, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), and because Respondent failed to pay a reasonable portion of the cost of care for the juveniles for a period of six months prior to the filing of the termination petitions, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). However, as only one ground is necessary to support the termination of parental rights, N.C. Gen. Stat. § 7B-1111(a), we need not address whether the findings of fact support termination based on N.C. Gen. Stat. §§ 7B-1111(a)(2) or (3).

C. Best Interests of the Children

[5] By Respondent's next assignment of error, she asserts that the trial court abused its discretion in concluding that the best interests of the minor children would be served by terminating Respondent's parental rights.

Once grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it determines that the best interests of the child require otherwise. N.C. Gen. Stat. § 7B-1110(a) (2007). The trial court's determination of the child's best interests lies within its sound discretion and is reviewed only for abuse of discretion. *In re T.L.B.*, 167 N.C. App. 298, 605 S.E.2d 249 (2004).

In its order terminating Respondent's parental rights, the trial court made the following unchallenged findings of fact concerning its best interests inquiry:

a. Since the minor children, [J.A.P.] and [I.M.P.], have been in the custody of the Department, they have improved in ways that the Guardian ad Litem Rachal Hannibal and foster parent Sally Wright have described as increased maturity and learning to accept limits on their behaviors; the children are better socialized, are more stable, happier and better-adjusted. The children are also interacting better with their peers and authority figures.

b. [J.A.P.] remains in the care of Perry and Sally Wright, where he has resided since May 3, 2006. He has found a sense of comfortableness and stability in this home that he has never had before.

c. Both [I.M.P.] and [J.A.P.] are doing well in school, with [I.M.P.] receiving all As and Bs and [J.A.P.] receiving all As on their most recent report cards.

d. Both [I.M.P.] and [J.A.P.] continue to receive therapy, case management services, and medication management services.

e. [I.M.P.] and [J.A.P.] visit each other consistently and continue to include each other in their extracurricular activities and celebrations. Their foster families have helped to make sure that the children have ongoing contact in order to maintain their sibling bond.

f. Sally Wright testified that she and her husband wish to adopt the minor child [J.A.P.] should he become free for adoption. Ms. Wright has also recently indicated that she would like to provide a placement in her home for [I.M.P.] as well, despite the fact that she also has two biological teenage sons who reside in the home. [I.M.P.]'s visits in the Wrights' home have been increased; she seems comfortable in their home and gets along well with Mr. and Mrs. Wright.

g. [J.A.P.] had indicated that it is his first desire to be reunited with the Respondent[], but if this does not happen, he would like to remain in the home of the Wrights'. [I.M.P.] has indicated that she would like to see the Respondent [] to say goodbye, but does not wish to reside with her anymore.

Based upon these findings, we cannot conclude that the trial court's decision is manifestly unsupported by reason. We thus find no abuse of discretion in the trial court's conclusion that termination of Respondent's parental rights is in the children's best interests. This assignment of error is overruled.

[6] By Respondent's final assignment of error, she asserts she was prejudiced by the trial court's failure to file the written order terminating her parental rights within 30 days of the completion of the hearing.

A trial court must enter a written order regarding its decision on termination of parental rights within 30 days of the completion of the hearing. N.C. Gen. Stat. §§ 7B-1109(e) and 7B-1110(a) (2007). Noncompliance with these statutory time requirements does not warrant a new termination hearing, however, absent a showing of prejudice. *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

In the present case, the termination hearing was held on 12, 26, and 27 July 2007 and the trial court entered the written order 82 days later, on 17 October 2007. While Respondent claims that she was prejudiced by the delay in filing, she offered no evidence in support of this bare assertion. This Court has previously held that despite an 89-day delay in reducing the termination order to writing, "vacating the TPR order" was "not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing" where "neglect and abandonment had been proven by clear, cogent and convincing evidence as the grounds upon which respondent's parental rights were being terminated." *Id.* at 316, 598 S.E.2d at 391. Here, neglect was proven by clear, cogent, and convincing evidence as the grounds upon which Respondent's parental rights were being terminated. Furthermore, the trial court announced its adjudication of neglect and its decision to terminate Respondent's parental rights in open court on 27 July 2007. Accordingly, we conclude that the delay in reducing the trial court's order to writing did not prejudice Respondent and, thus, does not warrant reversal of the trial court's termination of Respondent's parental rights.

For the reasons stated, the order of the trial court is

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

ANDRE D. KNIGHT, PLAINTIFF/APPELLANT v. ROOSEVELT HIGGS, GLADYS SHELTON, IN HER INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS A MEMBER/CHAIRPERSON OF THE EDGECOMBE COUNTY BOARD OF ELECTIONS, BETTY LEWIS, IN HER INDIVIDUAL CAPACITY AND HER OFFICIAL CAPACITY AS A MEMBER OF THE EDGECOMBE COUNTY BOARD OF ELECTIONS, SAMUEL BRANCH, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS A MEMBER OF THE EDGECOMBE COUNTY BOARD OF ELECTIONS, AND THE EDGECOMBE COUNTY BOARD OF ELECTIONS AS A QUASI-JUDICIAL BODY POLITIC, DEFENDANT/APPELLEES

No. COA07-322

(Filed 15 April 2008)

1. Elections— motion to recuse board of elections member— delegation to attorney—due process violations

A county board of elections violated plaintiff's due process rights when it delegated to its attorney the decision on a motion to recuse a member and decided the underlying issue of whether to remove a voter's name from the county registration rolls without addressing the challenge to the board member. While the board may consult with its attorney, it may not delegate its decision-making authority.

2. Open Meetings— board of elections—closed session—no vote or stated purpose

A county board of elections violated the Open Meetings Law by going into closed session without a vote or stating its purpose. N.C.G.S. § 143-318.11(c).

3. Open Meetings— violation as matter of law—attorney fees

On remand, the trial court should consider the taxing of attorney fees where violations of the Open Meetings Law were established as a matter of law. N.C.G.S. § 143-318.16B.

Appeal by plaintiff from judgment entered 21 November 2006 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 16 October 2007.

Tharrington Smith, L.L.P., by Michael Crowell, and Lawrence Best & Associates, by Antonia Lawrence, for plaintiff-appellant.

No brief(s) filed for defendant-appellees.

STEELMAN, Judge.

The failure of the defendant Board of Elections to consider a recusal motion alleging partiality of a board member, supported by the affidavits of three persons, creates a question as to the propriety of the Board's decision. The Board violated the Open Meetings Law by this failure and also by twice going into closed sessions without a motion or stating the purpose for the closed session. The resulting decision must be vacated and appellant is entitled to a new hearing. Upon remand, the trial court shall consider the imposition of attorney's fees under N.C. Gen. Stat. § 143-318.16B and further remand the matter to the Board with detailed instructions for proceedings consistent with this Opinion.

I. Procedural History

In August 2006, defendant-challenger Roosevelt Higgs (Higgs) filed a challenge to Andre Knight's voter registration, asserting that Andre Knight (Knight) did not reside at 1517 Cherry Street in Rocky Mount, Edgecombe County, North Carolina. Higgs asserted that Knight's residence was at one of two addresses in Rocky Mount, but located in Nash County. Higgs' challenge was brought before the Edgecombe County Board of Elections ("Board"). The Board set the matter for public hearing on 9 October 2006. The hearing commenced on that date but was not concluded until 17 October 2006.

Prior to the hearing, Knight moved that Gladys Shelton (Shelton), chair of the Board, be recused for the reason that she had publicly stated that Knight did not live in Edgecombe County. The motion was supported by affidavits from three individuals who heard the statements. This motion was not heard by the Board at its hearing, but was summarily denied by Mr. DeLoatch, attorney for the Board. The Board then heard Higgs' argument that utility and tax bills before the Board showed that Knight did not reside at the Cherry Street address. Following Higgs' challenge, Knight presented evidence to prove residency at the Cherry Street address and testified that he moved to Edgecombe County in order to run for Rocky Mount City Council as the Ward One representative.

At the conclusion of the 9 October 2006 session, the Board went into closed session without a motion, and without any explanation as to why they were going into closed session, stating only that the Board would "go into Executive Session for just a moment" and then reconvene. The Board was gone for 28 minutes. Upon its return, Shelton stated that the Board had discussed procedure with its attor-

ney and then announced that the Board members would talk among themselves and "make some kind of decision." The Board then went into a second closed session. Upon the members' return to the open meeting, it was announced that the hearing would resume on 17 October 2006.

After reconvening on 17 October 2006, the Board ruled 2 to 1 that Knight was not a resident of Edgecombe County. At all times between the filing of Higgs' challenge and the hearing, Knight represented Ward One on Rocky Mount City Council. Ward One included the property located at 1517 Cherry Street in Edgecombe County.

On 23 October 2006, Knight appealed the Board's decision to Edgecombe County Superior Court. In his complaint, Knight asserted the following claims: (1) appeal of the Board's decision of 16 October 2006; (2) nullification of the Board's decision for alleged violations of the Open Meetings Law, N.C. Gen. Stat. § 143-318.11(c); (3) relief for violations of his due process rights and his rights to vote and hold office; (4) attorneys' fees pursuant to N.C. Gen. Stat. § 143-318.16B; and (5) a temporary restraining order and preliminary injunction against enforcement of the Board's decision.

On 24 October 2006, the trial court granted a temporary restraining order, preventing enforcement of the Board's order to remove plaintiff from Edgecombe County's list of registered voters.

On 21 November 2006, Judge Brown entered an order affirming the ruling of the Board. The order contained no findings of fact. Applying the whole record test, the trial court made three conclusions of law:

(1) there were no procedural errors which denied the appellant due process of law and a fair hearing; and

(2) the decision of the Board of Elections has a rational basis in the evidence before the Board; and

(3) there is substantial evidence to support the conclusions of the Edgecombe County Board of Elections.

On 29 November 2006, Knight appealed this order to the Court of Appeals. On 6 December 2006, this Court granted Knight's motion for a temporary stay. On 19 December 2006, this Court issued a writ of supersedeas. During the pendency of this appeal, Knight was re-elected to the Rocky Mount City Council from Ward One.

Defendants did not file a brief in this appeal.

II. Standards of Review

A. Appeal of the Board's Decision

Judicial review of the decision of a local Board of Elections to remove a voter's name from the County registration rolls is permitted by N.C. Gen. Stat. § 163-90.2(d). In reviewing the decision by a board sitting as a quasi-judicial body, the Superior Court acts as an appellate court. The scope of its review 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 [the Board] 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, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Sitting as an appellate court, the trial court does not review the sufficiency of evidence as presented to it but reviews the evidence presented to the board. *See id.* Subsequent review by this Court is limited to whether the trial court committed any errors of law. *Farnsworth v. Jones*, 114 N.C. App. 182, 441 S.E.2d 597 (1994) (concluding that the trial court erred in affirming a residency determination by a local Board of Elections).

B. Open Meetings Law Violations

Allegations that a party violated the Open Meetings Law are considered by the Superior Court in its role as a trier of fact.

> "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If supported by competent evidence,

> the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980).

Gannett Pacific Corp. v. City of Asheville, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006). Whether a violation of the Open Meetings Law occurred is a question of law. We therefore apply *de novo* review to this portion of the decision of the trial court.

III. Analysis

A. Motion for Recusal

[1] In his first argument, Knight contends that the trial court erred in affirming the Board's decision because the Board failed to properly consider his motion to disqualify Shelton and instead delegated the decision to its attorney. We agree.

Knight's complaint specifically alleged that the Board failed to rule upon his motion to disqualify Shelton. The court below failed to address this claim other than to summarily conclude that there were no procedural errors which denied Knight his due process rights. Neither the Board's decision nor the order from the trial court contain findings of fact regarding this question, nor do they contain any conclusions of law resolving this question. *Cf. Lange v. Lange*, 167 N.C. App. 426, 428-31; 605 S.E.2d 732, 733-35 (2004) (reviewing the findings of fact and conclusions of law to determine the appropriateness of a denied recusal motion). This constitutes reversible error.

i. The Board Failed to Act Corporately

At the hearing before Judge Brown in Superior Court, Mr. DeLoatch, attorney for the Board, stated that he made the ruling based upon his own personal knowledge of the events and without consulting the Board. Under the provisions of N.C. Gen. Stat. § 163-86 (2005), it is the County Board of Elections that hears voter registration challenges made pursuant to N.C. Gen. Stat. § 163-85 (2005). The Board, not its attorney, is the decision-making body. When a challenge is made to the impartiality of a member of the Board of Elections, it must be considered and ruled upon by the Board. *See* N.C. Gen. Stat. §§ 163-86, 143-318.10(d). The record on appeal and transcripts of the hearings before the Board are devoid of such delib-

erations and ruling. While the Board certainly has the right to consult with its attorney concerning such a challenge, it may not delegate its decision-making authority.

ii. Knight's Due Process Rights

It is well-established that the deprivation of a liberty interest requires due process protection.

> Whenever a government tribunal, be it a court of law or a school board, considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955).

Crump v. Bd. of Education, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990). "An unbiased impartial decision-maker is essential to due process." *Id.* at 615, 392 S.E.2d at 585 (citations omitted). Not only unfairness, but the very appearance of unfairness, is to be avoided. *Id.* at 624, 392 S.E.2d at 590. The affidavits filed by Knight alleged that Shelton had publicly stated that Knight did not reside in Edgecombe County. Knight's county of residence was the very issue before the Board, and these affidavits raised a reasonable question concerning Shelton's ability to give Knight a fair and impartial hearing. *See id.* at 616, 392 S.E.2d at 586 (noting that one biased Board member's participation in Crump's hearing "would cause that hearing to deny Crump procedural due process" regardless of the meeting's outcome); *id.* at 622, 392 S.E.2d at 589 (concluding that the Board "was required to afford Crump, at a minimum, an unbiased hearing in accord with principles of due process").

iii. Board's Decision Provided No Basis for Review

The Board was required to consider Knight's challenge and make a decision as to whether Shelton should have been recused from sitting as a decision-maker on Higgs' challenge to Knight's voter registration. Instead, in a 2-1 vote, the Board upheld Higgs' challenge to Knight's right to remain a registered voter in Edgecombe County, with Shelton voting in the majority. The Board's failure to properly consider Knight's motion to recuse a potentially biased member resulted in a decision that clearly carries an appearance of impropriety. *See Crump* at 624, 392 S.E.2d at 590. Based upon the holding of our Supreme Court in *Crump*, *supra*, we hold that the trial court erred in

concluding that "there were no procedural errors which denied the appellant due process of law and a fair hearing." The decision of the Board must be vacated, and this matter is remanded to the trial court for further remand to the Board of Elections for a new hearing. The new hearing is to be conducted only after a proper consideration of Knight's motion to recuse Shelton, if necessary.

B. Open Meetings Law

[2] In his second argument, Knight contends that "the superior court erred in affirming the Board's decision in that the Board violated the Open Meetings Law, G.S. § 143-318.11(c), by going into closed session" on 9 October 2006, without a vote of the Board or stating its purpose for such a session. We agree.

"[T]he overriding intent behind the Open Meetings Law [is that] public bodies should act in open session because they serve the public-at-large[.]" *H.B.S. Contractors v. Cumberland County Bd. of Education*, 122 N.C. App. 49, 55, 468 S.E.2d 517, 522 (emphasis and citation omitted), *review improv. allowed*, 345 N.C. 178, 477 S.E.2d 926 (1996); N.C. Gen. Stat. §§ 143-318.9-10 (2005). A Board may act only as a body and only in a meeting. *See O'Neal v. Wake County*, 196 N.C. 184, 187, 145 S.E. 28, 29 (1928).

(1) N.C. Gen. Stat. § 143-318.16A

The order entered by the trial court contains neither findings of fact nor conclusions of law that demonstrate that it fulfilled its duty to ensure that procedures specified by the Open Meetings Law were followed. *See H.B.S. Contractors*, 122 N.C. App. at 55, 468 S.E.2d at 522 (analyzing discretionary rulings under N.C. Gen. Stat. § 143-318.16A).

The Board is a public body as defined in N.C. Gen. Stat. § 143-318.10(b). Within the definition of "official meetings of public bodies," the statute includes:

> [A] meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.

N.C. Gen. Stat. § 143-318.10(d).

There is an exception to this general rule, allowing for closed sessions of public bodies only for the specific purposes enumerated in N.C. Gen. Stat. § 143-318.11(a). The procedure for going into a closed session is set forth in N.C. Gen. Stat. § 143-318.11(c):

> (c) Calling a Closed Session.—A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

Id. (2005).

On 9 October 2006, the Board twice went into closed session. On the first occasion, Shelton announced "We're going to go into Executive Session for just a moment and then we'll be back." This action clearly violated two of the requirements of N.C. Gen. Stat. § 143-318.11(c). First, there was no motion and a vote by the Board to go into closed session. The chair of the board, acting alone, does not have the authority to direct that the board go into closed session. Second, there must be a statement of the purpose of the closed session, and the purpose must be one of those permitted under subsection (a) of N.C. Gen. Stat. § 143-318.11.

We note that upon the return of the Board from closed session, Shelton stated that "We talked about procedure with our attorney." However, this statement does not cure the Board's original omissions. The statement of the purpose for the closed session must precede, rather than follow, a motion and vote to go into closed session. In addition, meeting with the attorney to discuss procedure does not fall under any of the exceptions set forth in subparagraph (a). *See Gannett Pacific*, 178 N.C. App. at 714-16, 632 S.E.2d at 588-89 (discussing the competing policy interests inherent in the attorney-client exception); *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 575, 525 S.E.2d 786, 792 (2000) (noting that the burden to demonstrate the need for the attorney-client exception lies with the governmental body). The mere mention of "procedure" is insufficient to invoke the attorney-client privilege that is recognized under the statute. *See* N.C. Gen. Stat. § 143-318.11(a).

The initial violation was compounded by a second closed session announced by Shelton so that the Board could "talk among ourselves and make some kind of decision." There was no motion and no vote taken on Shelton's announcement, nor is the stated purpose to be found anywhere among the permitted exceptions enumerated in subsection (a). To the contrary, deliberation on the record is one of the enunciated principles of the Open Meetings Law. *See* N.C. Gen. Stat. § 143-318.10(d); *H.B.S. Contractors*, 122 N.C. App. at 54, 468 S.E.2d at 521 (stating a belief that the General Assembly intended "to curtail exactly this type of unwarranted secrecy by public bodies"). We hold that these two closed sessions, held without a motion and a statement of purpose, violated the Open Meetings Law.

The Board's failure to consider Knight's recusal motion in a public setting, *supra*, also violated the Open Meetings Law. The trial court's failure to make conclusions of law that demonstrate consideration of the statutory factors for such violations, N.C. Gen. Stat. § 143-318.16A, is reversible error.

(2) N.C. Gen. Stat. § 143-318.16B

[3] One of Knight's claims for relief was for attorney's fees pursuant to N.C. Gen. Stat. § 143-318.16B (2005). Such an award is discretionary under the statute. *Id*. This Court has adopted the merits test as the proper standard for awarding attorney's fees to "prevailing" parties pursuant to N.C. Gen. Stat. § 143-318.16B. *H.B.S. Contractors*, 122 N.C. App. at 57, 468 S.E.2d at 522. Knight's pleadings in Superior Court clearly sought to establish a violation of the Open Meetings Law. We have determined as a matter of law that such violations occurred. We hold that Knight is a prevailing party under the statute, *id*., and the taxing of attorney's fees should be considered by the trial court upon remand.

VI. Conclusion

The Board of Elections violated Knight's due process rights when it failed to address a motion for recusal that was supported by affidavits establishing a reasonable basis to challenge the impartiality of a member of the Board. The Board violated the Open Meetings Law by failing to consider the motion and by twice going into closed session without a motion or stating its purpose.

Since this matter is being remanded to the Board for a new hearing, we do not remand this matter to the trial court for determination of whether the Open Meetings Law violations also constitute

a basis for vacating the Board's actions pursuant to N.C. Gen. Stat. § 143-318.16A. This matter is remanded to the Superior Court of Edgecombe County for a determination of whether an award of attorney's fees is appropriate. *See* N.C. Gen. Stat. § 143-318.16B. The trial court shall then remand the matter to the Board for a new hearing, with instructions for the Board to first consider and rule upon the recusal motion. In its order, the trial court shall instruct the Board to support its conclusions of law with detailed findings of fact that reflect the rules of residency provided in N.C. Gen. Stat. § 163-57 (2005) and the three-part test set forth in *Farnsworth v. Jones*, 114 N.C. App. 182, 187, 441 S.E.2d 597, 601.

Because of our holdings above, we need not reach appellant's remaining assignments of error.

VACATED and REMANDED.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. RONNIE LAMAR DANIELS

No. COA07-1202

(Filed 15 April 2008)

1. Constitutional Law— double jeopardy—punishment for both first-degree kidnapping and underlying sexual assault

The trial court erred by sentencing defendant for both first-degree kidnapping and first-degree rape where the same sexual assault served as the basis for both convictions, and at the resentencing hearing the trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction, because: (1) a defendant may not be punished for both the first-degree kidnapping and the underlying sexual assault; (2) where the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, such a verdict is ambiguous and should be construed in favor of defendant; (3) the jury returned a verdict of guilty of first-degree kidnapping but did

not specify on which theory it relied in reaching its verdict, and the Court of Appeals was required to assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping; and (4) the State asknowledged the defect.

2. Evidence— receipt for pornographic movies listing titles— failure to request limiting instruction or redaction

The trial court did not abuse its discretion in a first-degree kidnapping and first-degree rape case by admitting into evidence a receipt for pornographic movies that listed the movie titles because: (1) defendant acknowledged that the receipt was relevant for the purpose of showing that defendant had been in the van; (2) although defendant argued that reciting the titles of the movies portrayed him as a sexual deviant during his rape trial, defendant did not request a limiting instruction from the trial court at the time of the admission of the receipt nor did he request the trial court to redact the movie titles from the receipt; (3) the issue was not preserved for review since defendant made only a general objection to the evidence and conceded that the evidence was relevant; and (4) even assuming *arguendo* that defendant's objection preserved the matter for review, the record revealed that the admission did not prejudice defendant when there was no reasonable possibility a different result would have been reached at trial had the receipt not been admitted.

3. Evidence— prior crimes or bad acts—prior acts of violence against victim

The trial court did not abuse its discretion in a first-degree kidnapping and first-degree rape case by admitting evidence of defendant's alleged prior acts of domestic violence against the victim, because: (1) the evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show defendant's motive, intent or purpose, opportunity, and plan; (2) the evidence demonstrated a chain of events tending to show that defendant became increasingly angry with the victim for filing charges against him in January 2005 for a November 2004 incident, and then again in April 2005; (3) it showed defendant's opportunity since defendant was prevented from contacting the victim while he was incarcerated, but upon his release on each occasion he immediately went to the victim's home in violation of domestic violence protective orders; (4) evidence of defendant's prior course of violent conduct with the victim was relevant to show that contrary to

defendant's assertion, she did not consent to sexual intercourse on the date in question; and (5) the trial court gave the jury a proper limiting instruction as to this evidence.

4. Constitutional Law— effective assistance of counsel— withdrawal of motion for complete recordation

Defendant was not denied effective assistance of counsel in a first-degree kidnapping and first-degree rape case based on his attorney's withdrawal of a motion for complete recordation filed by his previous attorney because: (1) defendant's trial counsel only withdrew the request as it pertained to jury selection and bench conferences; (2) our Supreme Court has specifically held that the failure to request recordation of jury selection and bench conferences does not constitute ineffective assistance of counsel where defendant fails to make specific allegations of error regarding these portions of the proceedings; (3) there is no distinction between failing to make an initial motion for recordation and the subsequent withdrawal of a portion of a motion for recordation; and (4) defendant made no showing of any matter that would have been reflected in the jury selection or bench conferences that had any prejudicial effect on the outcome of the trial.

Appeal by defendant from judgments entered 20 March 2007 by Judge Steve A. Balog in Hoke County Superior Court. Heard in the Court of Appeals 20 March 2008.

Attorney General Roy A. Cooper III, by Assistant Attorney General K.D. Sturgis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

STEELMAN, Judge.

The trial court erred when it permitted the same sexual assault to serve as the basis for defendant's convictions of first-degree kidnapping and first-degree rape. Where defendant failed to state his grounds for objection to the admission of evidence and the evidence was relevant, the issue has not been preserved for appellate review. The trial court did not err in admitting evidence of acts of domestic violence committed by defendant where the purpose of the evidence was not to show defendant's bad character. When the defendant does not show that his counsel's performance was deficient or that any alleged deficiency was prejudicial, a new trial is not warranted.

I. Factual and Procedural Background

Ronnie Daniels (defendant) and Daphne Lane (Lane) were married but living apart on 28 and 29 June 2005, the dates of the alleged offenses. On 28 June 2005, Lane returned to her home after completing her paper route and discovered that her cell phone was missing, a window in her bedroom was open, the blinds were broken, and her dresser drawer was open with clothes hanging out. Lane called 911 and a Hoke County Sheriff deputy took her report. Lane went to work at Wal-Mart that evening. While she was at work, Lane observed defendant driving back and forth in the parking lot. After leaving work, Lane stopped at a gas station to make a phone call. Defendant pulled into the gas station and began yelling at her. Defendant left the gas station when he learned the police had been called.

Lane met deputy sheriffs at a grocery store parking lot near her house. She observed defendant's vehicle in the parking lot, but defendant was not inside the vehicle. The deputies searched the area but did not find defendant. The deputies escorted Lane home and searched the area around her house. Defendant's shoes and the keys to his jeep were found on Lane's back porch.

At approximately three a.m. on 29 June 2005, Lane left her house with her four children to go on her paper route. While she was gone, defendant used a key he had taken from her van to enter her home. When Lane returned, defendant held a kitchen knife to her throat, told her to remove her clothes, and proceeded to have vaginal intercourse with her. After he ejaculated inside of her, defendant forced Lane into her van and drove to a nearby gas station. When defendant got out of the vehicle, Lane got into the driver's seat. Defendant returned, smashed through the window on the passenger side, and instructed Lane to drive to another store. When they arrived at the second store, Lane fled into the store, asked the clerks to call the police, and locked herself in the bathroom until the police arrived. Lane was taken to Cape Fear Valley Hospital and given a rape kit examination.

On 22 August 2005, defendant was indicted for first-degree rape, first-degree kidnapping, two counts of felonious breaking and entering, and two counts of felonious larceny. The jury found defendant guilty of all charges. The trial court found defendant to be a prior record level IV for felony sentencing purposes. Defendant was sentenced to a term of 307 to 378 months imprisonment for the first-degree rape charge. A second consecutive sentence of 133 to 169

months was imposed for the first-degree kidnapping charge. Sentences of 11 to 14 months were imposed for each of the felonious breaking and entering charges and each of the felonious larceny charges. Defendant appeals.

II. Sentencing

[1] In his first argument, defendant contends that the trial court erred in sentencing him for both first-degree kidnapping and first-degree rape where the same sexual assault served as the basis for both convictions. We agree.

> The offense of kidnapping is established upon proof of an unlawful, nonconsensual restraint, confinement or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or the commission of any felony; or (3) terrorizing or doing serious bodily harm to the person.

State v. Smith, 160 N.C. App. 107, 119, 584 S.E.2d 830, 838 (2003) (citing N.C. Gen. Stat. § 14-39(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. . . ." *Id.* (quoting N.C. Gen. Stat. § 14-39(b)). A defendant may not be punished for both the first-degree kidnapping and the underlying sexual assault. *State v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40-41 (1986). Where the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, "[s]uch a verdict is ambiguous and should be construed in favor of defendant." *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986) (citation omitted). "This Court is not free to speculate as to the basis of a jury's verdict." *Id.*

The indictment in the instant case for first-degree kidnapping stated that:

> [D]efendant named above unlawfully, willfully and feloniously did kidnap Daphne Shay Lane, a person who had attained the age of 16 years, by unlawfully confining, restraining, or removing her from one place to another without her consent; and for the purpose of terrorizing her. Daphne Shay Lane was not released by the defendant in a safe place, and was sexually assaulted.

The jury was instructed by the trial court that, to find defendant guilty of first-degree kidnapping, it had to find that Lane was "not released by the defendant in a safe place or had been sexually assaulted."

The jury returned a verdict of guilty of first-degree kidnapping but did not specify on which theory it relied in reaching its verdict. Under *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993), we are required to assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping. This is true even though the sexual assault in this case occurred prior to the kidnapping. *See id.*; *see also State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990). Since defendant's conviction of the sexual offense was used to elevate the kidnapping to first-degree kidnapping in this case, the trial judge erred in sentencing defendant for both crimes. *Whittington* at 123-24, 347 S.E.2d at 408 (citation omitted). Since defendant was erroneously subjected to double punishment, we remand this case to the trial court for a new sentencing hearing. *Id.* The State acknowledges this defect.

At the resentencing hearing, the trial court may 1) arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or 2) arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction. *Id.* at 124, 347 S.E.2d at 408-09.

III. Admission of Evidence

[2] In his second argument, defendant contends that the trial court erred or abused its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against Lane. We disagree.

North Carolina Rule of Evidence 404(b) states:

> 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.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). "The use of evidence under Rule 404(b) is guided by two constraints: 'similarity and temporal proximity.' " *State v. Bidgood*, 144 N.C. App. 267, 271, 550 S.E.2d 198, 201 (2001) (citation omitted).

"Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of

the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (citation omitted). The ruling under Rule 403 by the trial court of whether the danger of unfair prejudice outweighed the probative value of the evidence was within the sound discretion of the trial court, and appellate review of that ruling is limited to determining whether the trial court abused its discretion. *Bidgood* at 272, 550 S.E.2d at 202. We will reverse the trial court "only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *Id.* (citation omitted).

In the instant case, the State offered into evidence a receipt for two pornographic videos which was found in the back of Lane's van used by defendant in the kidnapping. The State then called the jury's attention to the two titles of the videos listed on the receipt. Defendant acknowledges that the receipt was relevant for the purpose of showing that defendant had been in the van. However, defendant claims that the failure by the court to give a limiting instruction to the jury was highly prejudicial, and that the court abused its discretion in the admission of the evidence. Defendant argues that reciting the titles of the movies portrayed him as a sexual deviant during his rape trial, and that as a result of this error, he is entitled to a new trial.

A general objection to evidence is ordinarily inadequate to preserve an alleged error for review unless it is clear from the entirety of the evidence that no purpose can be served from its admission. *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996).

Defendant did not request a limiting instruction from the trial court at the time of the admission of the receipt, nor did he request the trial court to redact the movie titles from the receipt. Jennifer Lewis, a lieutenant with the Hoke County Sheriff's Office, found the receipt in the van and testified that the receipt was for two "pornographic movies." Defendant initially objected to Lewis's testimony, but withdrew his objection and did not object to Lewis's testimony reciting the titles of the movies. Subsequently, defendant objected to the admission of the receipt into evidence and its publication to the jury, but he failed to specify the grounds for his objection. Since defendant made only a general objection to the evidence, and concedes that the evidence was relevant, we hold that this issue has not been preserved for our review. *See Jones* at 535, 467 S.E.2d at 20. This argument is without merit.

Even assuming *arguendo* that defendant's objection preserved the matter for our review, the record reveals that the admission of the receipt into evidence did not prejudice defendant. A defendant is only prejudiced by the erroneous admission of evidence "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is [on] the defendant." N.C. Gen. Stat. § 15A-1443(a) (2007); *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992). Defendant has not shown that there is a reasonable possibility a different result would have been reached at trial had the receipt not been admitted.

[3] Defendant further contends that the trial court erred or abused its discretion in admitting evidence of alleged prior acts of domestic violence committed by defendant against Lane.

"Under Rule 404(b), evidence of other crimes, wrongs or acts may be admissible to show motive, opportunity, intent, plan or identity." *State v. Carter*, 338 N.C. 569, 592-93, 451 S.E.2d 157, 170 (1994) (citing N.C. Gen. Stat. § 8C-1, Rule 404(b)).

> Although not enumerated in Rule 404(b) itself, evidence may also be admitted to establish a chain of circumstances leading up to the crime charged:
>
> > Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

State v. Smith, 152 N.C. App. 29, 34-35, 566 S.E.2d 793, 798 (2002) (citations omitted).

> [E]vidence of a victim's awareness of prior crimes allegedly committed by the defendant may be admitted to show that the victim's will had been overcome by her fears for her safety where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim.

State v. Young, 317 N.C. 396, 413, 346 S.E.2d 626, 636 (1986) (citation omitted).

The court allowed Lane to testify about the following acts of domestic violence committed by defendant over the course of

their relationship: an incident in 2001 in which defendant threatened Lane with a kitchen knife while she was pregnant; a domestic violence questionnaire Lane filled out in support of a protective order pursuant to this incident in which she indicated being previously punched, slapped, pushed, and threatened with kitchen knives by defendant "many times"; a November 2004 incident in which defendant, wielding a large kitchen knife, forced Lane to remove her clothes and get into a bathtub so that he would not make a mess when he killed her; an incident in April 2005 in which defendant took Lane's keys, stole her van, and hit her when she attempted to get her keys back; and two warrants taken out against defendant by Lane and Ashley Cheney, one of Lane's co-workers, for assault on a female following the April 2005 incident. The State also introduced evidence that defendant was arrested on those warrants on 7 April 2005 when he went to the children's school and was incarcerated from that date until 24 June. On 24 June defendant was released, at which time he went to Lane's home in violation of two protective orders. He was arrested and incarcerated from that date until 27 June 2005. The offenses at issue here occurred on 28 and 29 June 2005. Defendant claims that he suffered prejudice from the admission of this testimony and evidence, as well from the State's opening statement and closing argument, in which the State emphasized to the jury that this case was about domestic violence.

The trial court found the evidence to be admissible under 404(b) to show defendant's motive, intent or purpose, opportunity, and plan. The court also allowed the evidence to be admitted on the basis that it demonstrated a chain of events tending to show that defendant became increasingly angry with Lane for filing charges against him in January 2005 for the November 2004 incident, and then again in April 2005. The trial court found that the evidence was admissible to show defendant's opportunity in that defendant was prevented from contacting Lane while he was incarcerated, but upon his release on each occasion he immediately went to Lane's home in violation of domestic violence protective orders.

Defendant admitted to having vaginal intercourse with Lane on the date of the offense, but contended that it was consensual. Evidence of defendant's prior course of violent conduct with Lane was relevant to show that she did not consent to sexual intercourse on the date in question. *Young* at 313, 346 S.E.2d at 636. The trial court properly admitted the evidence of prior acts of domestic violence to show absence of consent by Lane.

We hold the evidence was admitted for proper purposes under Rule 404(b) and that the trial court gave the jury a proper limiting instruction as to this evidence. The trial court did not abuse its discretion by admitting evidence of defendant's acts of domestic violence against Lane. *See Bidgood* at 272, 550 S.E.2d at 202. This argument is without merit.

IV. Assistance of Counsel

[4] In his third argument, defendant contends that he was denied effective assistance of counsel when his attorney withdrew a motion for complete recordation filed by his previous attorney. 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, 80 L. Ed. 2d 657, 665 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

N.C. Gen. Stat. § 15A-1241 (2007) governs the recordation of criminal trial proceedings, and provides that all statements from the bench and all proceedings at trial must be automatically recorded with three exceptions: jury selection, opening statements and closing arguments of counsel, and arguments of counsel on questions of law. N.C. Gen. Stat. § 15A-1241(a). Upon motion from either party, jury selection, opening statements, and closing arguments must also be recorded. N.C. Gen. Stat. § 15A-1241(b).

Defendant's prior counsel moved for complete recordation of the trial proceedings. Defendant's trial counsel withdrew the request as it pertained to jury selection and bench conferences. Defendant contends this was error, and that his appellate counsel is at an unfair advantage in discovering potential appealable errors due to his trial counsel's actions.

Our Supreme Court has specifically held that the failure to request recordation of jury selection and bench conferences does not constitute ineffective assistance of counsel where defendant fails to

make specific allegations of error regarding these portions of the proceedings. *State v. Hardison*, 326 N.C. 646, 661-62, 392 S.E.2d 364, 372-73 (1990).

We addressed this issue in *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675 (2005). In *Verrier*, there was no evidence that defendant's trial counsel made a motion for the jury selection, bench conferences, and opening and closing statements to be recorded. On appeal, defendant argued that this violated his due process and effective assistance of counsel rights. This Court held that although "appellate counsel may be at a disadvantage when preparing an appeal for a case in which he did not participate at the trial level, as appellate counsel [he] is somewhat bound by the decisions and strategies of trial counsel." *Id.* at 130, 617 S.E.2d at 680. Defendant's argument that he was denied effective assistance of counsel was overruled. *Id.*

Defendant contends that the facts of his case are distinguishable from *Verrier* in that counsel originally requested complete recordation and later withdrew the motion as to jury selection and bench conferences. We hold that there is no distinction between failing to make an initial motion for recordation and the subsequent withdrawal of a portion of a motion for recordation.

Defendant has made no showing of any matter that would have been reflected in the jury selection or bench conferences that had any prejudicial effect on the outcome of the trial. Defendant has failed to meet his burden of showing any deficiency in his counsel's performance or prejudice from any alleged deficiency. *See Strickland*, 466 U.S. at 694. This argument is without merit.

Remaining assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2008).

NO ERROR as to the trial; REMANDED for a new sentencing hearing on the charges of first-degree rape and first-degree kidnapping.

Judges McCULLOUGH and ARROWOOD concur.

STATE OF NORTH CAROLINA v. MARK LEONARD MORGAN

No. COA07-745

(Filed 15 April 2008)

Constitutional Law— double jeopardy—dismissal in district court

Double Jeopardy barred the State from retrying defendant where a district court judge had dismissed a driving while impaired charge on the mistaken finding that the notarization of the probable cause affidavits did not include the notary commission's expiration date. The District Court heard evidence and found the evidence legally insufficient, which constitutes an acquittal for Double Jeopardy, even though the violation was not related to guilt or innocence.

Appeal by defendant from order entered 3 November 2006 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 5 February 2008.

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

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for defendant-appellant.

WYNN, Judge.

The United States Supreme Court has held that "[a]n order entering . . . a finding [that the evidence is insufficient as a matter of law to sustain a conviction] meets the definition of acquittal that our double-jeopardy cases have consistently used[.]"[1] Because we find that the District Court's dismissal of criminal charges against the defendant in this case was based on a finding that the State's evidence was insufficient as a matter of law, we conclude that the Double Jeopardy Clause bars the State's appeal. We therefore reverse the order of the Superior Court.

At 2:37 a.m. on 4 June 2005, Officer S.A. Evett of the Charlotte-Mecklenburg Police Department arrested Defendant Mark Leonard Morgan without a warrant and charged him with driving while impaired (DWI). Defendant refused to perform field sobriety tests

1. *Smith v. Massachusetts*, 543 U.S. 462, 467-68, 160 L. Ed. 2d 914, 923 (2005).

and likewise declined to submit to an Intoxilyzer test. Based on Officer Evett's arrest affidavit and affidavit and revocation report, a magistrate issued an order for Defendant's arrest and detention. Defendant was processed by the Mecklenburg County Sheriff's Office and spent approximately three hours in jail reception, where he had access to a telephone, until his release from detention at 10:38 a.m. on 4 June.

On 1 February 2006, Defendant's case was heard in District Court and dismissed; no information as to the reason for the dismissal, or at what point it came during the proceedings, is listed on the docket sheet. However, in its notice of appeal, the State asserted that Defendant "made a pretrial motion to dismiss based on alleged violations of N.C.G.S. 15A-511(c)(1) and 15A-304(d)[,]" namely, that Officer Evett's arrest affidavit and affidavit and revocation report were not properly sworn and notarized because the documents did not contain the expiration date of the notary's commission. Thus, according to the State, Defendant contended that the magistrate issued its order in violation of N.C. Gen. Stat. § 15A-305, due to the allegedly deficient notarization.

The Superior Court heard the State's motion to appeal the dismissal on 18 September 2006. The hearing initially focused on whether the District Court had heard evidence before dismissing the case, including whether Officer Evett had actually been sworn in to testify. However, the bulk of the argument ultimately centered on whether the State had to prove beyond a reasonable doubt that the District Court had dismissed the case for procedural reasons, rather than those related to Defendant's factual innocence or guilt. When asked by the trial court what the basis was for the dismissal, the assistant district attorney—who did not try the case in District Court—responded that Defendant had "alleged that North Carolina General Statute 15A-511-C1 and 15A-304D were not complied with, such that the affidavits, which includes the officer's arrest affidavit and affidavit and revocation report[,] did not include the Notary expiration date for her commission." Defense counsel did not dispute nor otherwise contradict this assertion.

Officer Evett testified at the hearing that, although his recollection of the hearing was uncertain and somewhat non-specific, he remembered "that the motion was filed to dismiss the case, based on the absence of [an] expiration date for the Notary. And, [defense counsel] made an argument and the DA made an argument. And, the judge, I guess granted the Motion to Dismiss, at that time." He further

stated that defense counsel had asked him some questions about the notary, how the documents were notarized, and going before the magistrate, but he did not remember testifying or offering any statements concerning the substantive details of the traffic stop and arrest. The other witnesses at the hearing were the Intoxilyzer operator on duty when Defendant declined to submit to the test and the notary who notarized Officer Evett's arrest affidavit and revocation report. Defense counsel called a personal acquaintance of Defendant to testify to establish prejudice to Defendant from the alleged statutory violation, but the State informed the trial court that it was "not going to make that argument" as to prejudice in light of the evidence that the documents were properly notarized.

Following the hearing, the trial court made findings of fact including that the notary "seal does not clearly show the expiration date of [the notary's] commission," that "Defendant alleged that the magistrate erred in finding probable cause . . . because [Officer] Evett's arrest affidavit had not been properly sworn," and that the District Court granted Defendant's motion to dismiss after hearing testimony from Officer Evett. Based on those findings, the trial court concluded as a matter of law that, although "the State had begun to present . . . evidence on the charge in the District court when that court dismissed the case[,]" the District Court "dismissed the charge on grounds unrelated to the Defendant's guilt or innocence. Accordingly, the State's appeal is not barred on double jeopardy grounds." The trial court further concluded that "the seals on the arrest affidavit and the revocation reports contain all of the necessary information, including the expiration date of the notary's commission." As such, the trial court granted the State's motion to appeal and reinstated the DWI charge against Defendant, remanding the case to District Court for trial.

Defendant now appeals,[2] arguing that the trial court erred by concluding that the State's appeal was not barred by the principle of double jeopardy because (I) there was insufficient evidence to support the findings of fact as to the reason for the District Court's dismissal; and (II) the findings of fact did not support the conclusion that the dismissal was not the equivalent of an acquittal. Because Defendant's arguments are closely related in substance, we consider them together.

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2. Although this appeal is interlocutory, the Superior Court judge certified it for appeal, and the State has made no argument opposing its being heard prior to Defendant's new trial in District Court.

In general, "[u]nless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court . . . [w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C. Gen. Stat. § 15A-1432(a)(1) (2005). The Double Jeopardy clause of the U.S. Constitution protects an individual "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. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Jeopardy attaches in a non-jury trial when the court receives evidence. *State v. Brunson*, 327 N.C. 244, 245, 393 S.E.2d 860, 861-62 (1990).

Despite this general prohibition, we have also held that the subsequent prosecution of a previously-dismissed charge does not violate the principle of double jeopardy if the dismissal was not based upon grounds of factual guilt or innocence. *State v. Priddy*, 115 N.C. App. 547, 551, 445 S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994). Moreover, if the superior court finds that a dismissal by the district court "was in error," it must reinstate the matter and remand to the district court for further proceedings. N.C. Gen. Stat. § 15A-1432(d). Nevertheless, according to the United States Supreme Court, "any contention that the Double Jeopardy Clause must itself (even absent provision by the State) leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law." *Smith v. Massachusetts*, 543 U.S. 462, 473, 160 L. Ed. 2d 914, 926 (2005). This holding applies if the "acquittal" is decreed by a court or returned by a jury verdict. *Id.* at 467, 160 L. Ed. 2d at 922; *see also United States v. Scott*, 437 U.S. 82, 91, 57 L. Ed. 2d 65, 74 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.").

Defendant's arguments to this Court can best be summarized as the following: regardless of the reason why the evidence against Defendant was insufficient—be it a legal or technical basis—the case was dismissed by the District Court on evidentiary grounds. As such, jeopardy had attached and further prosecution of Defendant by the State is barred. Thus, the question before us is whether the District Court's dismissal of the charges against Defendant, allegedly due to the magistrate's erroneous finding of probable cause based on incom-

petent affidavits, amounts to an acquittal for the purposes of double jeopardy. We must hold that it does.

The United States Supreme Court has spoken directly to this issue, holding that "a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 90 L. Ed. 2d 116, 120 (1986); *see also State v. Murrell*, 54 N.C. App. 342, 345, 283 S.E.2d 173, 174 (1981) ("Moreover, under [North Carolina statutory law,] a dismissal based on lack of evidence has the effect of a verdict of not guilty. The Supreme Court, in the absence of a statute, announced the same rule in [*United States v.*] *Scott*."), *disc. review denied*, 304 N.C. 731, 288 S.E.2d 804 (1982). After such a judgment has been entered, "the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged." *Smalis*, 476 U.S. at 142, 90 L. Ed. 2d at 120. Thus, the State may not appeal such a judgment when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 51 L. Ed. 2d 642, 651 (1977).

In *Smith*, the United States Supreme Court considered a case in which the trial judge, after determining that the prosecution had failed to meet its burden of proof, applied a Massachusetts Rule of Criminal Procedure to enter a finding of not guilty for a defendant on a charge of possessing a specific type of firearm. 543 U.S. at 465-66, 160 L. Ed. 2d at 921-22. Instructively, the Supreme Court's reasoning states:

> Massachusetts' characterization of the required finding of not guilty as a legal rather than factual determination is, as a matter of double jeopardy law, . . . not binding on us; what matters is that, as the Massachusetts Rules authorize, the judge evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction.

Id. at 468-69, 160 L. Ed. 2d at 923-24 (internal citations and quotations omitted). The Supreme Court went on to hold:

> An order entering . . . a finding [that the evidence is insufficient as a matter of law to sustain a conviction] thus meets the defini-

> tion of acquittal that our double-jeopardy cases have consistently used: It actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Id. at 467-68, 160 L. Ed. 2d at 923 (citations and quotation omitted). Explaining its rationale in reaching this result, the Supreme Court stated:

> To put it differently: Requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause—*even when the acquittal was erroneous because the evidence was sufficient*. . . . Our double-jeopardy cases make clear that an acquittal *bars the prosecution from seeking another opportunity to supply evidence which it failed to muster before jeopardy terminated*.

Id. at 473 n.7, 160 L. Ed. 2d at 926-27 n.7 (citation and quotation omitted) (emphasis added).

Here, the State asserts—and Defendant has not disputed—that the District Court dismissed the DWI charge against Defendant because the notary's seal on the affidavits giving rise to probable cause seemed to be missing the date on which the notary's commission would expire. As such, the affidavits were insufficient for a showing of probable cause under N.C. Gen. Stat. §§ 15A-304(d) and 15A-511(c)(1). We recognize that these were technical violations only and were not substantively related to Defendant's guilt or innocence. Further, we are fully aware that the District Court was mistaken in dismissing the charges on this basis, as later evidence showed that the seal contained the necessary information and that the notary's commission is not due to expire until 2010. Finally, we appreciate the extensive findings of fact and thoroughly researched conclusions of law included by the Superior Court judge in its order allowing the State's appeal and reinstating the DWI charge against Defendant.

Nevertheless, the basis of the District Court's dismissal arose from the lack of any evidence to support the charge of DWI once the District Court disallowed the affidavits based on what now appears to be the erroneous finding of a technical violation. It is revealing to note that the suppression of the affidavits did not itself warrant dismissal of the charge; rather, it was the lack of any other evidence to support the charge that moved the District Court to dismiss the case. Defendant had declined an Intoxilyzer test and likewise refused to

submit to any field sobriety tests; as such, Officer Evett's affidavits were the only evidence that Defendant was driving while impaired. As found by the Superior Court after a hearing on the matter, the District Court found this evidence legally insufficient and accordingly dismissed the charges against Defendant; that entry of judgment "constitutes an acquittal for purposes of the Double Jeopardy Clause." *Smalis*, 476 U.S. at 142, 90 L. Ed. 2d at 120.

This result is compelled by precedent. Although the District Court was mistaken in its rejection of the affidavits as improperly sworn, we are bound by the holding that "the bar [against double jeopardy] will attach to a preverdict acquittal that is patently wrong in law." *Smith*, 543 U.S. at 473, 160 L. Ed. 2d at 926. Moreover, unlike in *Priddy*, where this Court held that double jeopardy did not bar the retrial of a defendant after a mid-trial dismissal based on jurisdictional grounds, 115 N.C. App. at 551, 445 S.E.2d at 613, the dismissal of the charge against Defendant in this case was unquestionably based upon grounds of factual guilt or innocence. The District Court's decision may not have been based on the substance, weight, or credibility of such evidence, but, as found by the Superior Court, the District Court did hear evidence in the case and determined that the charge should be dismissed. Both sides seem to agree that the basis of this decision was insufficiency of the evidence—even if for technical reasons. Accordingly, this judgment must be considered an acquittal, as "[i]t actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith*, 543 U.S. at 468, 160 L. Ed. 2d at 923 (quotation and citation omitted). The Double Jeopardy Clause therefore bars the State from retrying Defendant on this charge.

Finally, we observe in passing that, as the law now stands in North Carolina, a case such as the one at bar should no longer arise. The General Assembly has seen fit to ensure that evidentiary questions in district court are now decided prior to the point at which jeopardy would attach to a DWI defendant. In 2006, the Motor Vehicle Driver Protection Act went into effect in North Carolina, providing in part that in a district court trial for an implied consent offense such as DWI, a "defendant may move to suppress evidence or dismiss charges *only prior to trial*," except for a motion to dismiss for insufficient evidence. N.C. Gen. Stat. § 20-38.6(a) (2007). More significantly to the case at hand, the statute now declares that, "[t]he judge may summarily deny the motion to suppress evidence if the defendant failed to make the motion pretrial when all material facts were

known to the defendant."[3] *Id.* § 20-38.6(d). Indeed, the General Assembly's action in passing the Motor Vehicle Driver Protection Act seems designed at least in part to address the precise problem we are faced with in the instant case.

Reversed.

Judges McGEE and CALABRIA concur.

EMILIO DAVIS, Employee, Plaintiff v. CITY OF NEW BERN, Employer, SELF-INSURED (CRAWFORD & COMPANY, Servicing Agent), Defendants

No. COA07-785

(Filed 15 April 2008)

1. Workers' Compensation— ex parte contact with physician—testimony struck

The Industrial Commission did not err in a workers' compensation case by striking the testimony of one of plaintiff's treating physicians where there were nonconsensual ex parte communications by the physician with defendants.

2. Workers' Compensation— causation—speculative medical testimony

The Industrial Commission erred by awarding workers' compensation where the medical evidence was too speculative to establish medical causation and disability. Plaintiff may not rely on "could" or "might" expert testimony to establish causation where other evidence showed that the testimony was speculative.

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3. We note that the statute further requires the district court judge to make written findings of fact and conclusions of law and "preliminarily indicate whether the motion should be granted or denied." N.C. Gen. Stat. § 20-38.6(f). However, if the motion is likely to be granted, the judge "shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal." *Id.* A Superior Court judge in Mecklenburg County has recently ruled that this and other portions of the Motor Vehicle Driver Protection Act are unconstitutional, finding in part that they violate equal protection, due process, and the separation of powers, as the General Assembly is barred constitutionally from changing the jurisdiction of North Carolina's district courts. *See State v. Fowler*, No. 07-CRS-200258. We understand the State is appealing that ruling to this Court. Given that the statute was not in force at the time the instant case came to trial, we express no opinion here as to the constitutional validity of its provisions.

Appeal by defendants from an opinion and award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2008.

Edwards & Ricci, P.A., by Brian M. Ricci, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by John A. Tomei, for defendant-appellants.

HUNTER, Judge.

The City of New Bern and Crawford & Company (collectively "defendants") appeal an opinion and award from the Full Industrial Commission ("the Commission") which granted Emilio Davis ("plaintiff") workers' compensation benefits. After careful consideration, we affirm in part and reverse in part.

On 5 May 2003, plaintiff was employed by defendant Crawford & Company in a Maintenance II position, which involved laying sewer and water pipes, making taps, and installing water meters, as well as operating a vacuum truck. On that date, plaintiff slipped and fell, head first, into a sewer pit, injuring his back and shoulder.

After the accident, Dr. Angelo Tellis treated plaintiff for a lumbosacral strain/sprain, noting that plaintiff did not have significant radicular pain, and prescribed anti-inflammatory and pain medications. Dr. Tellis also restricted plaintiff to sedentary activity at that time.

Dr. Tellis continued his treatment of plaintiff during the summer of 2003 and ordered an MRI of plaintiff after he told Dr. Tellis that he had been feeling pain in his left thigh. The MRI revealed no significant disk bulges or neural foraminal narrowing but did reveal degenerative changes at L4-5. When physical therapy and medications failed to resolve plaintiff's symptoms, Dr. Tellis performed bilateral SI joint injections on 12 August 2003, which provided plaintiff with temporary relief, after which plaintiff was placed back into physical therapy. On 22 September 2003, plaintiff complained to Dr. Tellis of pain in the right side of his lower back and increased pain in his chest. Dr. Tellis continued with the course of physical therapy and sedentary work restrictions, but recommended the use of a cane to help plaintiff become more mobile.

Upon request of defendants, plaintiff was seen by Dr. Kasselt, an orthopedist. Dr. Kasselt noted that plaintiff performed well on

strength tests, used to determine mobility. Dr. Kasselt recommended that plaintiff undergo a psychological evaluation, a functional capacity evalaution, and an MRI of his hips to exclude the possibility of avascular necrosis, and that plaintiff discontinue his use of anti-inflammatory and narcotic medications.

Because plaintiff's condition was not improving, he sought chiropractic treatment at this own expense from Dr. Gatlin for approximately two months. Plaintiff also went to his family doctor, Dr. Farina, who ordered nerve tests. The tests showed mild left carpal tunnel syndrome but no significant nerve compression. Due to the lack of nerve compression, Dr. Farina did not recommend a referral to a neurosurgeon.

On 6 February 2004, plaintiff sustained a second compensable work injury. Plaintiff was working in a ditch with a vacuum hose when he slipped, fell on his back, and struck his head. Plaintiff felt immediate back and head pain and numbness in his legs. Coworkers summoned an ambulance, which took him to the hospital. Dr. Kevin Geer examined him upon his arrival at Craven Regional Medical Center. Dr. Geer found no neurological damage but plaintiff was anxious and hyperventilating. Dr. Geer took plaintiff out of work for three days and restricted him to light duty work.

On 8 February 2004, plaintiff returned to the emergency room with complaints of numbness on the bottom of his feet. An MRI was negative as to any disc herniation, spinal stenosis, or neuroforaminal stenosis. Defendants admitted liability under the Workers' Compensation Act for this second injury pursuant to a Form 60 and sent plaintiff to Dr. Virginia Ward for treatment.

Dr. Ward examined plaintiff on 10 February 2004. She noted that plaintiff gave an extreme pain response when palpating his back muscles. Dr. Ward stated that it was difficult to examine plaintiff due to his over-reaction to touch and movement. She kept plaintiff out of work, prescribed medications, and ordered a functional capacity work hardening program. Dr. Ward also ordered a work-hardening program due to plaintiff's poor physical condition.

Defendants ultimately offered plaintiff light duty work on 20 April 2004. Plaintiff engaged in office type work but had problems staying awake due to his medications.

Plaintiff was still complaining of pain and eventually sought treatment from Dr. Michael Apostolou, a neurologist, at his own expense

because defendants would not authorize a referral to another doctor. Dr. Apostolou prescribed various medications to plaintiff in an effort to alleviate the pain. When plaintiff did not respond to the medications, Dr. Apostolou performed an electrodiagnostic test on 10 September 2004.

The electrodiagnostic test did not reveal a clear indication as to the cause of plaintiff's symptoms. Instead, there was some evidence of demyelinative damage of some peripheral nerves, which was not likely to be traumatic in origin. There was also an indication that plaintiff had no problem with his lumbar and had good strength in his legs.

Plaintiff continued to complain about worsening pain in September 2004. Dr. Apostolou was puzzled by this development in light of the nerve test results. Dr. Apostolou also questioned the relationship of the pain to the work related injury. After reviewing Dr. Apostolou's note, defendants advised plaintiff that light duty work would no longer be provided as of 5 November 2004. Plaintiff stopped working on 4 November 2004.

Defendants present the following issues for this Court's review: (1) whether the Commission committed reversible error when it struck expert testimony upon a finding that the expert had non-consensual, *ex parte* communication with defendants; and (2) whether the evidence before the Commission was so speculative that the Commission erred in awarding plaintiff workers' compensation benefits.

Our review of an opinion and award of the Commission is limited to a determination of: "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001).

The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139. Accordingly, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

I.

[1] Defendants first argue that the trial court erred in striking the opinions of Dr. Max R. Kasselt.[1] We disagree.

The Commission struck the opinions of Dr. Kasselt, one of plaintiff's treating physicians, upon a finding that Dr. Kasselt engaged in non-consensual, *ex parte* communications with defendants' adjuster. Defendants do not dispute the fact that Dr. Kasselt had a conversation with the adjuster, during which he suggested that surveillance be conducted on plaintiff to determine the validity of his symptoms. The Commission thereafter determined that Dr. Kasselt's allegiances were with defendants and not plaintiff.

Non-consensual, *ex parte* communications between defendants and a plaintiff's treating physician are prohibited. *Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 87, 468 S.E.2d 536, 538-39 (1996). The proper remedy for such *ex parte* communication is to strike the treating physician's deposition testimony. *Evans v. Young-Hinkle Corp.*, 123 N.C. App. 693, 696, 474 S.E.2d 152, 153-54 (1996). Accordingly, when the commission found that Dr. Kasselt engaged in non-consensual, *ex parte* communications with defendants, it properly struck the testimony. However, this Court is not bound by this finding unless it is supported by competent evidence.

Defendants contend that Dr. Kasselt made "recommendations, with no communication or other suggestion by defendants." They thus argue that the rule announced in *Salaam* should not apply as defendants did not solicit the information from plaintiff's treating physician. Although the evidence presented before the Commission could support such a finding, there is also evidence suggesting that defendants contacted Dr. Kasselt. Specifically, there is evidence that defendants contacted Dr. Kasselt regarding whether plaintiff would need a cane. There was also evidence, based on Dr. Kasselt's own notes, that he and one of defendants' employees "discussed the situation[.]" The obvious implication of this statement is that it was a two-way conversation, not one in which defendants were merely listening. Additionally, all of Dr. Kasselt's records were copied directly to defendants without plaintiff's consent. Under such circumstances, we cannot say that the commission erred in concluding that defendants engaged in *ex parte* communications with Dr. Kasselt.

1. Although the Commission struck Dr. Kasselt's opinions, his medical records noting plaintiff's complaints and his course of treatment were allowed and were summarized in the Commission's opinion and award.

Because competent evidence supports the Commission's findings of fact that defendants' non-consensual, *ex parte* communications required Dr. Kasselt's testimony to be stricken from the record, the Commission did not err in striking the testimony. Defendants' assignments of error as to this issue are therefore overruled.

II.

[2] Defendants next argue that the Commission erred in awarding plaintiff workers' compensation after 4 November 2004 because the medical evidence was too speculative to establish medical causation and disability. We agree.

In reviewing findings of fact made by the Commission, we review those findings to determine whether they are supported by competent evidence. *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 817, 600 S.E.2d 501, 505-06 (2004) (Steelman, J., dissenting), *reversed per curiam for reasons stated in dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005). If supported by competent evidence, then they are binding on appeal, even though there was evidence to support contrary findings. *Id.* (citing *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004)). This Court will not "sift through the evidence and find facts that are different from those actually found by the Commission." *Id.*

"Expert 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.' " *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 446-47 (2005) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000); citing *Edmonds*, 165 N.C. App. at 818, 608 S.E.2d at 506). Instead, expert testimony can serve as competent evidence as to causation where the testimony "establishes that a work-related injury '*likely*' caused further injury[.]" *Id.* at 264, 614 S.E.2d at 447 (emphasis added).

Plaintiff concedes that his evidence consists of "could or might" expert testimony regarding the cause of plaintiff's injury. Plaintiff, however, argues that there is no evidence indicating that the testimony was guess work or mere speculation under *Edmonds*. Simply put, a plaintiff may not rely on "could" or "might" expert testimony to establish causation where there is some evidence that the testimony was speculative.[2] We find evidence of speculation in the record and therefore reverse the Commission as to this issue.

2. We note that plaintiff relies on *Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 241, 605 S.E.2d 197, 202 (2004), which was decided before *Edmonds* and *Cannon*,

Specifically, Dr. Ward testified that plaintiff's symptoms created a "very puzzling picture." Dr. Ward also noted that plaintiff's symptoms were even more unusual, given the rather "minor trauma" that he suffered. Dr. Apostolou testified that it was "possible" that plaintiff's symptoms were the product of a traumatic injury but also presented evidence that the symptoms were consistent with a chronic process. Dr. Voos's testimony is also speculative as he only testified that plaintiff's injury "could" or "might" be work related. Dr. Tellis also stated that plaintiff's back and leg pain were of "uncertain etiology"; a statement with which Dr. Voos agreed.

Dr. Gridley, a psychologist, concluded that plaintiff was suffering from a conversion disorder, somatic complaints, and neurologic symptomatology, not the result of a traumatic workplace injury. Dr. Gridley believed that plaintiff could return to work without restrictions, with the possible exception of needing supervision. He also testified that plaintiff could be malingering, particularly if there was no response to further treatment. Another psychiatrist, Dr. Hoeper, diagnosed plaintiff with conversion disorder and a probable lumbosacral muscle strain. He also testified that plaintiff needed to return to work.

After hearing all the evidence, the Commission made the following findings of fact that are relevant to this issue:

> 17. Plaintiff began complaining of worse pain in September 2004 without having had further injury or doing significant work activity. Dr. Apostolou was puzzled by this development, particularly in view of the conflicting nerve test results, and he questioned its relationship to the injury at work. Defendant-employer had given plaintiff a light duty job marking where water and sewer lines were located. However, after reviewing Dr. Apostolou's office note, defendant stopped authorizing further medical treatment and advised plaintiff that light duty work would no longer be provided as of November 5, 2004. Consequently, plaintiff stopped working on November 4, 2004. He remained out of work until January 17, 2005[,] when he began driving a truck on a part-time basis for a trucking company. He drove a dump truck for several months, but the bouncing motion of the truck caused him to experience increasing back pain. By April 2005 he was having considerable difficulty getting out of the truck and he stopped working after April 22, 2005.

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the cases relied on by defendants that were neither acknowledged nor distinguished in plaintiff's brief.

18. Except for an emergency room visit on October 16, 2004, in which the emergency room physician recommended a pain management consultation, plaintiff did not receive further known medical care until July 20, 2005[,] when he went back to Dr. Tellis, whom he had not seen since November 2003. Dr. Tellis reviewed his history of subsequent injury and treatment. Dr. Tellis was unable to specifically identify the etiology of Plaintiff's back and leg pain, but thought it might be due to sacroiliitis. Dr. Tellis performed a left sacroiliac joint injection on August 3, 2005. There was no indication that he ever saw plaintiff again in follow-up.

. . .

20. Plaintiff then received sponsorship from the North Carolina Division of Vocational Rehabilitation Services and was able to receive further medical treatment. The physician's assistant for Dr. Voos evaluated him on September 2, 2005. The examination revealed abnormal neurological findings, so the physician's assistant ordered cervical and lumbar myelograms in order to rule out any impingement on the spinal cord and any nerve root compression. At plaintiff's follow-up visit, Dr. Voos examined him and reviewed the myelogram, as well as the MRI performed in August 2005. There was no evidence of cord impingement in the cervical spine and no evidence of nerve impingement in the lumboscacral spine, except for the Tarlov cyst. The disk at L4-5 was bulging somewhat and Dr. Voos thought that it might be degenerative. Dr. Voos was of the opinion that a discogram would be necessary in order to verify his impressions and, until plaintiff's symptoms became intolerable, he did not believe a discogram would be warranted. Consequently, he ordered therapy, including aquatherapy.

In summation, there was no expert testimony that the work-related injury "likely" caused plaintiff's symptoms. Moreover, as noted above, there is ample evidence that the doctors treating plaintiff were uncertain as to the issue of causation.[3] We find that, like in *Edmonds*, the expert testimony in this case "does not rise above a

3. By way of comparison, plaintiff's own expert in this case, Dr. Voos, has testified in a different, unrelated case that a plaintiff's medical problems were "likely" caused by a workplace injury. *Avery v. Phelps Chevrolet*, 176 N.C. App. 347, 354-55, 626 S.E.2d. 690, 695 (2006). In that case, this Court affirmed the opinion and award of the Full Commission as Dr. Voos's testimony, although contradicted by several other experts, was competent evidence to support the award of workers' compensation. In the instant case, there is no medical evidence of plaintiff's medical issues as being "likely" caused by a workplace injury. *Id.* at 355, 626 S.E.2d at 695.

guess or mere speculation[.]" *Edmonds*, 165 N.C. App. at 818, 600 S.E.2d at 506. The opinion and award of the Commission is therefore not supported by competent evidence and is reversed. In light of this holding, we need not reach defendants' final argument.

III.

In conclusion, we affirm the Commission's ruling to strike the testimony of one of plaintiff's treating physicians as he engaged in non-consensual, *ex parte* communications with defendants. We reverse the Commission's finding regarding the cause of plaintiff's injury as it was not supported by competent evidence.

Affirmed in part; reversed in part.

Judges CALABRIA and STROUD concur.

NUCOR CORPORATION, PLAINTIFF v. PRUDENTIAL EQUITY GROUP, LLC, JOHN C. TUMAZOS, AND PARETOSH MISRA, DEFENDANTS

No. COA07-1007

(Filed 15 April 2008)

1. Libel and Slander— financial report—not libel per se

The trial court correctly granted defendants' motion to dismiss a libel per se action arising from a financial report where the portions of the document objected to did not assert illegal or wrongful activity or consisted of opinion or rhetorical language, and the overall import of the document was not derogatory to plaintiff. A claim of libel per se refers solely to the face of the document and explanatory circumstances are not considered.

2. Unfair Trade Practices— financial report—not libel per se—no misappropriation of information—actual injury not alleged

A claim for unfair and deceptive trade practices arising from a financial report was properly dismissed where the claim was based on a libel per se claim, held to have been properly dismissed, and the misappropriation of confidential information. Plaintiff did not allege that the actions of defendant Misra, who had access to the information, constituted unfair or deceptive

trade practices or that those actions were the proximate cause of actual injury. At most, plaintiff alleged breach of a confidentiality agreement, but did not allege actual injury or substantial aggravating circumstances.

Appeal by plaintiff from final judgment and amended order entered 25 April 2007 by Judge James W. Morgan in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 February 2008.

Moore & Van Allen PLLC by Colin R. Stockton, Gregory J. Murphy, and Paul J. Peralta, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, LLP by Raymond E. Owens, Jr., for defendants-appellee.

STROUD, Judge.

Plaintiff filed a complaint alleging claims of libel *per se* and unfair and deceptive trade practices against defendants. Defendants filed a motion to dismiss both causes of action. The trial court allowed defendants' motion to dismiss, and plaintiff appeals. The dispositive question before this Court is whether the trial court erred in allowing defendants' motion to dismiss. For the following reasons, we affirm.

I. Background

On 22 January 2007, plaintiff filed a complaint against defendants Prudential Equity Group, LLC ("Prudential"), John C. Tumazos ("Tumazos"), and Paretosh Misra ("Misra") alleging the following pertinent facts:

> 9. Nucor is a steel manufacturer based in Charlotte, North Carolina with facilities located throughout the United States. It is a publicly traded company on the New York Stock Exchange.
>
> 10. As a publicly traded company, Nucor's business operations and stock performance is, from time to time, the subject of analysts' reviews.
>
> 11. [Prudential] has had in its employ, at all relevant times, . . . Tumazos, an analyst who reviews the metals market. Tumazos is a Chartered Financial Analyst ("CFA") who is bound by the CFA Institute Code of Ethics and Standards of Professional Conduct.
>
> 12. The CFA Code of Ethics and Standards of Professional Conduct require that its analysts have a reasonable and adequate

basis supported by research and investigation for any investment analysis.

13. Nucor is among the companies within Tumazos' self-proclaimed "Analyst Universe Coverage".

14. Former Nucor employee, . . . Misra, assisted Tumazos in his coverage of Nucor at all relevant times.

15. Misra is a metallurgist by training. Prior to working for [Prudential], Misra was employed at Nucor's Berkeley facility in Berkeley, South Carolina . . . from December 16, 2002 through approximately December 19, 2005.

. . . .

18. Misra was subject to a confidentiality agreement with Nucor which he signed on February 13, 2004.

. . . .

20. Before communicating his resignation to Nucor, Misra downloaded onto two USB flash drives confidential Nucor data[.]

. . . .

22. Misra removed and kept the documents, materials and data . . . without Nucor's authorization or knowledge.

. . . .

29. Tumazos . . . prepared a "Company Update" dated December 12, 2006. The Company Update, on page 1, contained the following statement under the "Highlights" section:

> Alienated customers may encourage Nippon Steel, Brazil's CSN or some of Nucor's sixteen plant managers to build new steel companies in addition to Thyssen, Severcorr, or reborn Weirton Steel adding ten million tons. Alienated customers may file antitrust lawsuits as has been done in the electrode, container board OSB, or other sectors. A clever attorney could make hay from trebled damages on Nucor's $2.6 billion pretax earnings. . . .

30. The reference to antitrust lawsuits "in the electrode sector[]" concerned lawsuits filed by steel manufacturers alleging price-fixing by electrode suppliers.

31. The reference to antitrust lawsuits in the OSB sector concerned class-action lawsuits filed by consumers alleging price-fixing by OSB producers and suppliers.

32. On page 7 of the Company Update, [Prudential] further states:

Nucor needs to wake up from its monopoly dreams and get back to reality in our view.

33. [Prudential] published this Company Update via electronic mail to investors nationwide and to Nucor on or about December 12, 2006 under the banner head "First Call Research Network".

. . . .

35. Following publication of the December 12, 2006 Company Update Nucor customers contacted Nucor after having received copies of the [Prudential] statement. Similarly, a metals analyst contacted Nucor to inquire whether there was any truth to the [Prudential] statements regarding Nucor and antitrust activities.

36. On December 18, 2006, Platts Metals Week Market Supplement re-published excerpts of the [Prudential]/Tumazos article where Tumazos was quoted as stating "Nucor needs to wake up from its monopoly dreams and get back to reality in our view." . . . .

37. On December 15, 2006, through counsel, Nucor demanded that [Prudential] retract the defamatory statements contained in the [Prudential] Company Update. [Prudential] failed to issue the retraction. Instead, on December 27, 2006, [Prudential] issued a Company Update stating, under the "Highlights" Section:

The December 12, 2006 Company Update on Nucor Corporation was not intended to, did not, and should not be read to suggest or imply any unlawful conduct on the part of Nucor. . . . .

39. The December 27, 2006 statement by [Prudential] did not withdraw or retract its earlier December 12, 2006 statement claiming Nucor had engaged in anti-trust activities.

Plaintiff's complaint asserted causes of action for libel *per se* and unfair or deceptive trade practices.

On 22 February 2007, defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because

1. [p]laintiff's libel per se claim is barred because the words complained of are non-verifiable and opinion and therefore not subject to a defamation action under North Carolina law and the First Amendment;

2. [p]laintiff's libel per se claim is barred because the words complained of are subject to more than one interpretation and not of such character that the court can presume as a matter of law that they are defamatory; and

3. [p]laintiff's claim for alleged unfair business practices under N.C. Gen. Stat. § 75-1.1 is based solely on the publication of allegedly defamatory statements, and must be dismissed when the underlying libel claim is dismissed.

On 25 April 2007, the trial court entered a "Final Judgment and Amended Order" allowing defendants' motion to dismiss and dismissing plaintiff's complaint with prejudice. Plaintiff appeals. The issue before this Court is whether the trial court erred in granting defendants' motion to dismiss both plaintiff's libel *per se* and unfair or deceptive trade practices claims.

II. 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.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (internal citations and internal quotation marks omitted).

III. Libel *Per Se*

[1] Plaintiff first assigns error and claims that the superior court erred in dismissing its libel *per se* claim as "defendants published false and misleading statements which impeached [plaintiff's] business reputation." For the following reasons, we disagree.

"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).

> In North Carolina, the term defamation applies to the two distinct torts of libel and slander. Libel *per se* is a publication which, *when considered alone without explanatory circumstances*: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) (citation and internal quotation marks omitted) (emphasis added), *cert. denied*, 540 U.S. 965, 157 L. Ed 2d 310 (2003).

> [D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.

Renwick v. News and Observer and Renwick, 310 N.C. 312, 317-18, 312 S.E.2d 405, 409 (citation and quotation marks omitted) (emphasis in original), *rehearing denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). "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." *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006). This Court considers how the alleged defamatory publication would have been understood by an average reader. *See Boyce & Isley, PLLC* at 31, 568 S.E.2d at 899. In addition, the alleged defamatory statements must be construed only in the context of the document in which they are contained, "stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof." *See Renwick* at 317-18, 312 S.E.2d at 409 (citation and internal quotation marks omitted).

Considering the publication at issue "alone without explanatory circumstances" we agree with the determination of the trial court. *See Boyce & Isley, PLLC* at 29, 568 S.E.2d at 898. The alleged defamatory statements are:

> Alienated customers may encourage Nippon Steel, Brazil's CSN or some of Nucor's sixteen plant managers to build new steel companies in addition to Thyssen, Severcorr, or reborn Weirton Steel adding ten million tons. Alienated customers may file antitrust lawsuits as has been done in the electrode, container board OSB, or other sectors. A clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings[, and]
>
> Nucor needs to wake up from its monopoly dreams and get back to reality in our view.

Plaintiff contends its case is analogous to *Ellis v. Northern Star Co.* and *Ausley v. Bishop* where valid claims for defamation were found. *See Ellis v. Northern Star Co.*, 326 N.C. 219, 221, 388 S.E.2d 127, 128, *rehearing denied*, 326 N.C. 488, 392 S.E.2d 89 (1990); *Ausley v. Bishop*, 133 N.C. App. 210, 214-15, 515 S.E.2d 72, 76 (1999). However, in both *Ellis* and *Ausley* specific wrongful acts were alleged in the publication; here, no specific acts on the part of plaintiff have been alleged. *See Ellis* at 222, 388 S.E.2d at 129; *Ausley* at 214, 515 S.E.2d at 76. The publication here in no way asserts any illegal or wrongful activity on the part of plaintiff, distinguishing it from the *Ellis* and *Ausley* cases. *See id.*

The statement in regard to "alienated customers" states the customers "*may* file antitrust lawsuits." Certainly it is true that alienated customers "may" file antitrust lawsuits, as presumably anyone can "file" any lawsuit, although the merits of those lawsuits are a different issue. The "alienated customers" statement also referenced lawsuits filed in the "electrode, container board OSB, or other sectors" as an example. Plaintiff then goes on in paragraphs 30 and 31 of its complaint, noted *supra*, to explain these references. However, for a claim of libel *per se* this Court is not to consider "explanatory circumstances[,]" but rather solely considers the document on its face. *See Boyce & Isley, PLLC* at 29, 568 S.E.2d at 898. "Words which are libelous *per se* do not need an innuendo, and, conversely, words which need an innuendo are not libelous *per se*." *Flake v. News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938). Lastly, as to "alienated customers" the publication notes that "[a] clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings." We do not find any part of this statement, which does not allege specific wrongful conduct on the part of the plaintiff and uses such rhetorical language as "could make hay[,]" to be defamatory. *See*

Daniels at 539, 634 S.E.2d at 590; *Boyce & Isley, PLLC* at 29, 568 S.E.2d at 898. The second statement, "Nucor needs to wake up from its monopoly dreams and get back to reality in our view[,]" is also an opinion statement without any alleged facts on which we could find grounds for a claim of libel *per se*. *See id.*

We must also consider the publication as a whole, looking at the allegedly defamatory statements, within the "four corners" of the document. *See Renwick* at 318, 312 S.E.2d at 409. The overall import of the document is not derogatory of plaintiff. The publication also states that "We believe Nucor is a fine company, and we are not aware of any 'company-specific' flaw or blemish." The publication also states under the bold and enlarged font heading, "REGULATION AC DISCLOSURE[,]" that "Tumazos CFA is principally responsible for the analysis of any security or issuer included in this report and certifies that the views expressed accurately reflect such research analyst's personal views[.]" We conclude that neither the individual statements separately considered nor the publication considered as a whole are grounds for a valid claim of libel *per se*, and therefore we affirm the dismissal of this claim. This assignment of error is overruled.

IV. Unfair or Deceptive Trade Practices

[2] Plaintiff also assigns error and argues that the trial court erred in dismissing its unfair or deceptive trade practices claim because (1) "libel *per se* in a business context constitutes a violation of the trade practices statute" and (2) "defendant Misra's misappropriation of confidential information, done in violation of his confidentiality agreements with [plaintiff], constitutes a violation of the trade practices statute[.]"

> 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.

Craven v. SEIU COPE, 188 N.C. App. ——, ——, 656 S.E.2d 729, 733-34 (2008) (internal citations, quotations marks, ellipses, and brackets omitted).

As we have already determined that plaintiff's claim for libel *per se* was properly dismissed, plaintiff's unfair and deceptive trade practices claim cannot be based upon the libel *per se*. Plaintiff also argues that "Misra's misappropriation of confidential information, done in violation of his confidentiality agreements with [plaintiff]" constitutes "other tortious conduct" upon which its unfair and deceptive trade practices claim stands as valid. *See Craven* at ——, 656 S.E.2d at 734.

There are at least two flaws in plaintiff's argument that "Misra's misappropriation of confidential information, done in violation of his confidentiality agreements" can be the basis for an unfair and deceptive trade practices claim. First, plaintiff did not allege in its complaint that the actions of Misra constituted unfair or deceptive trade practices or that Misra's actions were the proximate cause of any actual injury to plaintiff, as is necessary for a valid claim of unfair or deceptive trade practices. *See Craven* at ——, 656 S.E.2d at 733. Next, even if we construe the complaint as liberally as possible and incorporate all of the prior allegations into the unfair or deceptive trade practices claim, at most, plaintiff has alleged that Misra breached his confidentiality agreement with plaintiff.[1] "However, it is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (citation, internal quotation marks, and ellipses omitted), *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). A "plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act[.]" *Id.* at 368, 533 S.E.2d at 833 (citation and internal quotation marks omitted). Even assuming that plaintiff has alleged a breach of contract, plaintiff has failed to allege either actual injury or "substantial aggravating circumstances" related to any breach of the confidentiality agreement. *Craven* at ——, 656 S.E.2d at 733; *Eastover Ridge, L.L.C.* at 367-68, 533 S.E.2d at 833. These assignments of error are overruled.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order allowing defendants' motion to dismiss plaintiff's claims.

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1. However, we note that plaintiff has not argued that its complaint states a claim for breach of contract against Misra.

AFFIRMED.

Judges TYSON and GEER concur.

EVALYN GONZALES, PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. COA07-87

(Filed 15 April 2008)

1. Employer and Employee— professor harassing student—ten-year history—no prior formal complaint—action against University

Defendant's failure to act on a prior claim of sexual harassment by a student against a professor was the proximate cause of plaintiff's injuries from similar behavior, even though the prior incident occurred ten years previously and did not result in a formal complaint. The Industrial Commission correctly decided for plaintiff in a Tort Claims action for negligent infliction of emotional distress and negligent retention and supervision of the professor.

2. Tort Claims— jurisdiction—ratification

Although the Industrial Commission lacked jurisdiction over a ratification claim in a Tort Claims action alleging sexual harassment, the error was of no consequence because the Commission correctly determined the issue of negligence.

3. Tort Claims— sexual harassment—damages—evidence

The Industrial Commission did not abuse its discretion in its award of damages of $150,000 in a sexual harassment claim where plaintiff presented expert testimony on the issue. The Commission was entitled to rely on the evidence presented and accord it the weight it deemed proper.

Appeal by defendant from decision and order entered 21 July 2006 by Commissioner Laura Kranfield Mavretic in the North Carolina Industrial Commission. Heard in the Court of Appeals 15 October 2007.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, for plaintiff.

Attorney General Roy Cooper, by Tina Lloyd Hlabse, for defendant.

ELMORE, Judge.

Dr. Shuaib Ahmad, an employee of North Carolina State University (defendant or NCSU), joined the faculty as an assistant professor in 1980. In 1986, Ahmad was promoted to associate professor, and in 1991 he became a professor. Ahmad became the Director of the Construction Facilities Laboratory on Centennial Campus in the 1996-97 academic year.

During the 1987-88 school year, Ahmad sexually harassed Martha Brinson, NCSU's Director of Communications in the College of Engineering. On the day after the incident, Brinson reported the conduct to her immediate supervisor, Jenna Rayfield. Rayfield referred Brinson to Dr. Larry Monteith, who was, at that time, the Dean of the College of Engineering. Brinson went to Monteith that day and reiterated her complaint. Although Monteith suggested that Brinson file a formal complaint with Billie Richardson, NCSU's sexual harassment officer, she declined to do so. Her decision was based both on Richardson's dismissive attitude regarding her previous report of a "peeping Tom," and on a desire to protect her privacy. In 1988 or 1989, Dr. Downey Brill became Dean of the College of Civil Engineering, and Brinson again reported Ahmad's conduct, calling Ahmad "a monster." Brill asked if Brinson had filed a report, and she told him that although she had reported the incident before, she had not filed a formal complaint because she wished the matter to remain confidential.

Kathy A. Wood (plaintiff Wood)[1] attended NCSU from 1993-98, majoring in civil engineering and environmental engineering. In May of 1996, Ahmad hired plaintiff Wood to serve as a research assistant. Shortly thereafter, Ahmad began to sexually harass plaintiff Wood. Despite Ahmad's request that she continue working with him, plaintiff Wood left her job in August of 1996 as a result of the harassment. She refused to have anything to do with Ahmad, including taking his class in structural engineering, which, because the class was required, resulted in her inability to continue in her curriculum. Plaintiff Wood also reported Ahmad's conduct to Leslie Dare, who

1. Wood is the plaintiff in a companion case, *Wood v. North Carolina State University*, COA-07-88.

was NCSU's sexual harassment officer at that time. After reporting Ahmad's conduct, plaintiff Wood discovered that Ahmad had harassed other students and employees in the past.

Evalyn Gonzales (plaintiff Gonzales) attended NCSU beginning in 1993. She graduated with a degree in engineering, and, pursuant to her plan to attend graduate school, applied for a job as a research assistant. Ahmad contacted plaintiff Gonzales and offered her a job. Plaintiff Gonzales interviewed with Ahmad, who "told her that he liked her because her skin color was the same as his." At some later point, plaintiff Gonzales, who had also applied for other jobs, contacted Ahmad about the job again. He told her that he would discuss the position over coffee, and offered to pick plaintiff Gonzales up at her apartment. Plaintiff Gonzales instead offered to meet Ahmad on campus. Ahmad therefore met her on campus, where plaintiff Gonzales got into his car and he told her that they could talk over lunch.

Rather than discussing plaintiff Gonzales' job prospects, however, Ahmad instead pursued a range of personal topics including his troubled marriage, whether plaintiff Gonzales had a boyfriend, his knowledge of massage techniques, and the potential for the two to go to the movies. After lunch, rather than returning plaintiff Gonzales to campus, Ahmad brought her to Lake Johnson and told her to take a walk with him. During the walk, Ahmad began to touch plaintiff Gonzales inappropriately. She objected, yelling "this isn't okay!" Ahmad continued his advances, and plaintiff Gonzales continued to object.

Ahmad then abruptly changed the subject and took plaintiff Gonzales back to campus. They did not speak on the way back, but as plaintiff Gonzales exited the car, Ahmad told her that he would instruct his secretary to draft the paperwork needed to hire her as his research assistant.

Plaintiff Gonzales went immediately to her boyfriend's office and told him what had occurred. He told her to report the matter. Shortly thereafter, plaintiff Gonzales spoke with one of Ahmad's former employees, Tony Modesta. Modesta suggested that plaintiff Gonzales should speak to plaintiff Wood. When plaintiff Gonzales contacted plaintiff Wood, the two compared their experiences. Plaintiff Wood suggested that plaintiff Gonzales write down what had happened, and told plaintiff Gonzales of another woman that Ahmad had allegedly harassed.

Plaintiff Gonzales also contacted a former professor, who referred her to Dare. Dare told plaintiff Gonzales to file a formal complaint, and represented to plaintiff Gonzales "that she was the first person to make a sexual harassment complaint with the University regarding Dr. Ahmad." Dr. Tony Mitchell, who helped Dare in the investigation of both plaintiffs' complaints, spoke with Brill. Brill informed Mitchell of the incident ten years before involving Brinson. Mitchell contacted Brinson, informed her of the new complaints, and requested that she make a written record of her own experience. Brinson provided Dare a written complaint to assist in the investigation.

Through their investigative efforts, Dare and Mitchell discovered at least eight additional women who Ahmad had sexually harassed from 1986-97. As a result of the investigation, Provost and Vice Chancellor for Academic Affairs Phillip J. Stiles told Ahmad that he intended to fire Ahmad and that Ahmad had ten days in which "to make a written request for either a specification of reasons or a hearing."

Although Ahmad did not respond within the designated time period, NCSU did not fire him. Instead, the university allowed Ahmad to resign, agreed to pay him his salary for the balance of the school year, and agreed "to place a 'neutral' letter of reference in [his] personnel file." After informing both plaintiffs about the agreement, university officials refused to communicate further with plaintiffs.

On 28 May 1999, plaintiffs filed tort claims against NCSU, alleging negligent infliction of mental and emotional distress on Ahmad's part and negligent retention and supervision of Ahmad on NCSU's part. Deputy Commissioner George T. Glenn, II, filed a Decision and Order in plaintiffs' favor on 24 June 2005, and NCSU appealed to the Full Commission. On 21 July 2006, the Full Commission affirmed, with slight modifications, the Deputy Commissioner's Decision and Order. NCSU now appeals to this Court.

Preliminarily, we note the appropriate standard of review:

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. As long as there is competent evidence in support of the

> Commission's decision, it does not matter that there is evidence supporting a contrary finding. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. Thus, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quotations and citations omitted).

[1] In its first argument on appeal, NCSU avers that the Full Commission erred because there was no competent evidence to support its finding of negligence. We disagree.

Specifically, NCSU claims that the Full Commission erred in finding "that NCSU breached its duty to plaintiffs and proximately caused plaintiffs' alleged damages." NCSU argues that although it might have breached a duty to Brinson, there was no evidence to show that that breach proximately caused injury to plaintiffs. Accordingly, NCSU submits that "[p]laintiffs have erroneously attempted to extrapolate and apply the duty owed to Brinson to their claims . . . [without producing] any competent evidence that NCSU breached any duty owed to them."

NCSU primarily argues that Ahmad's earlier harassment of Brinson was not the proximate cause of plaintiffs' injuries. This misses the point. It was not Ahmad's conduct towards Brinson that opens NCSU to liability. Rather, it was NCSU's failure to properly *respond* to the earlier harassment that was the proximate cause of plaintiffs' injuries.

This Court has defined proximate cause as:

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Loftis v. Little League Baseball, Inc., 169 N.C. App. 219, 222, 609 S.E.2d 481, 484 (2005) (citation and emphasis omitted).

In this case, Brinson complained of Ahmad's actions ten years prior to his harassment of plaintiffs. Nevertheless, NCSU took no cor-

rective action. NCSU suggests that because Brinson refused to file a formal complaint, it could not move forward in an investigation. We find this suggestion implausible. With or without a formal complaint, numerous members of the university's administration were aware of the allegations. The Full Commission found as fact, supported by expert witness Debra Ragan Jessup's testimony, that NCSU failed to follow its own guidelines. NCSU claims that "[w]ithout substantiation of Brinson's allegations, NCSU could not take any negative employment action against Ahmad." Nevertheless, NCSU could and should have requested a written complaint, made written documentation of Brinson's oral complaint, and conducted a further investigation to determine the veracity of the claim. Any of these actions could have forestalled Ahmad's subsequent misconduct.

Moreover, NCSU's "pattern of ignoring complaints of sexual misconduct and threatening behavior," as the Full Commission noted in reference to the administration's dismissive attitude regarding the "peeping Tom" incident that Brinson reported and the fact that the "peeping Tom" in question was allowed to haunt the NCSU campus for sixteen years, "shows institutional indifference and a lack of concern" on NCSU's part. "[A] person of ordinary prudence could have reasonably foreseen" that such indifference could lead to unreported sexual misconduct and the eventual injuries suffered by plaintiffs. *Id.*

NCSU also claims that the ten year time period is simply too long to allow a causal connection. We agree that the time lapse is troubling. However, the Full Commission found that Ahmad continued to harass female students in the intervening time, listing seven women by name in addition to plaintiffs. NCSU cannot, by turning a blind eye to reported misdeeds, hope to escape liability based on subsequent victims' failures to report later bad behavior. NCSU is correct that Ahmad might have been exonerated had it conducted a proper investigation. However, having failed to take the proper steps to investigate, NCSU should have reasonably foreseen that "consequences of a generally injurious nature . . . [were] probable under all the facts as they existed." *Id.*

We note NCSU's claim that expert witness Jessup's testimony incorrectly relied on case law from this Court. However, we find NCSU's characterization of Jessup's testimony unpersuasive. Jessup testified as an expert in the field of human resources that NCSU failed to follow its own sexual harassment guidelines, that the guidelines themselves were defective in that they did not require the immediate initiation of an investigation and follow up, and that NCSU failed in

its duty to properly disseminate its sexual harassment policy. NCSU's suggestion that plaintiffs' claims "hinge upon their interpretation of *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (1986)," is simply incorrect. Although Jessup's testimony did deal, in part, with that case, it was only for the proposition that "the knowledge by an agent and/or manager was imputed to the employer."[2]

NCSU's arguments regarding negligent supervision and negligent infliction of emotional distress are essentially the same as its arguments above: that without a formal complaint on Brinson's part, no investigation could be pursued. We reject this contention as we did above; Brinson's failure to submit a formal complaint did not absolve NCSU of responsibility.

[2] NCSU next attacks the Industrial Commission's assertion of jurisdiction over plaintiffs' claims of ratification. We agree that the Industrial Commission overstepped its bounds by addressing this theory of recovery; "the Tort Claims Act allows a suit against the State only for ordinary negligence in the forum of the Industrial Commission." *Collins v. N.C. Parole Comm'n*, 118 N.C. App. 544, 548, 456 S.E.2d 333, 336 (1995). However, having already held that the Full Commission was correct in its determination of negligence, it is unnecessary to address the issue of ratification. Accordingly, although the Industrial Commission lacked jurisdiction over the ratification claim, the error was of no consequence. We therefore modify the decision and order to remove that part which addresses plaintiffs' theory of ratification, while leaving intact the remainder of the decision and order.

[3] Finally, NCSU claims that the Full Commission abused its discretion in its award of $150,000.00 to each plaintiff because there was no competent evidence on damages. We disagree.

"The amount of damages awarded is a matter within the discretion of the Commission. The Commission's order may not be disturbed unless, in view of the Commission's findings as to the nature and extent of the injury, the award is so large as to shock the conscience." *Jackson v. N.C. Dep't of Crime Control & Pub. Safety*, 97 N.C. App. 425, 432, 388 S.E.2d 770, 774 (1990) (citation omitted). In this case, plaintiffs presented expert testimony on the issue of damages from both Rosemary Smith Nelson, Ph.D., and Dr. Gary Albrecht.

2. Because it does not appear that the Full Commission relied to any extent on Jessup's testimony regarding Title VII of the Civil Rights Act of 1964, we decline to address NCSU's arguments regarding that statute.

The Full Commission was entitled to rely on the evidence presented and accord it the weight that the Full Commission deemed proper. We will not substitute our judgment for the Full Commission's. *See Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589-90, 551 S.E.2d 486, 490 (2001) ("On appeal, 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.") (quotations and citations omitted). There was "evidence tending to support the finding" in this case. *Id.* The Full Commission therefore did not err in its award of damages.

We affirm the Full Commission's decision and order, modified to exclude the sections that address plaintiffs' claims of ratification, over which the Full Commission improperly exercised jurisdiction.

Affirmed as modified.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. DERAY YANTELL JACKSON

No. COA07-695

(Filed 15 April 2008)

1. Constitutional Law— trial by jury—discussion between two jurors

Defendant was not denied his right to a trial by jury where two jurors discussed his case in a bathroom. There is no authority that prevents two jurors from discussing the case between themselves, and the bathroom adjoined the jury room and was considered to be part of the jury room.

2. Constitutional Law— double jeopardy—discharging weapon into occupied property—first-degree murder

Defendant was not convicted of discharging a weapon into occupied property in violation of the double jeopardy clause where he contended that discharging a weapon was an element necessary to establish first-degree murder in this case. The relevant inquiry is into the elements of the crimes, not whether the

same fact scenario fulfills the elements of the two distinct crimes. The merger doctrine has been held not to apply in North Carolina.

3. Homicide— attempted murder—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of attempted murder on the ground of insufficient evidence. The State presented evidence that defendant fired a weapon at the vehicle the victim was driving as well as evidence of premeditation and deliberation, and a rational trier of fact could conclude from this evidence that defendant intended to kill both men in the car as he and others opened fire on it.

4. Homicide— conspiracy to commit murder—evidence sufficient

There was sufficient evidence to support a charge of conspiracy to commit murder.

Appeal by defendant from judgments entered 13 September 2006 by Judge Robert F. Floyd, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 9 January 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Diane A. Reeves, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr. and Amanda S. Zimmer, for defendant-appellant.

HUNTER, Judge.

Deray Yantell Jackson ("defendant") appeals from judgments entered on 13 September 2006 pursuant to a jury verdict finding him guilty of first degree murder under the felony murder rule, attempted first degree murder, discharging a weapon into occupied property,[1] and conspiracy to commit murder. Defendant was sentenced to, *inter alia*, life imprisonment without parole.[2] After careful consideration we find no error.

At trial, the State's evidence tended to show that defendant and Spencer White ("White") gave $60,000.00 to Terry Guy ("Guy") to pur-

1. Judgment was arrested on this charge as that felony was the basis for the application of the felony murder rule.

2. Defendant was also sentenced to 251-311 months' imprisonment for the attempted first degree murder conviction, and 251-311 months' imprisonment for the conspiracy to commit murder charge, to be served consecutively.

chase drugs on their behalf during October 2003. Two months after Guy received the money, he had not purchased the drugs and appeared to have taken the money without any intention of doing so.

Defendant and White then began to look for Guy, ultimately locating him at the Inkeeper Hotel in Fayetteville, North Carolina. Defendant, White, and two other men met at the hotel where Guy was staying. Upon observing Guy leave the hotel in his vehicle with Eric Cox ("Cox"), the men followed Guy and Cox.

At an intersection, gunshots were fired from the occupants of both vehicles, the relevant details of which are set out below. As a result of the incident, both Guy and Cox were shot. Guy ultimately died from his wounds, but Cox survived.

Defendant presents the following issues for this Court's review: (1) whether defendant's right to a trial by jury was violated; (2) whether the trial court erred by denying defendant's motion to dismiss the charge of discharging a weapon into occupied property; (3) whether defendant received ineffective assistance of counsel; (4) whether the trial court erred by not dismissing the charge of attempted first degree murder; and (5) whether the trial court erred in denying defendant's motions to dismiss and set aside the charge of conspiracy to commit first degree murder.

I.

[1] Defendant first argues that he was denied his right to a trial by jury because ten jurors discussed his case in the jury room, while two others discussed it in an adjoining bathroom. Defendant contends that upon learning about the deliberation proceedings, the trial court should have declared a mistrial *ex mero motu*, or alternatively, that defendant received ineffective assistance of counsel when his attorney failed to move for a mistrial upon learning of the same. We disagree.

Article I, § 24 of the North Carolina Constitution states that "[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. The Sixth Amendment of the United States Constitution, applicable to the states via the Fourteenth Amendment, guarantees "that the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI. As a general matter, our constitution provides a higher level of protection on issues regarding the right to a jury trial than does the federal counterpart. *See*, *e.g.*, *State v. Poindexter*, 353 N.C.

440, 545 S.E.2d 414 (2001) (a unanimous verdict is assured by our constitution but not by the federal constitution); *State v. Hill*, 209 N.C. 53, 182 S.E. 716 (1935) (right to a jury trial is not a personal right that can be waived under our constitution but can be waived as a personal right under the federal constitution). Accordingly, we, like defendant in his brief to this Court, analyze the issue solely under Article I, § 24 of the North Carolina Constitution.

On 13 September 2006, during the jury's deliberations on defendant's sentence, a note was passed from juror number twelve to the judge regarding an incident occurring during the guilt phase of the deliberations. The note read as follows:

> "An incident occurred on Thursday, 09/07/06, that I believe you need to be aware of. During this time of deliberation, emotions were running high, and two of the jurors went into the restroom to discuss the trial out of earshot of the rest of the jurors. Yesterday, (09-12-06,) one of the two jurors stated that the only reason she voted guilty was because she felt pressured into it. I don't know if [it] will have any bearing on the trial, but I think you should know about it now rather than find out about it 6 months from now from some news interview with someone.["]

After receiving the note, the trial court spoke with the juror about whom the note was written to determine whether that juror was influenced by any matters not in evidence or by intimidation, two of the permitted inquiries a trial court may make regarding a jury's deliberative process. *See* N.C. Gen. Stat. § 15A-1240 (2007). The trial court, after speaking with the juror, determined that she had not been intimidated or received outside information and was in agreement with the verdict reached by the jury. The trial court also noted that no conversations had occurred outside the jury room.

At most, the record only establishes that the two jurors may have discussed the case between themselves. Defendant has cited no authority, nor were we able to uncover any, that prevents jurors from doing so. Indeed, the jurors were properly instructed under N.C. Gen. Stat. § 15A-1236(a)(1) (2007) "[n]ot to talk among themselves about the case except in the jury room after their deliberations have begun[]" several times by the trial court. This is not a case where two jurors left the jury room and walked down the hall to a detached bathroom while the other jurors continued to deliberate; the bathroom in this instance adjoined the jury room. In essence, we consider the jury bathroom, in this case, to be part of the jury room and accordingly

find no constitutional violation. Because we find no constitutional violation, defendant is unable to establish that his counsel was ineffective for failing to object on constitutional grounds. *See Strickland v. Washington*, 466 U.S. 668, 700, 80 L. Ed. 2d 674, 702 (1984) ("[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim"). Accordingly, defendant's assignments of error as to these issues are overruled.

II.

[2] Defendant next argues that he was convicted in violation of the double jeopardy clause. We disagree.

"The Fifth Amendment to the United States Constitution provides that no person shall be 'subject for the same offence to be twice put in jeopardy of life or limb.' " *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Although "Article I, section 19 of the North Carolina Constitution does not expressly prohibit double jeopardy . . . the courts have included it as one of the 'fundamental and sacred principle[s] of the common law, deeply imbedded in criminal jurisprudence' as part of the 'law of the land.' " *Id.* (alteration in original) (quoting *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972)).

The clause operates to prohibit: "(1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense." *Id.* In the instant case, defendant argues that he received multiple convictions for the same offense. Simply put, defendant contends that his conviction for discharging a weapon into occupied property should have been dismissed as it was an element necessary to establish first degree murder in this case. We first turn to defendant's argument that the trial court erred by failing to dismiss the charge at the close of evidence.

" 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' " *Missouri v. Hunter*, 459 U.S. 359, 366, 74 L. Ed. 2d 535, 542 (1983) (citation omitted). " 'If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.' " *State v. Fernandez*, 346 N.C. 1, 19, 484

S.E.2d 350, 361 (1997) (citation omitted). Thus, the elements of the crime, and not whether the same fact scenario fulfills the elements of the two distinct crimes, is the relevant inquiry.

N.C. Gen. Stat. § 15A-34.1 prohibits willfully or wantonly discharging or attempting to discharge a firearm into a vehicle while it is occupied. "[A] person is guilty of the felony . . . if he intentionally, without legal justification or excuse, discharges a firearm into [occupied property] with knowledge that the [property] is then occupied by one or more persons or when he has reasonable grounds to believe that" it is occupied. *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973).

Under the merger doctrine, not adopted in North Carolina but adopted by some states, " 'a . . . felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.' " *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 71 (1982) (quoting *People v. Ireland*, 70 Cal. 2d 522, 539 (1969)). "[Our Supreme] Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Id.* As we are bound by our Supreme Court's decision in *Wall*, defendant's arguments regarding the merger doctrine are rejected.[3] *See State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000) (holding that we are bound by the written decisions of our Supreme Court).

Accordingly, defendant's assignments of error as to this issue, and his alternate argument regarding ineffective assistance of counsel for failure to object to the jury instruction regarding the underlying felony, are rejected.

III.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of attempted murder on the grounds

3. Defendant cites our Supreme Court's opinion in *State v. Jones*, 353 N.C. 159, 170, n.3, 538 S.E.2d 917, 926, n.3 (2000), which stated that although the merger doctrine has been disavowed, "cases involving a single assault victim who dies of his injuries have never been similarly constrained[,]" as authority to overturn defendant's conviction in this case. The rule announced in *Jones*, however, only applies where there is a single assault victim. *State v. Carroll*, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002). There being multiple assault victims in this case, defendant's argument on this point is without merit.

that there is insufficient evidence to support the essential elements of the crime. We disagree.

The standard of review on appeal of the denial of a criminal defendant's motion to dismiss for insufficient evidence is whether the State has offered substantial evidence to show the defendant committed each element required to be convicted of the crime charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Substantial evidence is evidence that is existing, not just seeming or imaginary. *State v. Irwin*, 304 N.C. 93, 97-98, 282 S.E.2d 439, 443 (1981). "Upon a motion to dismiss in a criminal prosecution, the trial court must view the evidence in the light most favorable to the state, giving the state 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).

A person commits the crime of attempted first degree murder if he: "[1] specifically intends to kill another person unlawfully; [2] he does an overt act calculated to carry out that intent, going beyond mere preparation; [3] he acts with malice, premeditation, and deliberation; and [4] he falls short of committing the murder." *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998).

Defendant argues in his brief that there was no intent to kill Cox. Rather, Cox happened to be driving the vehicle occupied by Guy and was "simply in the wrong place at the wrong time." Moreover, defendant argues that his lack of intent to kill Cox is evidenced by the fact that the jury acquitted defendant on the charge that he intentionally killed Guy, instead convicting him under the felony murder rule, which does not require a showing of intent.

Our review for the sufficiency of the evidence is "independent of the jury's determination that evidence on another count was insufficient." *State v. Burton*, 119 N.C. App. 625, 640, 460 S.E.2d 181, 192 (1995) (reasoning that lenity may have been the cause for any inconsistences in the verdict and not necessarily the failure of the State to prove their case beyond a reasonable doubt) (citing *United States v. Powell*, 469 U.S. 57, 67, 83 L. Ed. 2d 461, 470 (1984)). Thus, our review is limited to whether the State offered substantial evidence that defendant committed each of the elements charged.

The overt act requirement is satisfied by the State's presentation of evidence tending to show that defendant fired a weapon at the vehicle which Cox was operating. There was also sufficient evidence

presented as to premeditation, deliberation, and intent: Defendant told Guy on the phone that he would not be able to get away and was aware that Cox was in the vehicle. Defendant, while acting in concert with others, then opened fire upon the vehicle in which Cox was riding. A rational trier of fact could conclude from this evidence that defendant, who had knowledge of Cox's presence in the car, intended to kill both men as he and the men he acted in concert with opened fire at the occupied car. *See Cozart*, 131 N.C. App. at 203, 505 S.E.2d at 909 (holding the element of intent satisfied where a defendant can see the victim in the property and begins shooting at the property he knows to be occupied while acting in concert with others). Accordingly, defendant's assignment of error as to this issue is rejected.

IV.

[4] Defendant's final argument is that the trial court erred in failing to dismiss the charge of conspiracy to commit murder. We disagree.

As stated above, when reviewing a motion to dismiss for insufficiency of the evidence, we view the evidence in the light most favorable to the State and grant every reasonable inference therefrom.

The elements of conspiracy to commit murder are: (1) defendant entered into an agreement with at least one other person; and (2) the agreement was for an unlawful purpose, here, to commit or assist in committing murder. *State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995).

Defendant again argues that the jury verdicts were inconsistent, and therefore, the State failed to carry its burden. For the reasons discussed in section III of this opinion, defendant's assignments of error as to this issue are also rejected.

V.

In summary, we hold that defendant has not successfully raised a constitutional issue under art. 1, § 24 of the North Carolina Constitution. Similarly, defendant was not convicted in violation of the double jeopardy clause. We also conclude that the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. Defendant's assignments of error are therefore rejected.

No error.

Judges CALABRIA and STROUD concur.

KAREN CARPENTER, PLAINTIFF v. CHRISTOPHER SCOTT CARPENTER, DEFENDANT

No. COA07-786

(Filed 15 April 2008)

1. Pleadings— motion to strike—absence of counsel—notice of hearing

The trial court did not abuse its discretion by hearing plaintiff's motion to strike defendant's answer and motion for judgment on the pleadings in the absence of defense counsel where defendant had adequate notice of the hearing.

2. Judges— comment on counsel's failure to appear—prejudice due to counsel's neglect

Defendant was not prejudiced in a hearing on plaintiff's motions to strike defendant's answer and for judgment on the pleadings where the judge said, "Why waste everybody's time" when plaintiff's counsel protested that he had not been able to argue. Defendant was prejudiced by his failure to appear in court, which was the result of his neglect, and whether the judge's comments violated the Code of Judicial Conduct is the province of the Judicial Standards Commission.

3. Pleadings— motion to strike—timeliness of answer

The trial court abused its discretion by striking defendant's answer because failure to timely file an answer is not grounds for striking a pleading under N.C.G.S. § 1A-1, Rule 12(f), and defendant's answer raised matters which could have a possible bearing on the litigation.

4. Pleadings— judgment on the pleadings—pleadings not closed

The trial court erred by granting plaintiff's motion for judgment on the pleadings where the motion was predicated on plaintiff's motion to strike defendant's answer, and that motion was improperly allowed. Judgment on the pleadings is not proper if the pleadings are not closed, and the pleadings here would not have been closed if the court had not stricken the answer.

Appeal by defendant from order entered 7 February 2007 by Judge Mary F. Covington in Davie County District Court. Heard in the Court of Appeals 9 January 2008.

Law Office of E. Edward Vogler, Jr., P.A., by E. Edward Vogler, Jr. and Emily R. Hunter, for plaintiff-appellee.

Harrell Powell, Jr., for defendant-appellant.

CALABRIA, Judge.

Christopher Scott Carpenter ("defendant") appeals an order granting Karen Carpenter's ("plaintiff") motion to strike defendant's answer and motion for judgment on the pleadings. We reverse.

Defendant and plaintiff were married on 30 April 1994. Two minor children were born of the marriage. The parties separated on 31 October 2005 and entered into a separation agreement and property settlement ("separation agreement") on 3 November 2005.

On 30 August 2006, plaintiff filed a verified complaint alleging breach of the separation agreement for defendant's failure to pay spousal support, child support, and other expenses defendant had agreed to pay. Plaintiff asked the court to order defendant to specifically perform under the separation agreement. Defendant was served with the complaint on 21 September 2006. Defendant timely filed for an extension of time and the trial court extended the time for defendant to file his answer through 20 November 2006.

By 1 December 2006, since defendant had not filed an answer, plaintiff filed a motion for judgment on the pleadings. The same day, plaintiff filed a notice of hearing for the motion for judgment on the pleadings for 18 December 2006 and mailed a copy to defendant. Defendant responded by filing an answer on 15 December 2006 that denied all material allegations in the complaint, raised several defenses, and asserted counterclaims against plaintiff for absolute divorce and a computation of child support according to the North Carolina Child Support Guidelines ("Answer").

On 20 December 2006, plaintiff filed a motion to strike defendant's Answer ("motion to strike"). The same day, plaintiff filed a notice of hearing for 8 January 2007. Upon defendant's motion, the hearing was continued to 5 February 2007. A notice of hearing on plaintiff's motion to strike was filed and served on 10 January 2007.

On 5 February 2007, Davie County District Court Judge Mary F. Covington ("Judge Covington") called the case for hearing. Plaintiff's counsel was present at calendar call. Defendant's counsel sent a fax to the court stating he would be present at 10:30 a.m. At 11 a.m., the

trial court heard the pending motions. Neither defendant nor his counsel were present. Judge Covington granted the motion to strike.

Judge Covington then heard plaintiff's motion for judgment on the pleadings. Plaintiff presented evidence to support her allegation that defendant did not pay child support and post-separation support. Judge Covington granted judgment on the pleadings for the plaintiff. At 11:56 a.m. the same morning, defendant filed an affidavit asserting he verified his answer in good faith and did not have an intention to delay the proceeding. An order granting plaintiff's motions was entered on 7 February 2007. Defendant appeals.

As a preliminary matter, we note that defendant did not include the standard of review in his brief, as required by the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 28(b)(6) (2007). However, this rule violation does not merit sanctions. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. ——, —— S.E.2d ——, (2008) (nonjurisdictional appellate rule violations that do not rise to the level of a substantial failure or gross violation do not merit sanctions).

I. Standard of Review

"A motion to strike an answer is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 25, 588 S.E.2d 20, 25 (2003) (citing *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E.2d 809 (1983)).

This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted).

II. The Hearing

[1] Defendant argues the trial court erred in hearing plaintiff's motion to strike and motion for judgment on the pleadings because

counsel was not present at the hearing, and the trial judge demonstrated bias in favor of the plaintiff. We disagree.

A trial court does not abuse its discretion in hearing a motion where counsel had adequate notice of the hearing and failed to demonstrate excusable neglect for failure to appear for the hearing. *Chris v. Hill*, 45 N.C. App. 287, 290-91, 262 S.E.2d 716, 718-19 (1980).

North Carolina Rules of Civil Procedure, Rule 6(d) requires written motions and "notice of the hearing thereof" to be served no later than five days before the time specified for the hearing. N.C.R. Civ. P. 6(d) (2007). Defendant had adequate notice of the hearing as evidenced by the calendar request and notice of hearing in the record. The written motion for the judgment on the pleadings was mailed to defendant along with a notice of hearing. The day of the hearing, defendant notified the trial court he would be present at 10:30 a.m. The trial court heard the motions after 11 a.m., after determining that defense counsel made no further contact with the trial court. We conclude the trial court did not abuse its discretion in hearing the motions. *See Texas Western Financial Corp. v. Mann*, 36 N.C. App. 346, 347, 243 S.E.2d 904, 906 (1978) (Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and the failure to do so is not excusable).

[2] Defendant argues the trial judge's comments during the hearing were inappropriate and contrary to the Code of Judicial Conduct, Canon 3A(3), 2007 Ann. R. N.C. 445, requiring judges to be patient, dignified and courteous to litigants.

"More than a bare possibility of prejudice from a remark of the judge is required to overturn a verdict or a judgment." *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d 338, 344-45 (1984). Our Supreme Court recognizes that a judge's inappropriate comments in the presence of the jury impedes impartiality of the trial process, yet "it is incumbent upon the appellant" to show prejudice by these remarks. *Id.*, 310 N.C. at 103, 310 S.E.2d at 344; *Upchurch v. Funeral Home*, 263 N.C. 560, 568, 140 S.E.2d 17, 23 (1965); *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 341, 323 S.E.2d 294, 305 (1984).

Here, the trial judge ruled on plaintiff's motion for judgment on the pleadings in a non-jury proceeding. Defendant argues Judge Covington's comment, "why waste everyone's time," in responding to plaintiff's counsel's protest to the judge that he "did not get to argue,"

"establishes a predisposition and bias against Defendant's counsel" and such comments violate the Code of Judicial Conduct and "constitute conduct prejudicial to the administration of justice. . . ." Whether or not the judge's comments violated the Code of Judicial Conduct is the province of the Judicial Standards Commission. N.C. Gen. Stat. § 7A-374.1 (2007). Defendant was prejudiced by his failure to appear in court which was the result of his neglect. This assignment of error is overruled.

III. Motion to Strike

[3] Rule 12(f) of the North Carolina Rules of Civil Procedure, allows the court to strike "from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C.R. Civ. P. 12(f) (2005). "A motion to strike an answer is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Broughton*, 161 N.C. App. at 25, 588 S.E.2d at 25 (citation omitted). "A motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense." *Faulconer v. Wysong and Miles Co.*, 155 N.C. App. 598, 601, 574 S.E.2d 688, 691 (2002) (citing *Trust Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975)). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978).

Defendant argues the trial court erred in granting the motion to strike because his answer was filed before the hearing on the motion to strike and motion for judgment on the pleadings. We agree that the trial court erred in granting plaintiff's motion to strike because failure to timely file an answer is not grounds for striking a pleading under Rule 12(f) and defendant's Answer raised matters which could have a possible bearing on the litigation.

It is error for a court to grant a motion to strike a pleading that was untimely filed in the absence of a showing that the pleading violates Rule 12(f). According to the plain language of North Carolina Rules of Civil Procedure, Rule 12(f), untimely filing is not grounds for striking a pleading. *See* N.C. Gen. Stat. § 1A-1, Rule 12(f) (2007) ("[T]he judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter."). In *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985), this Court addressed whether the trial court

should have granted a motion to strike an answer that was untimely filed. In that case, the plaintiff also moved for a default judgment after the answer had been filed, in part on the basis that the answer was untimely. The trial court granted summary judgment for defendants and plaintiff appealed. This Court concluded that even if the motion to strike were allowed, summary judgment for defendants would still be proper because there was an affirmative defense raised in the defendants' answer. Untimely filing did not preclude the sufficiency of the answer. *Id.*

Similarly in *Fieldcrest Cannon Employees Credit Union v. Mabes*, 116 N.C. App. 351, 447 S.E.2d 510 (1994), this Court reversed default judgment for plaintiff where the default judgment was entered after granting plaintiff's motion to strike the answer and counterclaim. Defendant obtained an extension of time to file his answer. Defendant filed his answer late and plaintiff moved to strike the answer and counterclaim and for an entry of default and default judgment. This Court concluded no prejudice resulted in the late filing and "that justice is better served by allowing the parties to fully litigate their claims." *Id.*, 116 N.C. App. at 353, 447 S.E.2d at 512.

In support of plaintiff's motion to strike, plaintiff contends defendant's failure to timely file his answer violated Rule 12(a) of the North Carolina Rules of Civil Procedure. Plaintiff cites *Fagan v. Hazzard*, 29 N.C. App. 618, 623, 225 S.E.2d 640, 643 (1976) in support of her argument.

In *Fagan*, defendant assigned error to the trial court's finding that defendant did not show excusable neglect to support filing his untimely answer. After defendant filed a late answer, plaintiff moved to strike the answer. "Based upon the findings, the [trial] court concluded that '(n)o excusable neglect (had) been shown by the defendant in failing to timely file [an] answer to the complaint and entered an order striking the answer and counterclaim and denying defendant's motion for leave to file an answer and counterclaim.[']" *Id.* This Court applied North Carolina Rule of Civil Procedure Rule 6(b) and determined the trial court's finding that defendant failed to show excusable neglect in filing an untimely answer was supported by the record. *Id.* Under Rule 6(b) of the North Carolina Rules of Civil Procedure, the trial court in its discretion, for cause shown, may extend the time period for a response to a pleading, if the request is made before the time has expired. N.C.R. Civ. P. 6(b) (2007). If time has expired, the trial court may allow an action "where the failure to act was the result of excusable neglect." Id.

The relevant issue in *Fagan* was whether the trial court erred in finding a lack of excusable neglect. The *Fagan* court did not address whether an untimely filing is sufficient grounds for a court to strike an answer under Rule 12(f). Here, as in *Fieldcrest Cannon*, defendant filed his answer after he received an extension of time, and plaintiff moved to strike the answer as untimely. The motion to strike was improperly granted because untimely filing is not one of the grounds to strike a pleading under Rule 12(f) and "justice is better served by allowing the parties to fully litigate their claims." *Fieldcrest Cannon*, 116 N.C. App. at 353, 447 S.E.2d at 512.

More importantly, defendant's Answer raised seven defenses and two counterclaims. Pleadings should not be stricken unless the matter cannot have any possible bearing on the litigation. *Shellhorn*, *supra.* Defendant raised several defenses to plaintiff's breach of contract claim. Some of the defenses included that the separation agreement was not supported by consideration; that vital and relevant information was concealed from him; that the terms of the separation agreement are substantively and procedurally unconscionable; and that enforcement of the separation agreement was contingent upon defendant's employment. In addition, defendant counterclaimed for absolute divorce and calculation of child support and the defenses and counterclaims could have a possible bearing on the litigation. *See Harrington v. Harrington*, 286 N.C. 260, 210 S.E.2d 190 (1974) (order granting wife's motion to strike husband's affirmative defenses to a divorce proceeding is reversed because defenses could defeat divorce action based on separation). We conclude the trial court abused its discretion in striking defendant's Answer.

IV. Motion for Judgment on the Pleadings

[4] Next we examine the issue of whether the trial court erred in granting plaintiff's motion for judgment on the pleadings.

North Carolina Rule of Civil Procedure, Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. *Toomer*, 171 N.C. App. at 66, 614 S.E.2d at 334 (quotation omitted). "Since a judgment on the pleadings is a summary procedure with the decision being final, these motions must be carefully examined to ensure that the non-moving party is not prevented from receiving a

full and fair hearing on the merits." *Garrett v. Winfree*, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995) (citation omitted). Judgment on the pleadings is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant. *Flexolite Electrical v. Gilliam*, 55 N.C. App. 86, 284 S.E.2d 523 (1981).

In *Yancey v. Watkins*, 12 N.C. App. 140, 141, 182 S.E.2d 605, 606 (1971), defendants moved for a judgment on the pleadings after plaintiff filed an amended complaint, but before defendants filed their amended answer. This Court vacated the trial court's grant of defendants' motion for judgment on the pleadings because it determined the pleadings were not closed. *Id.*

Here, plaintiff's motion for judgment on the pleadings was predicated on her motion to strike defendant's Answer. If the trial court had not stricken the Answer, the pleadings would not have been closed. Judgment on the pleadings is improper if the pleadings are not closed. Since we conclude the trial court improperly struck defendant's Answer, the trial court's allowance of plaintiff's motion for judgment on the pleadings also was error. We reverse and remand for a hearing on the merits.

Reversed and remanded.

Judges HUNTER and STROUD concur.

THE STATE OF NORTH CAROLINA v. ADRIA JOY HINKLE AND ANDREW COOK, DEFENDANTS

No. COA07-1014

(Filed 15 April 2008)

Criminal Law— littering—euthanized animals in private dumpster

A private dumpster is a litter receptacle within the meaning of the littering statute, and the trial court erred by denying defendants' motion to dismiss charges arising from placing animals which had been euthanized into a private dumpster. Essential to the crime of littering is that the litter be placed somewhere other than a litter receptacle. N.C.G.S. § 14-399.

Appeal by defendants from judgments entered 2 February 2007 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 20 February 2008.

Attorney General Roy Cooper, by Assistant Attorney Generals Catherine F. Jordan and LaToya B. Powell, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant Hinkle.

A. Jackson Warmack, Jr., for defendant Hinkle.

Zuckerman Spaeder LLP, by Blair G. Brown and Lisa J. Stevenson, for defendant Hinkle.

Edwards & Trenkle PLLC, by Mark E. Edwards, for defendant Cook.

ELMORE, Judge.

Adria Joy Hinkle (defendant Hinkle) and Andrew Cook (defendant Cook) (together, defendants) were each convicted by a jury of one count of littering. The trial judge imposed on each defendant a ten day suspended sentence, court costs, a $1,000.00 fine, $2,987.50 in restitution, a $200.00 community service fee, and fifty hours of community service, which was later reduced to twenty-four hours of community service. The court also ordered that the van used by defendants be forfeited for the use and benefit of the Ahoskie Police Department. Defendants now appeal. For the reasons stated below, we vacate the judgments of the trial court, the orders of forfeiture, and the orders of restitution.

On 15 June 2005, defendants were employed by People for the Ethical Treatment of Animals (PETA). Defendant Hinkle was an assistant manager of PETA's Community Animal Project (the CAP program). The CAP program's objective was "to improve quality of life and to also provide a humane death for animals." PETA's headquarters is in Norfolk, Virginia, but it began employing the CAP program in northeastern North Carolina in 2000 or 2001. PETA "provid[ed] death by lethal injection to animals waiting to die by carbon monoxide poisoning, gunshot and eventually later on injections of a paralytic drug that caused them to suffocate while they were fully aware." Defendant Hinkle's CAP responsibilities included the euthanasia of unwanted animals in the Bertie County animal shelter. Hinkle used a PETA van to travel to Bertie County and pick up

the animals from the shelter. She then euthanized the animals in the van and was supposed to transport the carcasses back to Virginia for cremation.

Defendant Cook worked as a project manager in PETA's information technology department and was volunteering for the CAP program on 15 June 2005.

It is undisputed that the following occurred on 15 June 2005: Defendants acquired three cats from the Ahoskie Animal Hospital and defendant Hinkle euthanized the cats in the back of the van. Defendants placed the dead cats inside a heavy duty black trash bag. Defendants acquired eighteen dogs from the Bertie County animal shelter and defendant Hinkle euthanized the dogs and then placed each dead dog inside a heavy duty black trash bag. Defendants pulled into the Newmarket Shopping Center in Ahoskie and then drove behind a Piggly Wiggly store. Defendant Hinkle stopped the van next to a private dumpster, which had a sign affixed to it saying, "notice, private use only, violators will be prosecuted." The dumpster belonged to D & E Properties, Inc. Defendant Hinkle instructed defendant Cook to put the black plastic bags containing the dead animals into the dumpster, which he did. Officers from the Bertie County Sheriff's office and Ahoskie Police Department observed defendants putting the black plastic bags into the dumpster and arrested defendants as they drove away from the dumpster.[1]

On 15 June 2005, the State issued arrest warrants for defendants for the unlawful disposal of dead animals (N.C. Gen. Stat. § 106-403 (2005)), felony cruelty to animals (N.C. Gen. Stat. § 14-360 (2005)), and second degree trespass (N.C. Gen. Stat. § 14- 159.13 (2005)). Superceding warrants were issued on 13 October 2005 for obtaining property by false pretenses (N.C. Gen. Stat. § 14-100 (2005)) and felony cruelty to animals (N.C. Gen. Stat. § 14-360 (2005)). On 31 October 2005, defendants were indicted on multiple counts of obtaining property by false pretenses, felony cruelty to animals, and litter-

1. A D & E Properties employee noticed that the dumpster contained dead animals on 19 May 2005. He notified the Ahoskie Police Department, and an officer confirmed that twenty-one dead dogs had been placed in the dumpster. Seventeen more dead dogs and three dead cats were found in the dumpster on 2 June 2005. One week later, on 9 June 2005, twenty more dead dogs were found in the dumpster. A Bertie County animal control officer confirmed that the dead dogs were the same dogs that PETA had obtained from the Bertie County animal shelter earlier in the week. Officers had both defendants and the dumpster under surveillance on 15 June 2005. Defendant Hinkle admitted that she disposed of euthanized animals in the dumpster on 2 June 2005.

ing (N.C. Gen. Stat. § 14-399 (2005)). On 16 November 2005, the State voluntarily dismissed nine counts of unlawful disposal of dead animals and one count of second degree trespass as charged against each defendant.[2] The State cited as its reason that defendants were "indicted on felony charges and related misdemeanors."

At the close of the State's evidence, defendants moved to dismiss all charges based on insufficiency of the evidence. The trial court reserved its ruling until the close of all of the evidence. Defendants renewed their motion at the close of all of the evidence, and filed a motion to dismiss the littering indictments or, in the alternative, to consolidate the littering indictments into one charge. The trial court allowed defendants' motions to dismiss all counts of felony cruelty to animals, but submitted to the jury eight lesser-included counts of misdemeanor cruelty to animals as to each defendant. The trial court dismissed the three counts of obtaining property by false pretenses as against defendant Cook, but not as against defendant Hinkle. The trial court denied defendants' motions to dismiss the littering charges, but submitted to the jury only one count of littering as to each defendant because of multiplicity concerns. The jury returned verdicts of not guilty for all charges except the littering charges.

Defendants argue that the trial court erred by denying defendants' motion to dismiss the littering charges because the evidence was insufficient to show that they disposed of the litter other than in a litter receptacle. At the close of the State's evidence, defendants argued that "[t]he littering statute prohibits someone from disposing of litter on any public or private property not owned by the person except in a litter receptacle. If you put it in the litter receptacle it's

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2. It is not clear why the State chose to prosecute defendants for littering instead of unlawful disposition of dead domesticated animals or second degree trespass.

N.C. Gen. Stat. § 106-403 states that "[i]t is the duty of the owner of domesticated animals that die from any cause and the owner or operator of the premises upon which any domesticated animals die, to bury the animals to a depth of at least three feet beneath the surface of the ground within 24 hours after knowledge of the death of the domesticated animals, or to otherwise dispose of the domesticated animals in a manner approved by the State Veterinarian." N.C. Gen. Stat. § 106-403 (2005). Knowing and willful violation of N.C. Gen. Stat. § 106-403 is a Class 2 misdemeanor. N.C. Gen. Stat. § 106-405 (2005).

"A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another . . . [t]hat are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises." N.C. Gen. Stat. § 14-159.13 (2005). Second degree trespass is a Class 3 misdemeanor. *Id.*

not littering. The point is they put these bags in a litter receptacle, the dumpster." Defense counsel also argued that

> the appropriate charge that the State should have brought here was a charge of trespass and not littering or perhaps a charge of dumping animals in an improper way. . . .
>
> And originally, if they were charged with that that may have been an appropriate charge but the State has chosen to proceed on littering charge and as [counsel] pointed out to you it's not covered by the statute.

The State countered that because the dumpster was a private receptacle, defendants littered by placing dead animals into the dumpster.

> Our review of the trial court's denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, 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. When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. 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, 905 (2007) (citations and quotations omitted) (alterations in original).

The crime in question is littering, which N.C. Gen. Stat. § 14-399 defines, in relevant part, as follows:

> (a) No person, including any firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of *any litter* upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street or alley except:

(1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or

(2) Into a *litter receptacle* in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C. Gen. Stat. § 14-399(a) (2005) (emphasis added). The statute does not define "litter receptacle," but defines "litter" as:

> any garbage, rubbish, trash, refuse, can, bottle, box, container, wrapper, paper, paper product, tire, appliance, mechanical equipment or part, building or construction material, tool, machinery, wood, motor vehicle or motor vehicle part, vessel, aircraft, farm machinery or equipment, sludge from a waste treatment facility, water supply treatment plant, or air pollution control facility, *dead animal*, or discarded material in any form resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations. While being used for or distributed in accordance with their intended uses, "litter" does not include political pamphlets, handbills, religious tracts, newspapers, and other similar printed materials the unsolicited distribution of which is protected by the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-399(i)(4) (2005) (emphasis added).

It is clear that defendants placed litter into a private dumpster. The parties disagree about whether a private dumpster is a "litter receptacle" within the meaning of the statute. We hold that it is. Our Supreme Court has previously described a dumpster as a "receptacle[]" for "trash removal." *Big Bear of N.C., Inc. v. High Point*, 294 N.C. 262, 269, 240 S.E.2d 422, 426 (1978). By choosing the word "receptacle," the legislature intended to include a broad range of containment vessels. That range includes dumpsters, which are defined as "containers designed for receiving, transporting, and dumping waste materials."[3] The American Heritage College Dictionary 426 (3d ed. 1997).

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3. We recognize that the complete dictionary entry is "Dumpster . . . A trademark used for containers designed for receiving, transporting, and dumping waste materials." *The American Heritage College Dictionary* 426 (3d ed. 1997). The parties and the U.S. Supreme Court use the generic term, "dumpster," and we follow suit. *See Yarborough v. Alvarado*, 541 U.S. 652, 656, 158 L. Ed. 2d 938, 946 (2004) ("Soto pulled

As defendants assert, the State did not prove that the dumpster in question was not a litter receptacle. In fact, the State's witnesses testified that the dumpster was used to hold refuse from the Piggly Wiggly and the rest of the shopping center, and that there were multiple bags full of trash in the dumpster at the time defendants deposited the dead animals.

The State instead argues that the language in section 14-399(a), "except . . . into a litter receptacle," is not a part of the statutory definition of "littering" and instead is an exception to the crime of littering. Although it is well established that the State bears the burden of production and persuasion as to each element of a crime, "exceptions" to crimes are not considered elements for this purpose and are instead considered to be affirmative defenses. *See State v. Trimble*, 44 N.C. App. 659, 665 n.2, 262 S.E.2d 299, 303 n.2 (1980) (explaining the difficult process of distinguishing elements and exceptions). Defendants bear the burdens of production and persuasion as to each affirmative defense; the State does not bear the burden of proving that a defendant *does not* fall within an exception. *Id.* As the Court noted in *Trimble*, we must be mindful when drawing the distinction between elements of an offense and exceptions to that offense.

> When one thinks in terms of circumscribing the parameters of criminal liability, disregarding for the moment the allocation of the burden of proof, there is little difference between requiring the State to show that an individual's actions are within the circumscribed area, and requiring the defendant to show that his actions are without the circumscribed area: in either case the prohibited range of conduct is the same.
>
> The procedural implications with respect to the burden of proof are, however, quite serious. As Mr. Justice Powell, in his dissent in *Patterson* . . . explains: "For example, a state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to

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out a .357 Magnum and approached the driver . . . who was standing near the truck emptying trash into a dumpster."). However, we acknowledge that our state courts have been less consistent in their use of the term. *Compare Rhyne v. K-Mart Corp.*, 358 N.C. 160, 164, 594 S.E.2d 1, 5 (2004) ("Roberts, one of the employees, inquired of plaintiffs as to whether they had been rummaging through K-Mart's dumpsters.") *with State v. Howell*, 343 N.C. 229, 233, 470 S.E.2d 38, 40 (1996) ("The victim was a twenty-nine-year-old black prostitute from Hickory whose body was found burning in a Dumpster . . . .").

> prove that he acted without culpable *mens rea*. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas."

Id. (quoting *Patterson v. New York*, 432 U.S. 197, 224 n.8, 53 L. Ed. 2d 281, 301 n.8 (1977) (Powell, J., dissenting)) (emphasis in original).

With these grave considerations in mind, we reiterate that "there are no magic words for creating an exception to an offense. Neither is placement of a phrase controlling. The determinative factor is the nature of the language in question. Is it part of the definition of the crime or does it withdraw a class from the crime?" *State v. Brown*, 56 N.C. App. 228, 230, 287 S.E.2d 421, 423 (1982); *see also State v. Connor* 142 N.C. 700, 702, 55 S.E. 787, 788 (1906) ("[T]he rule and its application depend[] not so much on the placing of the qualifying words, or whether they are preceded by the terms, 'provided' or 'except'; but rather on the nature, meaning and purpose of the words themselves.").

Therefore, we examine the nature of the littering statute's language and ask whether "[i]nto a litter receptacle" is part of the definition of the crime or whether it withdraws a class from the crime. It is clear that "[i]nto a littering receptacle" is part of the definition of the crime. If we read section (a) up to the word "except," then section (a) does not describe the complete crime of littering. Without the "except . . . [i]nto a litter receptacle" language, placing a broken rubber band into a trash can at our Court would be littering. Likewise, throwing a spent coffee cup into a trash can at the mall would be littering. Such a reading of the statute is inconsistent with both the plain language of the statute and common sense. Essential to the crime of littering is that the litter be placed somewhere other than a litter receptacle.

Accordingly, we hold that the trial court erred by denying defendants' motion to dismiss the littering charges because the State failed to present substantial evidence that the dumpster was not a litter receptacle. We therefore vacate the judgments against both defendants.

Because we vacate the judgments against both defendants, we also vacate the orders of restitution against both defendants. We do not reach the other issues presented by defendants in their appeal.

We vacate case numbers 05 CRS 003853 and 05 CRS 003859, the orders of forfeiture contained therein, and orders of restitution 05 CRS 3510 and 05 CRS 3550.

Vacated.

Judges STROUD and ARROWOOD concur.

BAILEY MICHELLE EAKER, Plaintiff v. WANDA A. GOWER, Individually and as President of Natural Touch School of Massage Therapy, Inc., and NATURAL TOUCH SCHOOL OF MASSAGE THERAPY, INC., Defendants

No. COA07-1025

(Filed 15 April 2008)

1. Appeal and Error— appealability—interlocutory order—jurisdiction immediately appealable

Although defendant's appeal from the denial of her motion to dismiss is from an interlocutory order, the Court of Appeals addressed the substance of the appeal under N.C.G.S. § 1-277(b) because it gives any interested party the right of immediate appeal from an adverse ruling as to the jurisdiction of the court of the person or property of defendant.

2. Jurisdiction— personal jurisdiction—due process—minimum contacts

The trial court erred in a breach of contract, unjust enrichment, and unfair or deceptive trade practices case by failing to grant defendants' motion to dismiss for lack of personal jurisdiction in regard to defendant Gower because: (1) the exercise of jurisdiction did not comport with due process when based upon the verified pleading and affidavits, the trial court could only find that defendant was a citizen and resident of Florida; (2) although plaintiff asserted defendant engaged in commerce within the state of North Carolina, plaintiff provided no facts in the record to support this conclusion; (3) the verified complaint and plaintiff's affidavit do not even mention the location of the pertinent school or where plaintiff actually attended classes; and (4) plaintiff failed to adequately assert the necessary minimum contacts including that defendant performed any actions in North Carolina

or that she has purposefully availed herself of the privilege of conducting activities within North Carolina and invoked the benefits and protections of the laws of North Carolina.

Appeal by defendants from order entered 19 March 2007 by Judge Susan C. Taylor in Superior Court, Alexander County. Heard in the Court of Appeals 7 February 2008.

Edward Jennings for plaintiff-appellee.

Law Offices of Matthew K. Rogers, PLLC by Joseph M. Long for defendant-appellant.

STROUD, Judge.

Plaintiff filed an action against defendants for breach of contract, unjust enrichment, and unfair or deceptive trade practices. Defendants filed motions to dismiss for, *inter alia*, lack of personal jurisdiction over defendant Wanda A. Gower. The trial court denied defendants' motion to dismiss for lack of personal jurisdiction. Defendant Wanda A. Gower appeals. The dispositive question before this Court is whether the trial court erred in failing to dismiss defendants' motion to dismiss for lack of personal jurisdiction as to defendant Wanda A. Gower. For the following reasons, we reverse.

I. Background

On or about 24 February 2005, plaintiff enrolled at defendant Natural Touch School of Massage Therapy, Inc. ("Natural Touch"). Plaintiff paid approximately $3,000 for tuition and other costs. On 4 April 2006, plaintiff filed a verified complaint naming Natural Touch and its president, Wanda A. Gower ("Gower"), as defendants, claiming defendants breached their contract, were unjustly enriched, and committed unfair or deceptive trade practices. On 7 June 2005, defendants filed an unverified "Defendants' Answer, Counterclaims & Motions" asserting, *inter alia*, that plaintiff's action should be dismissed for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), specifically because there was no personal jurisdiction over Gower.[1]

On 3 November 2006, defendants filed a "Notice of Hearing;" the motions were to be heard 16 January 2007. On or about 13 December

1. We note that the proper way to file a motion for lack of personal jurisdiction is pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2); however, this issue was not raised before the trial court or presented to us on appeal, and thus we will not address this procedural mistake.

2006, defendants filed another "Notice of Hearing" on the same grounds, but this time the hearing was to be held 12 February 2007. At the 12 February 2007 hearing, the trial court considered, *inter alia*, plaintiff's verified complaint, an affidavit from Gower, and an affidavit from plaintiff.

On 2 March 2007, the trial court denied one of defendants' motions to dismiss, but did not address the motion to dismiss regarding personal jurisdiction over Gower. On or about 7 March 2007, Matthew K. Rogers, defendants' attorney, sent the trial court judge a letter stating that "[t]he Motion To Dismiss Wanda Gower personally for lack of personal jurisdiction was not been [sic] addressed in the Order." On 19 March 2007, the superior court denied defendants' motion to dismiss for lack of personal jurisdiction as to Gower. Defendant Gower appeals.[2] The dispositive question before this Court is whether the trial court erred in failing to grant defendant Gower's motion to dismiss for lack of personal jurisdiction.

II. Interlocutory Appeal

[1] Plaintiff's brief does not address the substance of Gower's appeal, but only contends that Gower's appeal is interlocutory, and thus should be dismissed. This appeal is interlocutory, but pursuant to N.C. Gen. Stat. § 1-277(b), "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" N.C. Gen. Stat. § 1-277(b) (2005), *see also*, *e.g.*, *Godwin v. Walls*, 118 N.C. App. 341, 342-44, 455 S.E.2d 473, 476-77, *disc. rev. allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995) (allowing immediate appeal when defendant's motion to dismiss for lack of personal jurisdiction was denied). Therefore, this Court will address the substance of Gower's appeal.

III. Personal Jurisdiction

[2] Gower argues that the trial court erred in failing to grant defendants' motion to dismiss for lack of personal jurisdiction over Gower.

> The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court. Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to

2. Defendant Natural Touch did not assign any errors to the order which denied its motion to dismiss.

> dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.
>
> . . . .
>
> In the third category of cases, the parties—as here—submit dueling affidavits. Under those circumstances, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 182-83 (2005) (internal citations, internal quotation marks, ellipses, and brackets omitted). Furthermore, "[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 359, 583 S.E.2d 707, 711 (2003) (citation and internal quotation marks omitted), *aff'd*, 358 N.C. 372, 595 S.E.2d 146 (2004).

"When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Secs. LLC* at 694, 611 S.E.2d at 183 (citation and internal quotation marks omitted). "Such appeal is limited to a determination of whether North Carolina statutes permit our courts to entertain this action against defendant[], and, if so, whether this exercise of jurisdiction violates due process." *Saxon v. Smith*, 125 N.C. App. 163, 168, 479 S.E.2d 788, 791 (1997) (citation and internal quotation marks omitted).

> North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, was enacted to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Since the North Carolina legislature designed the long-arm statute to extend personal jurisdiction to the limits permitted by due process, the two-step inquiry merges into one question: whether the exercise of jurisdiction comports with due process.

Lang v. Lang, 157 N.C. App. 703, 708, 579 S.E.2d 919, 922 (2003) (citation and internal quotation marks omitted).

> In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. In order to have minimum contacts:
>
> the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled [sic] into a North Carolina court.
>
> This Court . . . discussed five factors to be considered to determine whether the defendant has had sufficient minimum contacts with the forum state. The factors are: (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties.

Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 715, 654 S.E.2d 41, 44-45 (2007) (internal citations, internal quotation marks, and brackets omitted).

> When jurisdiction is challenged, plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists. The failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts alleged permit the reasonable inference that jurisdiction may be acquired.
>
> We note that the trial court did not make any findings of fact to support [its] ruling denying defendant[]s[’] motion to dismiss. However, when there is no request of the trial court to make such findings, we presume that the judge found facts sufficient to support the judgment. If the presumed findings are supported by competent evidence in the record, they are conclusive on appeal, notwithstanding other evidence in the record to the contrary.

Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 629-30, 394 S.E.2d 651, 654 (1990) (internal citations, internal quotation marks,

ellipses, and brackets omitted). "[I]t is elementary that the trial court must draw its own legal conclusions from those facts, and that it may draw conclusions which may differ from those advocated by plaintiff[]." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002) (noting trial court's obligation for 12(b)(6) and 12(c) motions to dismiss).

Here we do not find that "the exercise of jurisdiction comports with due process." *Lang* at 708, 579 S.E.2d at 922. Plaintiff's only allegations in her complaint as to personal jurisdiction over defendant Gower are that

> [t]he individual [d]efendant, WANDA A. GOWER, is a citizen and resident of the State of North Carolina, and [that] . . .
>
> [t]he [d]efendants are engaged in commerce within the State of North Carolina and are a for profit business for purposes including offering an educational curriculum and courses of study for persons who are accepted as students upon the payment of tuition and fees, which are transactions which affect and are in commerce[.]

Defendant Gower's affidavit stated, "I am citizen [sic] and resident of the State of Florida." Attached to defendant Gower's affidavit were copies of her Florida drivers license and voter registration card from the State of Florida. In her affidavit plaintiff failed to rebut or to deny defendant Gower's statement that she is actually a Florida citizen and resident; therefore, the trial court had no evidence upon which to find that defendant Gower is a North Carolina citizen or resident as plaintiff alleged in her verified complaint. Based upon the verified pleading and affidavits, the trial court could properly find only that defendant Gower is a citizen and resident of Florida.

We must next determine whether there was any evidence that defendant Gower had "minimum contacts" with North Carolina such that the exercise of jurisdiction over her comports with due process. *See Baker* at 715, 654 S.E.2d at 44-45. The only other statement regarding defendant Gower's contact with North Carolina in a verified pleading or affidavit before us is that "[d]efendants are engaged in commerce within the State of North Carolina and are a for profit business for purposes including offering an educational curriculum and courses of study[.]" We find this statement to be a legal conclusion rather than a factual allegation. Plaintiff has asserted that defendant Gower is "engaged in commerce within the state of North

Carolina[,]" but has not provided us with any facts in the record to support this conclusion.

We must therefore consider the five factors as set forth in *Baker*. *See Baker* at 715, 654 S.E.2d at 45. As to the "quantity of the contacts" between defendant Gower and North Carolina, the pleadings and affidavits disclose, at best, that Gower is associated with the educational program which plaintiff attended at some unknown location. *See id.* We have no information as to the number of times Gower may have visited North Carolina or even directed communications here. As to the "quality and nature of the contacts" between Gower and North Carolina, we have no information at all. *See id.* As to "the source and connection of the cause of action" to defendant Gower's contacts with North Carolina, again, at best we could infer from the verified pleading and affidavits that Gower was somehow involved with plaintiff's classes, although we do not know where these classes occurred or the nature of Gower's actual involvement. *See id.* Furthermore, there are no allegations which elucidate to us "the interest" of North Carolina or the convenience of the parties. *See id.* All we know from the evidence before us is that Gower is a citizen and resident of Florida and plaintiff is a North Carolina citizen and resident, who attended classes presented by Natural Touch and/or Gower at an unknown location. In this regard, we note that the verified complaint and plaintiff's affidavit do not even mention the location of Natural Touch's or Gower's school or where plaintiff actually attended classes. We cannot make assumptions regarding these important facts, but rather are required to rely only upon the facts in the record before us.

Beyond the two statements *supra*, nowhere in plaintiff's complaint or affidavit does she assert that Gower performed any actions in North Carolina or that she has "purposefully availed [herself] of the privilege of conducting activities within [North Carolina] and invoked the benefits and protections of the laws of North Carolina. " *See id.* Based on the record, there is not competent evidence to support a finding of minimum contacts between defendant Gower and North Carolina in order for this State to exercise personal jurisdiction over defendant Gower; therefore, we reverse.

IV. Conclusion

For the reasons stated above, we reverse the trial courts denial of defendant's motion to dismiss for lack of personal jurisdiction.

REVERSED.

Judges TYSON and GEER concur.

IN THE MATTER OF J.J.D.L.

No. COA07-839

(Filed 15 April 2008)

1. Juveniles— first-degree sexual offense against child— release pending appeal—denied

The trial court's decision to deny release to a juvenile pending appeal was not unsupported or manifestly without reason where the trial court found that juvenile committed first-degree sexual offense against a 13-year-old child in violation of N.C.G.S. § 14-27.4(a)(1).

2. Evidence— summary of juvenile's statement—admissible

The trial court did not erred by admitting an officer's summary of defendant's statement in a proceeding against a juvenile for first-degree sexual offense. The evidence was admissible under both N.C.G.S. § 8C-1, Rule 801(d), as an admission, and under N.C.G.S. § 7B-2497, governing admissions by a juvenile.

3. Appeal and Error— record on appeal—matter not raised at trial or adjudicated by trial court—procedurally barred

Defendant was procedurally barred from raising on appeal the question of whether the trial court erred by conducting a juvenile dispositional hearing without the results of a court ordered sex offender evaluation. The record gives no indication that defendant contested the holding of the dispositional hearing on the ground that a sex offender specific evaluation was unavailable. Moreover, defendant did not argue on appeal how the absence of a sex offender specific evaluation hindered the court's ability to properly sentence him.

Appeal by defendant from disposition and commitment entered 13 March 2007 by Judge Jeffrey Moore in Robeson County District Court. Heard in the Court of Appeals 16 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Sofie Hosford for defendant-appellant.

BRYANT, Judge.

Defendant J.J.D.L., a juvenile, appeals from the trial court's adjudication and disposition for first degree sex offenses with a child under N.C. Gen. Stat. § 14-27.4(a)(1).

On 23 June 2006, the mother of T.B.M. filed a juvenile petition against defendant for sexual offenses against her son. The first petition alleged indecent liberties between children and three additional petitions alleged three separate counts of first degree sex offense. Evidence submitted during an adjudicatory hearing to determine delinquency tended to show the offenses occurred when defendant was fourteen years old and the victim, T.B.M., was seven years old.

During the hearing, T.B.M. identified defendant in the courtroom and testified that "[defendant] stuck his pee worm in [T.B.M.'s] butt hole." T.B.M. acknowledged that he referred to a penis as a "pee worm" or "pee bug." T.B.M. testified that defendant did this on five different occasions, all of which occurred in defendant's bedroom or in a bathtub. T.B.M. testified that defendant used lotion to lubricate himself, and when defendant anally penetrated him in the shower, defendant used soap. T.B.M. testified that each experience was painful.

T.B.M.'s mother testified that one day T.B.M. told her he did not want to go back to his grandmother's house and when questioned related the above events as the reason why. Defendant's grandfather was married to T.B.M.'s grandmother and defendant had a room at their house. T.B.M.'s mother filed a report with the Robeson County Sheriff's Department. Sergeant Sue Lutz with the Juvenile Division was assigned to investigate.

During the investigation Sgt. Lutz interviewed defendant with his mother present. Sgt. Lutz read defendant his juvenile rights warning and both defendant and his mother signed to indicate they understood defendant's rights. Defendant talked to Sgt. Lutz, and although defendant never signed a statement, at the juvenile delinquency hearing Sgt. Lutz testified, over defendant's objection, to the content of their conversation. Sgt. Lutz stated defendant acknowledged three occasions during which, though he denied penetration, defendant

admitted that he either soaped or lotioned his penis, stuck it between the victim's "butt cheeks and humped him." Sgt. Lutz also testified to defendant's acknowledgment of a fourth occasion when another boy named Johnny[1] was present. Though defendant admitted to masturbating in the presence of T.B.M. and Johnny, defendant denied performing any sexual act on T.B.M. at that time. Sgt. Lutz testified that according to defendant all of these events occurred in defendant's room or in a shower in T.B.M.'s grandmother's house.

During the course of the investigation, Sgt. Lutz and T.B.M.'s mother accompanied T.B.M. when he was examined by Dr. Howard Loughlin, a Board Certified Pediatrician practicing in Fayetteville, North Carolina at Southern Regional AHEC as the Medical Director of the Child Abuse Evaluation Clinic. At that time, Dr. Loughlin spoke to Sgt. Lutz, T.B.M.'s mother, and T.B.M. At the adjudication hearing, Dr. Loughlin testified without objection that T.B.M.'s mother informed him T.B.M.'s school performance had gotten "much worse," at times he was "much more moody," and T.B.M. had started having accidents where he urinated and defecated on himself.

Dr. Loughlin testified that he examined T.B.M. on two occasions—27 April and 19 May 2006, for evaluation, diagnosis, and treatment of alleged sexual abuse. Dr. Loughlin noted that T.B.M.'s anus was much larger than he was accustomed to seeing on physical exams. Dr. Loughlin testified that on a typical child T.B.M.'s age, the anal opening would be closed with perhaps a minimal, if any, opening. T.B.M.'s anal opening measured one and a half by two centimeters. Dr. Loughlin testified that in terms of the victim's anal dilation this was the most striking exam he had seen in twelve years.

During the examination, T.B.M. related to Dr. Loughlin those events that occurred at his grandmother's house, and Dr. Loughlin asked T.B.M. if anyone besides defendant participated. At the adjudicatory hearing, Dr. Loughlin testified, without objection, that T.B.M. mentioned the name of another boy, Johnny. Dr. Loughlin further testified that T.B.M.'s behavior and the disclosures of the physical exam were consistent with those of children who had been sexually abused, anally sodomized.

At the adjudicatory hearing, Johnny, fourteen years old at the time of trial and another grandchild of T.B.M.'s grandmother, testified to an incident that occurred one day when he was out from school for a week. Johnny testified that he, defendant, and T.B.M. were at their

1. "Johnny" is a pseudonym used in place of juvenile's real name.

grandmother's house watching a movie in defendant's bedroom. At some point, defendant pulled his pants down, began masturbating, and encouraged Johnny to join him. Johnny testified that Defendant asked T.B.M. if defendant could "clean [T.B.M.] out"? To which, T.B.M. responded no, saying it burned the last time. Johnny testified defendant urged T.B.M. to cooperate three times before relenting.

On 22 January 2007, the trial court entered a written adjudication order adjudicating defendant delinquent as to three counts of first degree sex offense under N.C.G.S. § 14-27.4(a)(1) and dismissing the charge of indecent liberties. In addition, the trial court ordered that defendant submit to a sex offender specific evaluation and not be around T.B.M. or around children without supervision. The trial court scheduled a disposition hearing for 13 March 2007. At the hearing, the trial court, despite the lack of a sex offender specific evaluation, ordered defendant committed to the Youth Development Center of the Department of Juvenile Justice and Delinquency for an indefinite commitment not to exceed defendant's eighteenth birthday, absent an extension; to submit and comply with any sex offender specific evaluation and its recommendations; have no contact with the victim; and register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.26.

On 14 March 2007, defendant filed a notice of appeal and made a motion for release from custody pending appeal. On 19 March 2007, the trial court denied defendant's motion for release.

On appeal, defendant raises three issues: whether the trial court erred by (I) denying defendant's motion for release pending appeal, (II) allowing Sgt. Lutz to testify about statements made by defendant that were against defendant's interests, and (III) proceeding with the disposition hearing in the absence of a sex offender specific evaluation report.

I

[1] Defendant first questions whether the trial court erred by denying defendant's release pending appeal. Defendant argues the trial court stated no reason for denying defendant's release and that the order should be reversed as a matter of law. We disagree.

Under North Carolina General Statute 7B-2605,

> [p]ending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be

> stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2007).

Here, the trial court ordered defendant committed to the Youth Development Center of the Department of Juvenile Justice and Delinquency for an indefinite commitment to last for a minimum of six months and a maximum term to end on defendant's eighteenth birthday. The record also contains the trial court's form for appellate entries in a delinquency proceeding, which includes the denial of defendant's motion to be released pending appeal pursuant to G.S. 7B-2605. On the form, the trial court stated the following as the compelling reason defendant's motion for release was denied: "first degree sex offenses with a child 14-27.4(a)(1)."

Under North Carolina General Statute 14-27.4(a)(1),

> [a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.

N.C. Gen. Stat. § 14-27.4(a)(1) (2007).

Given that defendant does not challenge the trial court's findings of fact that defendant "did engage in a sex offense with [T.B.M.], a child under the age of 13 years, who was at least four years younger than [defendant] and [defendant] was at least twelve years old, being offenses in violation of G.S. 14-27.4(A)(1)," we cannot hold the trial court's denial of defendant's motion to be released pending appeal was unsupported or manifestly without reason.

Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant next questions whether the trial court erred in admitting Sgt. Lutz's summary of defendant's statement. Defendant argues the State failed to establish Sgt. Lutz's summary constituted an accurate account of defendant's statement and the document constituted hearsay falling within no exception. We disagree.

Under North Carolina Rules of Evidence, Rule 801(c), " 'Hearsay' is a statement, other than one made by the declarant while testifying

at the trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C-801(c) (2007), and "[h]earsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-802 (2007). Under N.C.G.S. 8C-801(d), titled "Exception for Admissions by a Party-Opponent," "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . his own statement, in either his individual or a representative capacity." N.C. Gen. Stat. § 8C-801(d) (2007). "An admission is a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Smith*, 157 N.C. App. 493, 496, 581 S.E.2d 448, 450 (2003) (citation omitted).

In the North Carolina General Statutes, under Juvenile Code section 7B-2407, titled "When admissions by juvenile may be accepted," "[t]he court shall determine whether there were any prior discussions involving admissions . . . [and] [t]he court may accept an admission from a juvenile only after determining that the admission is a product of informed choice." N.C. Gen. Stat. 7B-2407 (b) (2007).

Here, the evidence presented during the adjudicatory hearing showed that during the investigation, Sgt. Lutz interviewed defendant, with his mother present. Sgt. Lutz testified that, at the time of the interview, defendant was not in custody; Sgt. Lutz read defendant his Juvenile Rights Warning, after which both defendant and his mother signed a statement indicating they understood the rights; and after defendant and his mother left, Sgt. Lutz wrote her summary of the interview. Sgt. Lutz's summary of defendant's statements during the interview were not admitted during the delinquency proceeding.

Sgt. Lutz then testified to defendant's admission that on at least three different occasions he used T.B.M.'s body for sexual gratification, though he denied penetrating T.B.M. Sgt. Lutz testified to defendant's statements regarding one incident involving both T.B.M. and another boy named Johnny, though in that situation defendant denied assaulting T.B.M. Sgt. Lutz testified to defendant's statements that all of these incidents occurred in defendant's room or in a shower.

We hold Sgt. Lutz's testimony was admissible under both Rule of Evidence, Rule 801(d), allowing admissions by a defendant, and General Statute 7B-2407, governing when admissions by a juvenile may be accepted. Accordingly, defendant's assignment of error is overruled.

III

[3] Last, defendant questions whether the trial court erred in conducting the dispositional hearing without the results of a court ordered sex offender evaluation. Defendant argues that in the absence of such a report, the public safety issues or the defendant's need for treatment could not be properly assessed.

Under North Carolina Rules of Appellate Procedure, Rule 10(b)(1)

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C.R. App. P. 10(b)(1) (2007).

Here, even acknowledging the informality allowed in a dispositional hearing, *see* N.C. Gen. Stat. § 7B-2501(a) ("[t]he dispositional hearing may be informal . . ."), the record gives no indication defendant contested the continuance of the dispositional hearing on the grounds that a sex offender specific evaluation was unavailable. As "[t]his Court will not consider arguments based upon matters not presented to, or adjudicated by the trial tribunal[,]" *State v. Hairston*, 123 N.C. App. 753, 761, 475 S.E.2d 242, 247 (1996), defendant is procedurally barred from asserting this argument.

Moreover, on appeal, defendant fails to argue how the absence of a sex offender specific evaluation hindered the trial court's ability to properly sentence him. The trial court adjudicated defendant delinquent based on the commission of a B1 felony, first degree sex offenses with a child under N.C.G.S. § 14-27.4(a)(1), (b) (2007). This is categorized as a "violent offense." *See* N.C. Gen. Stat. § 7B-2508(a)(1). In addition to commitment to the Youth Development Center of the Department of Juvenile Justice, the trial court ordered defendant to submit to and comply with any sex offender specific evaluations and its recommendations.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. RAYMOND WATKINS

No. COA07-774

(Filed 15 April 2008)

Sentencing— below minimum term—concurrent rather than consecutive—right of State to appeal

The trial court erred by sentencing defendant below the statutory minimum term for financial card theft and by sentencing him to a concurrent rather than consecutive term for being an habitual offender. The State has a right of appeal from a defendant receiving a sentence below the statutory minimum term, but no right to appeal from a concurrent rather than consecutive term. However, the Court of Appeals elected to treat this case as a petition for mandamus in the interest of the administration of justice.

Appeal by the State from judgment entered 5 February 2007 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 3 March 2008.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Judge.

On 15 November 2004, defendant pled guilty to financial card theft and having attained habitual felon status. Prayer for judgment was continued until 24 January 2005, when prayer for judgment was further continued until 23 January 2006. According to the record, the State prayed judgment on 5 February 2007, and the trial court adjudged defendant guilty of financial card theft as a habitual felon and sentenced him as a class C felon with a prior record level IV. Defendant was sentenced to imprisonment for a minimum term of 64 months and a maximum term of 86 months. The court also entered findings of extraordinary mitigation and indicated "this sentence is to run concurrently with the federal sentence [defendant] is now serving" and "it is the full intent of this court that this state sentence not exceed beyond [sic] the completion of the federal sentence." The State appeals from the judgment because defendant's sentence is (1)

below the statutory minimum term and (2) made to run concurrently with a federal sentence he is serving.

The State has a right of appeal from a trial court's error in sentencing a defendant below the statutory minimum term. N.C. Gen. Stat. § 15A-1445(a)(3)(c) (2007). Under North Carolina statute, the minimum term of imprisonment for a class C felon in the level IV mitigated range is 80 months and the maximum term is 107 months. N.C. Gen. Stat. § 15A-1340.17(c) (2007). Defendant's sentence to a term of imprisonment of 64 to 86 months is below the minimum prescribed by N.C.G.S. § 15A-1340.17(c). "[T]he General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes," *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986); therefore, the trial court must impose the terms of imprisonment set out in the statute. Because the trial court erred in sentencing defendant below the statutory minimum term, the judgment must be vacated and the case must be remanded to the trial court for resentencing in accordance with N.C.G.S. § 15A-1340.17.

We conclude the State has no right of appeal from the trial court's action in sentencing defendant to a concurrent term of imprisonment rather than a consecutive term of imprisonment. "The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982). The State's right of appeal is granted by N.C.G.S. § 15A-1445. Related to the term of imprisonment, the statute grants the State the right to appeal when the "duration [is] not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1445(a)(3)(c). The duration at issue here is controlled by N.C.G.S. § 14-7.6 rather than by § 15A-1340.17 or § 15A-1340.23, and so we conclude that the duration of the term of imprisonment assigned as error by the State is outside the scope of the right of appeal granted in § 15A-1445(a)(3)(c).

Consequently, this Court elects to exercise the discretion granted it by Appellate Rule 2 to suspend the appellate rules, and the Court treats the State's appeal as a petition for writ of mandamus, for the reasons stated in *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428-29 (2007). *See also* N.C.R. App. P. 2 (2008). In *Ellis*, our Supreme Court exercised its supervisory authority to reach the issue of a trial court's imposition of a concurrent rather than consecu-

tive sentence in order "to promote the expeditious administration of justice" and achieve "prompt and definitive resolution of an issue . . . necessary to ensure the uniform administration of North Carolina's criminal statutes." *Ellis*, 361 N.C. at 205, 639 S.E.2d at 428-29. The Court addressed the issue, relying on *State v. Wall*, 348 N.C. 671, 675-76, 502 S.E.2d 585, 588 (1998), and concluded that where a statute requires the court to sentence defendant to a consecutive term of imprisonment, the imposition of a concurrent sentence is contrary to law, and the sentence must be vacated and remanded for sentencing in accordance with the law. *Ellis*, 361 N.C. at 206, 639 S.E.2d at 429.

In the case before us, defendant pled guilty to having attained habitual felon status, bringing him within the provisions of N.C.G.S. § 14-7.6. In pertinent part, that statute states: "Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2007). Defendant's sentence to a concurrent term of imprisonment was contrary to law, and we direct the trial court upon remand to enter a judgment which comports with N.C.G.S. § 14-7.6.

Vacated and remanded.

Judges CALABRIA and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 APRIL 2008

BAILEY v. BAILEY No. 07-1340	Wilson (00CVD1513)	Affirmed in part; Reversed in part
BROADHURST v. TATUM No. 07-696	Moore (06CVS1603)	Affirmed
CLARK v. UNITED EMERGENCY SERVS., INC. No. 07-592	Durham (06CVS05049)	Affirmed
DAUGHTRIDGE v. BARBER No. 07-552	Mecklenburg (99CVD11508NPP)	Dismissed
FLIPPEN v. AMERICRAFT CARTONS, INC. No. 07-577	Ind. Comm. (I.C. 244728)	Affirmed
IN RE A.W. & K.M. No. 07-819	Robeson (07JB55-56)	Vacated
IN RE C.M.T. No. 07-1099	Alamance (01JT126)	Affirmed
IN RE C.P. No. 07-1485	Yadkin (07JA36)	Affirmed
IN RE E.G.F., T.S.F. No. 07-1409	Mecklenburg (05JT365-66)	Affirmed
IN RE L.F., T.F., K.S. No. 07-1253	Craven (06JA51-53)	Affirmed
JONES v. DALTON No. 07-553	New Hanover (05CVS2157)	Affirmed
McLOUGHLIN v. DROOG No. 07-542	Orange (03CVD87)	Affirmed in part, reversed in part and remanded
MOORE v. FIRST CITIZENS BANK No. 07-616	Ind. Comm. (I.C. 352436)	Affirmed
PHILLIPS & JORDAN INV. CORP. v. GREUN MADAINN, INC. No. 07-1105	Graham (06CVS26)	Affirmed in part; reversed in part and remanded to the trial court for disposition in accordance with the provisions set out herein
RABIL v. FOOD LION, LLC No. 07-706	Nash (05CVS2063)	Affirmed

STATE v. AMBROCIO No. 07-861	Guilford (05CRS75405)	No prejudicial error
STATE v. ARNOLD No. 07-712	Lincoln (05CRS51043) (06CRS1144)	No error
STATE v. BELL No. 07-1017	Sampson (03CRS54808-10)	Affirmed
STATE v. BISHOP No. 07-792	Alamance (04CRS54562) (04CRS54508) (04CRS12022)	No error
STATE v. BOWEN No. 07-414	Forsyth (05CRS56921) (05CRS56940)	Remanded
STATE v. CHIAROMONTE No. 07-534	Buncombe (06CRS11083) (06CRS55233)	No prejudicial error
STATE v. COLEMAN No. 07-825	Mecklenburg (05CRS230024)	No error
STATE v. CREDLE No. 07-1021	Beaufort (06CRS51607)	Remanded
STATE v. DOOLITTLE No. 07-952	Rowan (06CRS52024)	No error
STATE v. FOSTER No. 07-947	Guilford (06CRS79195)	No error
STATE v. HOILMAN No. 07-736	Avery (06CRS50968)	Affirmed
STATE v. IBARRA No. 07-1236	Davidson (05CRS56708-09)	No error
STATE v. IRBY No. 07-747	Person (03CRS920)	Affirmed
STATE v. JENKINS No. 07-973	Nash (05CRS55132)	No error at trial; sentence vacated; remanded for resentencing
STATE v. JONES No. 07-1113	Person (05CRS52949)	No error
STATE v. LEDBETTER No. 07-885	Henderson (06CRS52665-66)	No error in part; Vacated and remanded in part

STATE v. NICHOLS No. 07-871	Davidson (04CRS57985) (04CRS58307)	Dismissed
STATE v. RORER No. 07-1214	Iredell (05CRS54187)	No error
STATE v. ROSALES-VILLA No. 07-1144	Wayne (05CRS58661-62)	No error
STATE v. SHARPE No. 07-978	Rockingham (99CRS13151) (99CRS13154) (99CRS13156) (00CRS1093) (00CRS1096) (00CRS2690) (00CRS2692) (02CRS52655)	Affirmed; remanded for correction of clerical error in the written judgment and commitment in file number 99CRS13156
STATE v. SNYDER No. 07-713	Wake (06CRS7568)	No error
STATE v. SPRUILL No. 07-576	Tyrrell (06CRS554)	No error
STATE v. STANLEY No. 07-867	Forsyth (04CRS55796)	No error
STATE v. TRUCELL No. 07-1249	Granville (05CRS53342)	No error
STATE v. WATERS No. 07-557	Buncombe (05CRS59557) (05CRS59561) (05CRS11038-39)	No prejudicial error
STATE v. YOUNGER No. 07-999	Pitt (06CRS54641-43) (06CRS54757)	Affirmed
WOOD v. N.C. STATE UNIV. No. 07-88	Indus. Comm. (I.C. TA-16036)	Affirmed as modified

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TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW—Continued

Commission decision because: (1) petitioner's first allegation was addressed by N.C.G.S. § 150B-51(b)(4) and was characterized as a law-based inquiry requiring de novo review by the superior court; and (2) petitioner's second and third allegations were subject to N.C.G.S. § 150B-51(b)(5) and (6) respectively, requiring review under the whole record test as fact-based inquiries. **Trotter v. N.C. Dep't of Health & Human Servs., 655.**

Judicial review of final agency decision—substantially equivalent exemption—failure to exhaust administrative remedies—The trial court did not err in a declaratory judgment case by dismissing for lack of subject matter jurisdiction plaintiff employee's complaint seeking a determination that the Guilford County Personnel Regulations were not substantially equivalent to the standards established by the State Personnel Act based on her contention that the memorandum terminating her employment did not give her any notice of any right to appeal to the superior court where plaintiff had not exhausted all available administrative remedies. **Steward v. Green, 131.**

Practicing massage therapy without a license—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of practicing massage therapy without a license arising from events in 2004 and 2005 where the administrator of the Board testified that the Board's files had been examined, that defendant's license was revoked in 2002, and that it was never reissued. **State v. Viera, 514.**

ADVERSE POSSESSION

Continuous possession—hostile use not re-established—The trial court correctly granted summary judgment for defendant in an adverse possession action in which plaintiffs did not possess the disputed tract in a hostile manner for a continuous twenty-year period. Plaintiffs' possession was hostile for eleven years, the then-owners gave plaintiffs permission to use the property when approached about a sale, and there is no indication that plaintiffs expressly rejected the grant of permission or put the owners on notice that they intended to continue a hostile possession. **Jones v. Miles, 289.**

APPEAL AND ERROR

Appealability—allowance of motion to dismiss—interlocutory order—substantial right—possibility of inconsistent verdicts on same factual issues—Although plaintiffs appeal from an interlocutory order granting defendant's motion to dismiss and from the orders dated 8 December 2006, the orders are immediately appealable because plaintiffs demonstrated the orders affect a substantial right since: (1) these claims raise factual issues that are identical to the factual issues raised by defendant's counterclaims which were not dismissed; and (2) the denial of an immediate appeal creates the potential for inconsistent verdicts resulting from two trials on the same factual issues. **Crouse v. Mineo, 232.**

Appealability—attorney-client privilege or disclosure—interlocutory order—substantial right—Although defendants' appeal in a wrongful death case from an order allowing plaintiff's motion to compel disclosure was an appeal from an interlocutory order, the trial court's determination of the applica-

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Preservation of issues—failure to assign error—Although defendants appealed from the trial court's order denying summary judgment in favor of defendants and granting a declaratory judgment in favor of plaintiff in a recalculation of parole eligibility case caused by the failure to enter plaintiff's second-degree kidnapping offense into the computer system, the Court of Appeals' review is limited to whether the trial court erred in its declaratory judgment because defendants did not assign error to the ruling in their summary judgment motion as required by N.C. R. App. P. 10(a). **Lineberger v. N.C. Dep't of Corr., 1.**

Preservation of issues—failure to assign error to findings of fact—findings deemed binding—Defendants failed to assign error to the Full Commission's findings of fact numbers 1 through 9 in a workers' compensation case, and therefore, these findings of fact are deemed binding on appeal. **Freeman v. J.L. Rothrock, 31.**

Preservation of issues—failure to assign error to sufficiency of evidence—The trial court's order in an alimony, child support, and equitable distribution case is reviewed for abuse of discretion taking its findings of fact as conclusively established, because plaintiff failed to assign error to the sufficiency of the evidence to support any specific finding of fact. **Hartsell v. Hartsell, 65.**

Preservation of issues—failure to cite authority—Although defendant assigned error to the trial court's denial of his counterclaim for the restoration of his Section 8 housing assistance benefits, this assignment of error is overruled because defendant failed to cite authority in support of this argument as required by N.C. R. App. P. 28(b)(6). **Durham Housing Auth. v. Partee, 388.**

Preservation of issues—failure to include transcript of deposition—Although defendant doctor in a medical negligence case devoted seven pages in his brief to discussing and quoting from a doctor's videotaped deposition played for the jury, the Court of Appeals was unable to review the contents of this testimony in determining whether the trial court properly granted defendant's motion for directed verdict because the transcript of the deposition was not included as part of the record on appeal. **Kerr v. Long, 331.**

Preservation of issues—incorporation of argument by reference—An issue was not appropriately preserved for appellate review where plaintiff incorporated by reference into the brief an argument from a prior brief that was two years old. **S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 601.**

Preservation of issues—motion to dismiss made in brief—Plaintiff's motion in his brief to dismiss defendants' appeal was not properly before the Court of Appeals because such motions may not be raised in a brief, but instead must be made in accordance with N.C. R. App. P. 37. **Freeman v. J.L. Rothrock, 31.**

Preservation of issues—sufficiency of notice of appeal—Although plaintiff mother contends the trial court erred in a child custody case by denying her motion to modify custody even though she was never deemed unfit in the order that awarded custody to the paternal grandmother, this issue is dismissed because: (1) although plaintiff properly filed a timely notice of appeal to the Court of Appeals, the notice failed to make any reference to the order entered by the district court on 15 January 2004 that terminated the mother's visitation and

SEARCH AND SEIZURE—Continued

anticipatory search warrant because the warrant was obtained in a manner consistent with the reasoning adopted from the two-part test set out in *Wisconsin v. Falbo*, 526 N.W.2d 814 (1994), and the already-established three-part test outlined in *State v. Smith*, 124 N.C. App. 565 (1996). **State v. Stallings, 376.**

Probable cause—plain feel doctrine—film canister with crack cocaine—The trial court did not err in a maintaining a vehicle to keep or sell controlled substances and possession with intent to sell and deliver cocaine case by concluding that an officer had probable cause to search defendant's pocket and seize a film canister and its contents because the totality of circumstances revealed that there was substantial evidence that the film canister was immediately identifiable by the officer as containing crack cocaine. Under the plain feel doctrine, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. **State v. Robinson, 454.**

***Terry* frisk—investigatory stop—reasonable articulable suspicion**—The trial court did not err in a maintaining a vehicle to keep or sell controlled substances and possession with intent to sell and deliver cocaine case by denying defendant's motion to suppress even though defendant contends the officer did not have reasonable articulable suspicion to justify an investigatory stop and frisk under *Terry* because the totality of circumstances revealed that the officer had more than a generalized suspicion when: (1) the officer heard a car engine revving, and thereafter defendant's car came into view crossing over onto the left side of the road, jumping the curb, and driving onto the grass; and (2) the officer's further investigation revealed defendant talking to someone inside an apartment, the officer made eye contact with defendant who stopped talking abruptly and thereafter displayed a surprised or frightened look on his face, the officer thought defendant was going to run, and defendant backed away and reached into his right pocket. **State v. Robinson, 454.**

SENTENCING

Below minimum term—concurrent rather than consecutive—right of State to appeal—The trial court erred by sentencing defendant below the statutory minimum term for financial card theft and by sentencing him to a concurrent rather than consecutive term for being an habitual offender. The State has a right of appeal from a defendant receiving a sentence below the statutory minimum term, but no right to appeal from a concurrent rather than consecutive term. However, the Court of Appeals elected to treat this case as a petition for mandamus in the interest of the administration of justice. **State v. Watkins, 784.**

***Blakely* error—not prejudicial**—A *Blakely* error in sentencing defendant for driving while impaired was not prejudicial where there was overwhelming and uncontroverted evidence that defendant was driving while his license was revoked due to a prior impaired driving offense to support the aggravating factor found by the trial court. **State v. Coffey, 382.**

Habitual felon—inconsistent birthdate on judgments—There was sufficient evidence that defendant had achieved the status of habitual felon even though the birthdate of defendant on one of the convictions differed from the other two.

SENTENCING—Continued

The names were the same and the three judgments were prima facie evidence that the defendant in those judgments was the same as in this case. Further discrepancies in the judgments were for the jury to consider. **State v. Tyson, 408.**

Restitution—unrecovered items—failure to provide evidence—The trial court erred in a possession of stolen property case by awarding restitution in the amount of $3,125 to the victim, and this portion of the judgment is reversed and remanded, because while a trial court may award restitution under N.C.G.S. § 15A-1340.34(c) based on damages arising directly and proximately out of the offense committed by defendant, it cannot be concluded that defendant should be required to make restitution for a victim's unrecovered tools or lost wages when those losses are neither related to the criminal act for which defendant was convicted nor supported by the evidence in the record. **State v. Southards, 152.**

SEXUAL OFFENSES

Battery—massage therapist—The trial court correctly denied defendant's motion to dismiss charges of sexual battery for insufficient evidence where defendant was a masseur who was accused of inappropriately touching his clients. Sexual battery is defined in terms of sexual contact rather than a sexual act, and there was evidence of force in defendant's abuse of his position of trust and relative authority as a professional massage therapist. Furthermore, both victims testified that they were afraid to say anything to defendant after the touching began. **State v. Viera, 514.**

First-degree—sufficiency of evidence—sexual act—There was sufficient evidence of a first-degree sexual offense where defendant contended that there was not sufficient evidence of a sexual act, but a doctor testified that the hole in the victim's colon could have come from disease, of which there was no evidence, or the insertion of a foreign body, and there was evidence of extensive damage to the victim's outer genital and rectal areas. **State v. Harris, 49.**

SUBROGATION

Attorney abuse of clients' funds—Client Security Fund—The trial court did not err by finding that the State Bar had a valid right of subrogation in an action against an attorney. The Client Security Fund has a right of subrogation upon reimbursement to an injured client; defendant did not cite any rules that the Fund violated. No additional action is necessary to establish a subrogation interest. **N.C. State Bar v. Gilbert, 320.**

TERMINATION OF PARENTAL RIGHTS

Best interest of children—no abuse of discretion—The trial court did not abuse its discretion by concluding that termination of parental rights was in the children's best interests. **In re J.A.P. & I.M.P., 683.**

Delay in written order—not prejudicial—Respondent was not prejudiced by an 82-day delay in reducing a termination of parental rights order to writing where the decision was announced in open court and the neglect was proven by clear, cogent, and convincing evidence. **In re J.A.P. & I.M.P., 683.**

WORKERS' COMPENSATION—Continued

plaintiff attorney fees. The Commission found that defendants did not engage in stubborn, unfounded litigiousness and plaintiff did not cite any authority supporting his contention that defendants' defense was unreasonable or that the Commission abused its discretion. **Raper v. Mansfield Sys., Inc., 277.**

Authorization to stop payment of benefits—request for late penalty for failure to make payments—The Industrial Commission did not err in a workers' compensation case by concluding that defendants were authorized to stop payment of plaintiff employee's benefits and that a 10% penalty should not be assessed based on an alleged improper delay in paying the benefits owed to plaintiff because: (1) defendant was authorized to stop making payments under Workers' Compensation Rule 404A(5) and N.C.G.S. §§ 97-83 and -84 as a result of the 17 November 2005 opinion and award; and (2) defendants were not required to pay a late penalty since the Court of Appeals did not hold that defendants should have resumed payments after the 17 November 2005 order. **Roberts v. Dixie News, Inc., 495.**

Carpal tunnel syndrome—evidence of causation—sufficiency—The Industrial Commission did not err in a worker's compensation case by awarding benefits for plaintiff's carpal tunnel syndrome where the evidence was that the syndrome, even if preexisting, was aggravated by his work-related injury. **Raper v. Mansfield Sys., Inc., 277.**

Causation—intoxication—The Industrial Commission did not err in a workers' compensation case by finding as fact and concluding as a matter of law that plaintiff employee roofer's intoxication was a cause in fact of the injuries he sustained after falling from a roof while working. **Gratz v. Hill, 489.**

Causation—speculative medical testimony—The Industrial Commission erred by awarding workers' compensation where the medical evidence was too speculative to establish medical causation and disability. Plaintiff may not rely on "could" or "might" expert testimony to establish causation where other evidence showed that the testimony was speculative. **Davis v. City of New Bern, 723.**

Continuing disability—ability to do some work—findings not sufficient—The Industrial Commission did not make sufficient findings in a workers' compensation case when denying disability benefits after the date that plaintiff was capable of some work. The matter was remanded for findings about whether plaintiff had made a reasonable effort to obtain employment or that any effort to obtain employment would have been futile because of preexisting conditions. **Raper v. Mansfield Sys., Inc., 277.**

Denial of benefits—intoxication—The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee roofer benefits based on its finding as fact and concluding as a matter of law that plaintiff was intoxicated at the time he fell off a roof while working. **Gratz v. Hill, 489.**

Ex parte contact with physician—testimony struck—The Industrial Commission did not err in a workers' compensation case by striking the testimony of one of plaintiff's treating physicians where there were nonconsensual ex parte communications by the physician with defendants. **Davis v. City of New Bern, 723.**

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